1977

Development and Diversification in Administrative Rule Making

Ralph F. Fuchs
Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Administrative Law Commons, Policy Design, Analysis, and Evaluation Commons, and the Public Policy Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/1644

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
DEVELOPMENT AND DIVERSIFICATION IN ADMINISTRATIVE RULE MAKING

Ralph F. Fuchs*

"Nat" Nathanson, as his colleagues and contemporaries affectionately call him, has contributed effectively to an understanding of, among others, two aspects of administrative law which are increasingly being recognized as of exceptional significance: the development of policy by administrative agencies and the use of rule making as an administrative device. The two have frequently been linked together in practice, even though each can operate without significant connection to the other, as occurs, for example, when policy is shaped by action upon applications for certificates of convenience and necessity and when rule making takes place for the purpose of prescribing agency routines involving only secondary policy aspects relating to official convenience and the routines of service to the public. The purpose of this essay, written as a heartfelt tribute to Nat, is to call attention to several processes of government policy making that serve many goals and to discuss the ways in which they are carried on in several kinds of rule making by administrative agencies, particularly in the federal government.

PROCESSES OF GOVERNMENTAL POLICY MAKING

It is useful here to identify three processes by which governmental policy making may go forward and which are, or may be, employed in varying combinations by administrative agencies in much of the rule making they conduct. To indicate their nature, the three processes can be called the political, the investigational and the auditory. The political

---

* University Professor of Law Emeritus, Indiana University at Bloomington.


2 This classification is a modification of the one set forth in Fuchs, Procedure in Administrative Rule-Making, 52 HARV. L. REV. 259 (1938). There the focus was on the mechanics of agency rule-making procedures; here it is on the methods by which policy is determined, to which the procedures give varying form and scope. Concerning the interplay of processes and forces which determines policies at all levels of government, see C. LINDBLOM, THE POLICY-MAKING PROCESS (1968). See also Jaffe, The Illusion of the Ideal Administration, 86 HARV. L. REV. 1183 (1973); the contributions in The Government as Regulator, 400 ANNALS
process involves an interchange of information and views among persons in government and people in the relevant community whose interests, perceptions and desires are supposed to enter into the determinations to be made. The investigational approach to policy making, frequently used by experts, requires examination and evaluation of available relevant data, including viewpoints, gathered in numerous appropriate ways, by decision makers. The precise investigational methods employed should be those appropriate to the subject matter involved. The auditory process requires the presentation of information and argument to a determining authority in structured proceedings.

The extent to which each process is employed in particular policy-making operations of government determines to a large extent the structure, composition and procedures of the governmental bodies that carry on those operations. Obviously, the legislature employs largely the political process, as does the executive in many matters; the executive branch contains officials and agencies that rely heavily on investigational techniques in the solution of policy problems; and the judiciary primarily uses auditory processes. The characteristics of the three departments differ accordingly; but there are common elements because each branch uses each of the three processes to some extent.

In a democracy the highest policy-making function, aside from constitutional change, resides in an elected legislature and in a chief executive chosen directly or indirectly by the people and responsible to them. The representative character of the legislature introduces directly into the policy-making operation the diverse knowledge, interests and views of the constituencies, derived from the representatives' interactions with members of those constituencies. The representatives armed with this information interact through formal parliamentary proceedings, supplemented by informal negotiation off the floor. From this combi-

ix-139 (1972); and the observations of Emmette S. Redford in his books which are considered together in Fuchs, Book Review, 49 Tex. L. Rev. 204 (1970).

Boyer, Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 Mich. L. Rev. 111 (1972), discusses illuminatingly the interrelations of subject matter, social pressures and procedural alternatives in determining the processes, particularly the policy-making processes, which do and should prevail in administrative agencies. As to practical applications in relation to earlier forms of regulation, see W. Cary, Politics and The Regulatory Agencies (1967); K. Davis, Administrative Law Treatise 233-512 (1958); W. Gellhorn, Federal Administrative Proceedings 41-74, 116-44 (1941).

3 The term "auditory" is not wholly satisfactory, but a better alternative has not been found. "Forensic," which might be accurate, has too many alternative meanings; "adjudicatory" relates too often to determinations in which the policy element is lacking or is of minor concern; "trial-type" focuses attention too largely on fact ascertainment; and "quasi-judicial" is both vague and too strongly evocative of the image of courts alone.


tion of exchanges, legislative decisions in a democracy are made in basic instances. Executive decision making accompanied by consultation with interested persons has some of the same elements.

Even in the legislature, however, the political process generally does not function by itself. Especially through committee studies, hearings and staff advice, knowledge derived from investigatory processes is assembled and brought to bear on the legislative process. In addition, the legislature sometimes passes judgment in its enactments on the contentions of rival constituent groups that assume the initiative, in a manner which has been likened to adjudication. Perhaps more frequently, committee hearings at which information and opinion are adduced in an orderly manner and placed on record possess some of the attributes of an auditory proceeding on which the legislative outcome may in part be based. Expanding legislative and committee staffs attest to the growing infusion of expertness, of episodic and continuing inquiries and of structured hearing procedures into modern legislative processes, to supplement the dominant political element. To an even greater extent in the processes employed by executive officials, the advice of departmental staffs enters in, often reflecting information and views which have been assembled through investigations and hearings.

On the part of the courts, the policy-making function is incidental to the decision of cases and is largely based on structured auditory proceedings at which evidence and argument are adduced; but here also a combination of processes enters at times. Experts may give testimony reflecting their accumulated knowledge or special studies; and the judge himself may take judicial notice of sufficiently authenticated information which has not been introduced in evidence. The sentencing function in criminal cases, performed mainly by judges, has long been unstructured and in modern times has taken into account information and appraisal made available by specialized staff members. Also influential with judges to an uncertain extent are community pressures based on attitudes toward particular offenders or offenses or toward law enforcement in general. Finally, in the interpretation of constitutional provisions and statutes by courts, public opinion, which exerts pressures outside the structured judicial processes, may play a role.

Much of the infusion of investigative and auditory aspects into legislative proceedings and executive political activities and of expertness and politics into judicial processes is unplanned, that is, responsive to the inescapable requirements of the tasks to be performed. Some of the mixture arises, however, from deliberate specification, such as statutory provisions which make the services of probation staffs available to judges or require that budget plans or economic advice, prepared by specialists, be made available to the executive and the legislature.

6 J. Chamberlain, Legislative Processes 4-5 (1936).
In the specialized administrative agencies, the prevalent combinations of policy-making processes result from deliberate statutory prescription which imparts a unique character to these agencies. They are to make policy—albeit subordinate policy—reflecting the same community forces as shape the governing statutes, but often after channeling these forces through structured proceedings. At the same time, they must use agency information and expert judgment derived from continuing or special inquiries, which are often required to be stated openly in auditory proceedings, before authoritative action can be taken. The purposes of this combination of processes are to secure the informed effectuation of legislatively determined basic policies, to assure fair consideration of the specific interests which are at stake in the determinations to be made, and to facilitate later scrutiny of the results.7

Linked to these intra-agency processes of the specialized agencies is judicial review of agency action, which usually is available to help keep that action true to the prescriptions laid down for it. In some instances formalized review by the legislature or its agents may also take place.8 Varying forms of oversight of or prescription to agencies by the chief executive may also be appropriate from time to time.9 By these various

---

7 As to relevant distinctions between legislative and agency processes which may render concerted private efforts to influence the latter violative of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1970), even though similar attempts to influence the former could not constitutionally be forbidden, see California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972). The agency action which it was sought to influence there did not involve rule making, but the Court noted generally that immunity from illegality would attach to concerted activity, not constituting a "mere sham" for an illegal purpose, which used "the channels and procedures of state and federal agencies and courts to advocate their causes and points of view . . . ." Id. at 510-11. Inferentially, conduct outside those channels and procedures can be regulated in ways that conduct within them cannot be. There are also, however, more limited forms of conduct toward legislators, such as bribery, which fall outside legitimate channels of influencing legislation and can be forbidden.

8 As to statutory requirements for the "laying" of executive or administrative regulations or other actions before legislatures prior to their effectiveness, accompanied by readier means of disapproval than the enactment of countervailing statutes, see, e.g., the Energy Policy and Conservation Act of 1975 § 551, 42 U.S.C. § 6421 (Supp. V 1975), which applies to presidential actions under several other statutory provisions authorizing disapproval of these actions by either house of Congress within 15 days. For other examples and a discussion of the doubtful constitutionality of such legislative veto devices, see 1976 Bicentennial Institute, Oversight and Review of Agency Decisionmaking, 28 AD. L. REV. 569, 681-701 (1976); Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 HARV. L. REV. 569 (1953).

9 Submission of agency regulations to the governor or attorney general or both for approval or disapproval prior to effectiveness, is required by some state administrative procedure legislation. Presidential directives to federal agencies, designed to affect future weighing of policies on their part, are issued occasionally. See, e.g., Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (1974), relating to inflationary impact statements in connection with certain agency actions. Binding directives as to the government's own business, even when they bear on persons outside the government who receive grants from it or enter into contracts with it, are especially important in this connection. See Independent Meat Packers
means, within the specialized agencies and through external checks upon them, policy making often involves a planned combination of political, investigational and auditory processes such as occurs nowhere else in government. This interplay is analytically separate from, even though it may be operationally linked to, a second kind of task which agencies commonly perform. That task is the determination of the rights of particular persons under established policies, such as individual rights to social security benefits defined by precise statutory provisions. Policy making has distinct aspects and must be considered separately. In the proceedings to be discussed here it is harnessed to agency formulation of regulations.

**Development of Agency Rule Making as a Means of Policy Determination**

The story of the development of specialized administrative agencies and their varying powers has been told often and need not be repeated here. In relation to their form, agency functions were recognized early as falling into the two main categories of adjudication and rule making. Especially in the United States, the most controversial activities of the agencies were the adjudicatory ones which, because of their procedural departures from judicial models, drew most of the attention of commentators and became the subject of the bulk of the proposals which were made by lawyers for the reform of agency methods. Accordingly, when comprehensive prescriptions of agency procedures applicable to all or most of the agencies in government were enacted, they dealt in greater detail with adjudication than with rule making. The latter, in consequence, was left generally freer of procedural requirements.

As to adjudication, the now-standard statutory pattern in the federal system, set forth in the Administrative Procedure Act of 1946, provides for due notice to persons so entitled; for opportunity on the part of all interested persons to participate in the proceedings; for consensual adjustment when feasible; for decision after merely informal proceedings,


10 The leading American summarization is contained in the *Final Report of Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) [hereinafter cited as *Attorney General's Committee Report*].

11 A focal point of attack was the "combination of prosecutor and judge" in agencies which both initiated and rendered decisions in adjudicatory proceedings. The extent of substantive rule-making powers was also a matter of concern and, in England, was the focal point of attack in Lord Hewart's influential book, *The New Despotism* (1929). The leading early product of the lawyers' reform movement in the United States, the Walter-Logan Bill vetoed by President Roosevelt in 1940, 86 CONG. REC. 13,942 (1940), did contain procedural provisions for rule making as well as adjudication. See H.R. Doc. No. 986, 76th Cong., 3d Sess. 12 (1941).

unless not authorized by specific statute; for opportunity for an adequate hearing when final decisions based on nonconsensual informal proceedings are not authorized; for decisions, in many instances based wholly on a formal record, after opportunity for a hearing; for a strict division of labor among agency personnel in record-type proceedings, with interrelation of the results of this division taking place openly at the hearing and decisional stages; for communication of decisions to those interested; and for the availability of a specified scope of judicial review of final agency decisions. As to rule making the pattern recognizes different types of rules. As to some types, namely "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," it omits procedural requirements altogether, except publication of the resulting pronouncements in the Federal Register.\(^\text{13}\) As to the formulation of substantive regulations having legal force, the Act requires general notice in the Federal Register of proposed regulations, opportunity for both responses and suggestions from interested persons in writing or through oral presentations, publication of the resulting regulations \(^\text{14}\) accompanied by brief statements of their basis and purpose, and opportunity for limited judicial review. Other statutes may, of course, impose additional requirements. If a statute requires that regulations be on the record after opportunity for an agency hearing, then additional provisions of the Administrative Procedure Act are brought into play.\(^\text{15}\)


\(^{14}\) This provision, by its terms, applies "unless persons subject" to a proposed rule "are named and either personally served or otherwise have actual notice thereof in accordance with law." Id. § 553(b).

An escape clause permits prepublication agency processes to be omitted in exceptional instances. Id. § 553(b)(3)(B). In addition, the Act exempts rule making relating to a military or foreign affairs function of the United States, or relating to agency management or personnel, or to public property, loans, grants, benefits, or contracts from these same processes, but not from those relating to judicial review. Id. § 553(a). Elimination of the second part of this exemption and curtailment of the first part have been recommended by the Administrative Conference of the United States, Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 C.F.R. § 305.69-8 (1977); Recommendation 73-5, Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements, 1 C.F.R. § 305.73-5 (1977) [hereinafter cited as A.C.U.S. Recommendation].

Numerous agencies have published regulations, usually couched as policy statements, complying voluntarily with the first recommendation by foregoing the exemption as to public property, loans, grants, benefits or contracts. 3 Recommendations and Reports of the Administrative Conference of the United States 229 (1975) [hereinafter cited as Administrative Conference Reports]. See, e.g., 29 C.F.R. § 2.7 (1976) (Department of Labor); 36 Fed. Reg. 2532 (1971) (Department of HEW); id. at 8336 (1971) (Department of the Interior). These matters are thoroughly discussed in Bonfield, Military and Foreign Affairs Function Rule-Making Under the APA, 71 Mich. L. Rev. 221 (1972); Bonfield, Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts, 118 U. Pa. L. Rev. 540 (1970).

\(^{15}\) The provisions for agency procedure in adjudications are contained in 5 U.S.C. §§ 554-559 (1970); those for procedure in rule making are in id. § 553 and those for regulations
It has become well established that agencies which possess both adjudicatory and rule-making powers covering the same subject matter generally may choose whether to proceed by means of adjudication or of rule making in resolving particular policy problems confronting them. A growing tendency among most agencies in recent years has been to choose rule making. In addition, there has been widespread statutory assignment to agencies of duties to regulate conduct, especially business conduct, in the first instance by means of general regulations, especially when the conduct affects public health, safety or welfare, consumer or employee interests, or the environment.

Both developments, by increasing the use of rule making, have raised questions concerning the applicable agency rule-making procedure and the appropriate means and scope of judicial review of agency action much more frequently than before. The answers to these questions may turn on statutory provisions, judicial decisions, or, in respect to agency processes, agency determinations to which the courts pay deference.

Varieties of Regulations and of Rule-Making Procedures

Obviously, the potential for agency resort to rule making results from the range of rule-making authority which agencies possess. This authority has come to depend increasingly on explicit statutory provisions, yet it still depends in part on authorization which inheres in the requirements of good administration. These inherent requirements which regulations can help to fulfill include the effective announcement of an

required to be on the record after opportunity for an agency hearing, id. §§ 556-557. Judicial review as to both adjudication and rule making is covered by id. §§ 701-706. 5 U.S.C. § 552(a)(1) (1970), provides for publication of rules. The escape clause with respect to the use of agency procedures, id. § 553(b)(3)(B), applies "when the agency for good cause finds [and incorporates the finding and a brief statement of reasons therefor in the rules issued] that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Section 553(d), again with an escape clause "for good cause found and published," requires that the final publication of a substantive rule, unless it "grants or recognizes an exemption or relieves a restriction," take place not less than 30 days before the effective date of the regulation. "Interpretative rules and statements of policy," which also are to be published pursuant to section 552(a)(1), are not subject to the deferred effectiveness requirement. Finally, section 553(e) provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal" of any of the various kinds of regulations.


17 The first of the two developments has taken place despite frequent questions whether authority to use the rule-making power to issue binding regulations existed in particular instances. See text accompanying note 81 infra.
agency's prescriptions for doing business with it, such as are set forth in procedural rules; the issuance of internal directives to staff members; and the announcement for the information and guidance of persons concerned of policies and legal interpretations that are expected to determine future agency action. Unlike these kinds of pronouncements which may be authorized impliedly from the agency's very existence and need to administer, rules which legally dispose of outside interests, such as regulations which proscribe conduct or define enforceable rights, should rest on more specific statutory or constitutional authority to issue them, since otherwise the agency would be the architect of its own powers.  

The various kinds of regulations which have been mentioned are recognized as distinguishable by the federal Administrative Procedure Act in three provisions. The first of these defines "rule" to include an "agency statement of general ... applicability and future effect designed to implement, interpret, or prescribe law or policy. ..." The second provision, already summarized, exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from the procedural requirements of the Act for formulating regulations. The third provision, contained in the Act as amended by the Freedom of Information Act, requires "rules of procedure. . . , substantive rules of general applicability. . . , and statements of general policy or interpretations of general applicability formulated and adopted by the agency" to be published in the Federal Register.

18 But see National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974), in which the opinion could be understood to derive a power of the FTC to formulate binding rules, helpful in later adjudications, simply from the power to adjudicate with respect to the same subject matter. Nevertheless, the court also relied on the "particularly good reason" for upholding the rule-making power, that the statute expressly conferred authority on the Commission to "make rules and regulations for the purpose of carrying out the provisions" of the statute, including the adjudicatory provision in question. Id. at 675-76. The opinion also emphasized that exceptions to agency rules should remain possible in individual instances. Id. at 692.

19 At this point the definition contains the words "or particular," the meaning of which is obscure. The discussion in this article is confined to agency statements of general applicability to persons who come within their terms. Elimination of the words "or particular" from the definition has been advocated by the American Bar Association and the Administrative Conference of the United States. See 3 ADMINISTRATIVE CONFERENCE REPORTS (1975), supra note 14, at 59-61.

20 The definition adds, "or describing the organization, procedure, or practice requirements of an agency." It goes on to include specifically "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4) (1970). Elimination of this latter enumeration has been recommended by the ABA and the Administrative Conference.

21 See text accompanying note 14 supra.


23 Id. §§ 552(a)(1)(C), (D).
The publication requirement is followed by a provision that an agency "shall make available for public inspection and copying— . . . (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and (C) administrative staff manuals and instructions to staff that affect a member of the public."24 The seeming inconsistency between the publication requirement and a negative inference as to such a requirement for unpublished material covered by the disclosure requirement should not affect the added provision of the former that "[e]xcept to the extent that a person has adequate and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published";25 for this provision seems clearly intended to be effective as to all material included in the provision for publication in the Federal Register.

The contemporary classification of agency rules conforms to conceptions, statutory authorizations and agency practice going back to the earliest years of the republic. Alexander Hamilton articulated it in 1790 in his Plan for Disposing of the Public Lands.26 Congressional authorizations of legally effective substantive regulations on specific subjects began at the same time and were scattered through the subsequent years.27 At the very beginning of the government, in 1789, Congress authorized "[t]he head of each Department . . . to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."28 Modern regulatory statutes commonly include provisions which give the agency head power to promulgate such regulations "as may be necessary in the administration of this Act," or "make rules and regulations for the purpose of carrying out the provisions of this Act," or some similar form of bestowal of power which extends at least

24 Id. §§ 552(a)(2)(B), (C).
25 Id. § 552(a)(1).
27 Attorney General’s Committee Report, supra note 10, at 97-98; J. Comer, supra note 26, at 50-112; C. McFarland, supra note 26, at 234-37.
to internal directives, procedural or interpretative regulations and statements of policy.29

The most important categories of regulations from the standpoint of policy making are legally binding substantive regulations, interpretative rules, general statements of contemplated policy and internal directives to staff members for dealing with outsiders. To the extent that the power to choose among these is present, an agency's selection of one or another, as well as its initial decision to use rule making rather than adjudication for determining an issue of policy, establishes to an important extent the processes which should prevail in the policy determination. Formerly, freedom to forego all formulated rule-making processes prevailed, but nothing prevented an agency from resorting to consultation with interested persons, or to hearings, in advance of the issuance of regulations.30 Now the Administrative Procedure Act and the statutes establishing various agencies contain procedural prescriptions for defined categories of rule making. Courts also may impose requirements by their interpretation of the particular statute involved or their judgment of the prerequisites for the courts' own performance of the duty to review agency statements.31 Political, expert and auditory processes receive their places in the resulting framework of procedure and review.

Unhappily from the standpoint of easy understanding, the criteria for the decision to choose rule making over adjudication and the differing consequences of agency choices among the various kinds of regulations are often not easy to determine. An agency may issue interpretative regulations or "guidelines" as to intended policies and yet find them subject to immediate judicial review because of the nearly final effect which a court attributes to them.32 Agency rule-making processes which a court may think to be required impliedly by statute or may regard as necessary because they are prerequisites to judicial review are often not knowable until judicially specified. Consequently, an agency, assuming its possession of a full range of rule-making powers, may actually have in a given situation the alternatives of issuing binding substantive regulations in accordance with the rudimentary procedural requirements of the Administrative Procedure Act, to which further requirements may be added by other statutes or by courts, or of making tentative pronouncements. However, because of the weight the latter are given by the courts and the agency's need for data to undergird them, even those pronouncements should arguably be preceded by processes similar to those required for legally binding regulations.33

29 Attorney General's Committee Report, supra note 10, at 98.
30 Id. at 103.
31 See text accompanying notes 115-135 infra.
32 See Fuchs, Prerequisites to Judicial Review of Administrative Agency Action (pt. 1), 51 Ind. L.J. 817 (1976), and works cited at 985; Comment, Timing of Judicial Review Under the Administrative Procedure Act, 56 Calif. L. Rev. 1491 (1968).
33 See Bonfield, Some Tentative Thoughts on Public Participation in the Making of
Tendencies Toward Agency Choice of Rule Making Over Adjudication

Questions concerning an agency's use of regulations to bind future adjudications arise when it has specific authority to determine particular matters by adjudication and only a general authority to make rules. Such general rule-making authority may in some instances extend only to procedural rules, internal directives and nonbinding interpretative regulations or statements of policy. When binding substantive regulations are included, arguably they may not be authorized as to matters which the governing statute has committed to adjudication.\(^3\) One reason for such a result could be that the agency is obligated in each case to reach a single decision that takes account of all relevant factors without foreclosure of any issue by predetermined rules.\(^3\) A second reason, more pertinent here, arises when the statute specifies a procedure for adjudication which may not be accorded if rule making is substituted and may arguably have been withheld invalidly as to issues which the resulting regulations cover.\(^3\)

In most instances of rule making to formulate binding substantive regulations, only the Administrative Procedure Act's so-called notice-
and-comment procedures, summarized above, need be followed. Two other sections of the Act, applicable also to adjudication, are applicable to rule making which is required by another statute to be "on the record after opportunity for an agency hearing." However, even in these instances of rule making, the hearing which is accorded can be limited wholly or partially to written submissions "when a party will not be prejudiced thereby," and also certain other requirements for adjudication need not be followed.

Aside from these procedural differences, certain comparative advantages and disadvantages of rule making and adjudication have been repeatedly considered. The advantages of rule making include the facility of deciding a recurring issue by a single determination, and the possibility of assembling all relevant information from a variety of sources at that time. Notice of the determination to persons concerned, who may then respond or adjust to it, usually follows. The advantages of adjudication lie chiefly in the thoroughness with which the detailed formulation of policy in particular situations can be judged when policy is made. Obviously, rule making that covers a class of cases becomes increasingly feasible after adjudication in a number of representative instances has taken place.

The legitimacy of numerous instances of agency use of a general rule-making authority to foreclose particular issues in later adjudications

---

37 See text accompanying note 14 supra.
38 5 U.S.C. § 553(c) (1970) provides that sections 556 and 557 shall apply to these "on the record" rule-making situations, instead of the preceding provisions of section 553(c).
40 For example, when an agency "makes a decision without having presided at the reception of the evidence," the presiding officer or an equally qualified substitute "shall first recommend a decision," but in rule making and initial licensing proceedings
(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or (2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

Id. § 557(b). In addition, numerous procedural provisions in section 554 for adjudication on the record after opportunity for an agency hearing, including safeguards against off-the-record consultations and partiality affecting decisions, do not apply to rule making.

Except for publication of regulations, the Act, as has been noted, supra note 14, exempts rule making which involves "a military or foreign affairs function of the United States" or "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" from procedural requirements. Id. § 553(a).

for which a statutory procedure is prescribed has been sustained in judicial decisions which have been comprehensively reviewed. Recent major court decisions are to the same effect. An agency’s freedom or obligation to resort to its general rule-making authority in preference to adjudication when it has adjudicatory power over the subject involved is obviously negated to the extent the adjudicatory power is exclusive. Doubtless there are statutory provisions for adjudication which are in-


43 See FPC v. Texaco, Inc., 417 U.S. 380 (1974); American Tel. & Tel. Co. v. FCC, 539 F.2d 767, 774 (D.C. Cir. 1976); Shell Oil Co. v. FPC, 520 F.2d 1061 (5th Cir. 1975), cert. denied, 426 U.S. 941 (1976) (national maximum producers’ price for natural gas shipped in interstate commerce set by means of rule making held valid); Washington Utils. & Transp. Comm’n v. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1976); Bell Tel. Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975); Hughes Air Corp. v. CAB, 492 F.2d 567 (D.C. Cir. 1973), cert. denied, 420 U.S. 972 (1975); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 (1966). The question here relates to the use of rule making in place of adjudication to decide particular issues, not to the procedures which may be required in the particular instances of rule making that result. Typically these procedures are less safeguarded (auditory) than those in the adjudication they supplant. The resulting rules, moreover, bind all interested persons, subject to their rights to petition later for amendments of new regulations or, possibly, “waivers” in individual instances if the agency allows them to be sought. See Community Serv. Inc. v. United States, 418 F.2d 709 (6th Cir. 1969); Fuchs, 1965, supra note 34, at 782, 804-06.

A general practice of making “generic” environmental impact determinations applicable to all similar licensing cases by rule and those relating to single applications by adjudication has been recommended by the Administrative Conference of the United States. 3 ADMINISTRATIVE CONFERENCE REPORTS (1975), supra note 14, at 31. Questions concerning the wisdom of so sweeping a recommendation are raised in an accompanying statement of conference member Kenneth Culp Davis. Id. at 33.

The Nuclear Regulatory Commission’s Rules of Practice provide for the determination of any issues common to more than one license application in proceedings which are, in effect, partially consolidated for this purpose. 10 C.F.R. §§ 2.401-407, pt. 50, App. N (1976). The Commission may also resort to rule-making proceedings to determine issues which are, or will be, common to classes of license applications. It cannot, in the meanwhile, take definitive action on pending license applications before the relevant general determinations have been made by regulation. Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm’n, 539 F.2d 824 (2d Cir. 1976). See generally Ecology Action v. AEC, 492 F.2d 998 (2d Cir. 1974); Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974); Murphy, The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?, 72 COLUM. L. REV. 963, 988-90, 997-1005 (1972).

44 Cf. Campbell v. Galeno Chemical Co., 281 U.S. 599 (1930), holding that the involved agency could not by general regulation (prior to the provision of rule-making procedures by the Administrative Procedure Act) terminate outstanding licenses, revocable after hearing, even though the regulation gave opportunity for renewal applications to be filed and acted upon before the regulation became effective.
tended to be exclusive in this manner, at least as to the most essential issues in the adjudicatory proceedings; but the existence and scope of instances of this exclusiveness have become difficult to identify. In a previous article the present writer sought to suggest possible bases for their identification. Since then the potential for rule making in place of statutory adjudication has gone beyond the possibilities which the Supreme Court contemplated at that time. In *FPC v. Texaco, Inc.*, a leading decision which upheld the use of rule making, the Supreme Court noted that the regulations there involved "do not pass on the merits of any rate structure nor on the merits of a certificate of public convenience and necessity; they merely prescribe qualifications for applicants." The inference was that proceedings to frame regulations which included the kinds of determinations mentioned might well be beyond the power of the Commission to employ in place of the statutory procedures specifically provided. Insofar as the unique aspects of a particular producer's "rate structure" or certificate are concerned, the inference still holds; but subsequent decisions have not determined which aspects of rates or elements of public convenience and necessity may be determined by regulations. This generalized process of rate making could leave little to be determined in individual cases, except to the extent that "waivers" of the regulations or exceptions to them might be considered.

The presence of the agencies' freedom and tendency to use rule making, which has just been outlined, does not mean, of course, that rule making has swept the field, leaving little adjudication to be done. On the contrary, only in exceptional (but seemingly increasing) instances have important, recurring issues in a continuing flow of adjudications been predetermined by rules; and at least the National Labor Relations Board holds fast to its practice of enunciating substantive policies only by means of pronouncements in adjudicatory opinions. Nevertheless, the change has been significant among the regulatory agencies as a group.

---

45 Fuchs, 1965, supra note 34, at 800-04. See also FitzGerald, Adoption of Federal Power Commission Price-Changing Rules Without Evidentiary Hearing: Statutory Collision, 18 Sw. L.J. 236 (1964) (in defense of the maintenance of statutory adjudicative procedures or their equivalent).

46 377 U.S. 33, 42 (1964).

47 For analyses of the situation prior to Shell Oil Co. v. FPC, 520 F.2d 1061 (5th Cir. 1975), see Dakin, Ratemaking as Rulemaking—The New Approach at the FPC: Ad Hoc Rulemaking in the Ratemaking Process, 1973 DUKE L.J. 41; Nathanson, supra note 1, at 734-35 n.77.

48 The Supreme Court has stressed the significance of the availability of these means of overcoming the effects of regulations in later adjudications which they affect. FPC v. Texaco, Inc., 377 U.S. 33, 40-41 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). See Murphy, supra note 43, at 1003-04, with regard to the use of these means of overcoming an agency rule.

49 Although the Board's rules of practice provide for petitions for the issuance, amendment or repeal of rules to be filed with it and for their consideration, 29 C.F.R. §§ 102.124-125 (1976), it has only four substantive regulations in effect, all of which deal with narrow topics. Id. §§ 103.1-3,.100.
Compulsion to Precede Adjudication by Regulations

Under some circumstances in which highly personal interests have been at stake, lower federal courts have occasionally held,\(^5\) and in other instances strongly indicated,\(^5\) that, as a means of affording notice of the grounds of possible adverse agency action, regulations stating these grounds must precede and underlie unfavorable adjudications, even without an explicit statutory requirement to this effect. The Supreme Court in 1974 lent support of undefined scope to this principle by its decision in *Morton v. Ruiz.*\(^5\)

The *Ruiz* case involved the claim of an out-of-work Papago Indian couple to monetary assistance, pursuant to a federal statute authorizing the Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, to extend such assistance. They had lived in Arizona for many years near their place of employment not far from the Papago Reservation and maintained tribal contacts with the group that lived on the reservation. The principal question at issue was whether their place of residence rendered them geographically ineligible for the payments. The statute required the Bureau to "direct, supervise, and expend such money as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States" for purposes which included "relief of distress and conservation of health."\(^5\) Successive appropriation acts had provided money over the years for "grants and other assistance to needy Indians."\(^5\) The *Ruiz* claim was rejected

\(^{50}\) Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973) (existing policies governing rejection of driver's license applicants must be formulated and announced); Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968) (due process requires stated standards to govern choice of tenants for public housing project); Gonzalez v. Freeman, 334 F.2d 570, 577-78 (D.C. Cir. 1964) (Administrative Procedure Act intends, and considerations of basic fairness require, that grounds of possible debarment of government contractor from further business with government be specified in advance in regulations); Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir.), *rehearing denied per curiam*, 330 F.2d 55 (1964) (grounds for refusal of liquor store license must be specified in advance by regulations); Backer v. Commissioner, 275 F.2d 141 (5th Cir. 1960) (unpublished internal statement of policy cannot supply basis for disqualifying counsel of taxpayer's choice in appearance before revenue agents); Baker-Chaput v. Cammett, 406 F. Supp. 1134 (D.N.H. 1976) (written, objective and ascertainable standards required for the denial of public assistance to poor persons); Gates v. Collier, 349 F. Supp. 881, 895 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974) (due process requires that disciplinary proceedings in penal institutions be preceded by regulations defining punishable conduct). See the additional decisions cited in K. Davis, 1976, *supra* note 41, at 224-29.

\(^{51}\) See K. Davis, 1976, *supra* note 41, at 224-29. Decisions which hold regulations to be void for vagueness imply that an absence of regulations would be at least equally invalid. See, e.g., Radio Athens, Inc. v. FCC, 401 F.2d 398 (D.C. Cir. 1968).

\(^{52}\) 415 U.S. 199 (1974).


\(^{54}\) 415 U.S. at 206-07.
administratively, after which suit was instituted as a "purported class action."\textsuperscript{55}

Since 1952 the Bureau had included in its Indian Affairs Manual a provision to the effect that "[e]ligibility for general assistance is limited to Indians living on reservations and in jurisdictions under the Bureau of Indian Affairs in Alaska and Oklahoma."\textsuperscript{56} This statement of policy was not published elsewhere, but the Manual, although primarily an internal document for the instruction of Bureau personnel, was available to the public in Bureau offices.\textsuperscript{57} In its letter rejecting the plaintiffs' claim, the Bureau, without giving other reasons, cited the limiting provision as the basis for its decision.\textsuperscript{58}

Interpretation of the statute was affected by the legislative history relating to the successive appropriations, which contained statements from officials of the Bureau made to congressional committees that in practice the Bureau sometimes extended benefits to Indians living near, but not on, reservations elsewhere than in Alaska and Oklahoma.\textsuperscript{59} One question was whether Congress had, in effect, ratified either the manual provision or the somewhat less narrow practice which had been followed at times. Another was whether, even if Congress had ratified the practice, the Bureau still had implied power to limit the statute however interpreted. A third question was whether, even if it had that power, it had exercised it consistently with the requirements of the Administrative Procedure Act and the Bureau's own regulations.

As to the first of these questions, the Court held that Congress had impliedly ratified the less narrow policy which at times was actually followed.\textsuperscript{60} As to the second question, the Court held that "it does not necessarily follow that the secretary is without [an implied, continuing] power to create reasonable classifications and eligibility requirements [more restrictive than the statute] in order to allocate the limited funds available to him for this purpose."\textsuperscript{61} It would, however, in relation to the third question, "be incumbent upon" the Bureau and the Secretary "to develop an eligibility standard to deal with this problem," that was "rational and proper."\textsuperscript{62} They had not effectively accomplished this task by means of the Manual.\textsuperscript{63}

\textsuperscript{55} Id. at 204-05.
\textsuperscript{56} Id. at 204 n.6.
\textsuperscript{57} See Davis, Administrative Law Surprises in the Ruiz Case, 75 COLUM. L. REV. 823, 834 n.43 (1975) [hereinafter cited as Davis, Ruiz Article].
\textsuperscript{58} 415 U.S. at 204.
\textsuperscript{59} Id. at 212-29.
\textsuperscript{60} Id. at 229-30.
\textsuperscript{61} Id. at 230.
\textsuperscript{62} Id. at 231.
\textsuperscript{63} Id. at 236. The Manual's provision failed also as an interpretation of the governing statute by the Bureau, to which deference was due. Id. at 236-37. "The parameter of [the plaintiffs'] class will be determined, to the extent necessary, by the District Court on
Development and Diversification

The permissible means of establishing an "eligibility standard" were discussed by the Court. The standard must, "at a minimum... be generally known so as to assure that it is being applied consistently" and it may not consist of "unpublished ad hoc determinations." In the case of an agency like the Bureau of Indian Affairs, possessing power to issue legally binding regulations, the standard could clearly be embodied in such regulations adopted in conformity with the Administrative Procedure Act; but the opinion is obscure as to whether regulations of this type would be the only valid means of establishing a standard. In relation to the Bureau function involved, of dispensing a public grant or benefit, the use of a legally binding regulation would not at the time the Manual provision was formulated have required the use of section 553 procedures prior to publication of the rule. These procedures would apply now, however, because the Department of the Interior has undertaken to use them "to the fullest extent possible," regardless of the statutory exemption of regulations relating to public property, loans, grants, benefits, or contracts.

The Court dealt not only with the special obligations of the Bureau of Indian Affairs, but also more broadly with the "power of an administrative agency to administer a congressionally created and funded program..." remand of the case. Whether other persons qualify for general assistance will be left to cases that arise in the future." Id. at 238.

64 Id. at 231.
65 Id. at 232.
67 As Professor Davis has pointed out, Davis, Ruiz Article, supra note 57, at 829-30, the conclusion that legally binding regulations are the exclusive means of developing an eligibility standard is arguably supported by the statement of the Court that "[t]he conscious choice of the Secretary not to treat this extremely significant eligibility requirement, affecting rights of needy Indians, as a legislative-type rule, renders it ineffective so far as extinguishing rights of those otherwise within the class of beneficiaries contemplated by Congress is concerned." 415 U.S. at 236. Clearly, the Court felt that a legislative regulation was necessary to the stated effect of "extinguishing [the] rights" in question, and it clearly preferred the Bureau's use of such regulations for dealing with the subject. However, the alternative, which is discussed in the text, of adopting and duly publishing an agency "statement of policy," which might then be employed as an element in agency reasoning to "adversely affect" future claimants without becoming a basis for itself "extinguishing" their rights, was not necessarily excluded. The Court takes note of this alternative and concludes that it too failed in this case because the agency's statement of policy in the Indian Affairs Manual was not published in the Federal Register or otherwise made known to these claimants before being used in the decision to affect them adversely.

68 See note 14 supra.
70 The Court stressed "[t]he distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." 415 U.S. at 236.
gram" which, the Court said, "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." As to some agencies conceivably covered by this pronouncement, a limitation of policy formulation to legally binding rules, excluding nonbinding statements of general policy published in the Federal Register, would impose substantial procedural requirements. The Court does not seem to have intended to impose such a limitation upon the Bureau itself or upon other agencies; for although it gauged the effect of the Indian Affairs Manual provision as an attempted binding regulation, it was also aware that the provision could have been a nonbinding statement of intended general policy if it had been published and used as such.

As the Court noted, the Administrative Procedure Act as amended by the Freedom of Information Act requires "statements of general policy or interpretations of general applicability formulated and adopted by the agency" as well as "substantive rules of general applicability adopted as authorized by law," to be published in the Federal Register. The Act further requires that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." The Ruiz's

---

71 Id. at 231.
74 Id. § 552(a)(1). As Professor Davis has pointed out, Davis, Ruiz Article, supra note 57, at 838-39, a separate provision of the Freedom of Information Act amendments to the Administrative Procedure Act, Act of Nov. 21, 1974, Pub. L. No. 93-502, § 4, 88 Stat. 1564 (amending 5 U.S.C. § 552 (1970)) (codified at 5 U.S.C. § 552(a)(2) (Supp. V 1975)), requires that "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register" and "administrative staff manuals and instructions to staff that affect a member of the public" must be made available for public inspection and copying "unless the materials are promptly published and copies offered for sale."

By implication, therefore, it could be concluded that staff manuals such as the Indian Affairs Manual, even when they affect members of the public, and even statements of policy which have been adopted by an agency, need not be published in the Federal Register, but could, instead, be made available by the stated alternative means. More probably, however, the requirement of publication in the Federal Register still prevails as to statements of general policy formulated and adopted by an agency, including any portions of administrative staff manuals which have been so formulated and adopted, supplemented by a requirement of disclosure of specified material which, for whatever reason, has not been so published.

In addition, the sanction for nonpublication in the Federal Register—the nonenforceability of regulations and statements that affect persons adversely, unless these persons have "actual and timely notice thereof"—still seems to apply to all of the material which is covered by the basic publication requirement contained in section 552(a) of the Administrative Procedure Act. Staff manuals may still contain numerous substantive agency instruc-
were apparently not actually informed of the manual provision, which would have "adversely affected" them even as a mere statement of intended general policy, until they were notified of the Bureau's initial decision. Therefore, the statement could not be applied to their disadvantage; but seemingly it could have been made part of the rationale of an adverse decision if it had been published previously in the Federal Register or otherwise effectively communicated to them. If so, the Bureau and the Secretary in establishing eligibility standards for the future can still choose between binding rules, adopted and published as required by law, and more flexible statements of general policy freely formulated and adopted but also published in the Federal Register or otherwise effectively communicated to prospective claimants.

Even as so interpreted, the Ruiz decision breaks new ground on two important points: (1) its assertion that an agency having powers to issue binding rules may develop eligibility standards by means of regulations promulgated in light of the amount of appropriated funds, even to the extent of restricting eligibility which the governing statute seems clearly to bestow, and (2) its holding that such limitations on eligibility may not be newly imposed case by case, even on the basis of reasoned opinions, because the limitations must be made known in advance to persons adversely affected by them. The power to develop eligibility standards seemingly contrary to statute is extremely broad and difficult to control. As formulated by the Court, it could even be part of a larger authority of any agency having full rule-making authority to fill gaps in its governing statute when necessary "to administer a congressionally created and funded program." Such a program might conceivably be quite different from the one involved in the Ruiz case, consisting of any variety of regulatory power which required money for its administration and could be applied only selectively because of budgetary constriction. The Court was dealing, however, with a program which consisted simply of the distribution of appropriated funds without statutory goals other than to

tions which need not be published, such as positions to be taken in negotiations, until the agency has more fully formulated its policies.

75 415 U.S. at 231.

76 The selective enforcement of laws when the means of complete effectuation are lacking is a governmental necessity. Occasionally, less compelling reasons may justify selective enforcement. Cf. Pan American World Airways, Inc. v. CAB, 392 F.2d 483 (D.C. Cir. 1968) (upholding CAB's refusal to exercise jurisdiction over foreign tour operators).

As Professor Davis has well brought out, the exercise of the resulting administrative discretion can be greatly improved by the use of explicit policy guides, as well as by other means. See generally K. DAVIS, DISCRETIONARY JUSTICE (1969). Rigid guides can scarcely be used where their effect would be to grant absolution to conduct which the legislature has proscribed. Conceivably, in other situations, such as the distribution of governmental benefits, they can be justified or even be essential to even-handed administration, as the Court thought was true with respect to Indian benefits. The point which is emphasized here is that the principle announced by the Court in the Ruiz case should not be understood to extend beyond closely analogous situations.
supply economic and social benefit, care and assistance to Indians at whatever location or level of need. Its potential monetary reach was great and appropriations to carry it out might be severely limited. It seems sensible to conclude, therefore, that the Court’s assertion of implied agency power to develop “eligibility standards” and “fill gaps” applies only to a program which is broadly defined by statute and is “funded” in the sense of consisting wholly of the distribution of money in total amounts which the Congress has left itself free to vary from year to year.

The Court’s exclusion of case-by-case development of eligibility standards, without advance notice of the standards, arose at least in part because they affected “substantial individual rights and obligations.” The principle underlying the decision on this point probably does not extend beyond similar situations involving the interests of individual human beings. It would be a mistake to conclude on the basis of the Ruiz holding that the use of agency adjudication to develop policy generally is newly restricted by the decision. The Court’s reaffirmation in NLRB v. Bell Aerospace Co., decided two months later, of the Board’s authority to develop new policies by adjudication, emphasizes the point. In Bell Aerospace, the Ruiz decision was neither cited nor distinguished and seemingly was not regarded as relevant to the regulation of collective labor relations.

Statutory Proliferation of Rule-Making Powers and Processes

Increased authorization by Congress of binding regulations as the primary means of effectuating agency regulation of conduct and accomplishing the bestowal of government services has taken place for one or more of several reasons. Often, the regulated conduct arises frequently and the services are widespread, requiring general rules; yet the need for specialized inquiry into underlying problems and possible solutions as policy continues to develop, renders statutory rules too rigid. Political...
Development and Diversification

factors often remain prominent in relation to such matters, even after the
governing statutes have partially dealt with them; but their influence
needs to be systematized and limited by requiring interested persons to
present their contentions in the course of agency inquiries or during
statutorily prescribed hearings. Judicial review of the resulting regula-
tions is often explicitly authorized and given specific scope by statute to
provide added safeguards against abuse or serious error.

These features of much recent federal legislation, largely relating to
public health, consumer welfare, public or employee safety, and the
preservation of a healthful, ecologically sound environment, have been
ably analyzed. 82 At the minimum, subject to possible exceptions as to
even that much, 83 this legislation requires adherence to the basic rule-
making procedure set forth in the Administrative Procedure Act, which is
summarized above, 84 consisting initially of notice of proposed rule mak-
ing by an agency, published in the Federal Register, followed by opportu-
nity for written responses of interested persons which are to be considered
by the agency so far as relevant. When it takes final action, “‘the agency
shall incorporate in the rules adopted a concise general statement of their
basis and purpose.’” 85 At what was once the maximum, the applicable
legislation might require adherence to the additional procedures specified
in the Administrative Procedure Act for regulations required to be “‘on
the record after opportunity for an agency hearing.’” 86

The Act provides a differing scope of judicial review appropriate to
these different methods of formulating regulations. The first kind of
regulation shall, in essence, be held invalid if the agency action, findings
and conclusions are found to be arbitrary, capricious, or an abuse of
discretion; if unconstitutional or violative of law; if issued without ob-
servance of procedure required by law; or if “‘unwarranted by the facts to
the extent that the facts are subject to trial de novo by the reviewing
court.’” 87 Regulations required to be based on the record after opportunity
for an agency hearing shall be held invalid for the first three of the
foregoing reasons and, in addition, if “‘unsupported by substantial evi-
dence . . . on the record.’” 88

82 See, e.g., Hamilton, Procedures for the Adoption of Rules of General Applicability: The
Need for Procedural Innovation in Administrative Rulemaking, 60 CALIF. L. REV. 1276
(1972) [hereinafter cited as Hamilton].
83 Prepromulgation procedures may be omitted “when the agency for good cause finds
(and incorporates the finding and a brief statement of reasons therefor in the rules issued)
that notice and public procedure thereon are impracticable, unnecessary, or contrary to the
84 See text accompanying note 14 supra.
86 Id.
87 Id. §§ 706(2)(A)-(D), (F).
88 Id. § 706(2)(E).
A new maximum for several procedural requirements of rule making is incorporated in the Federal Trade Commission Act amendments of 1975 and in the Toxic Substances Control Act of 1976. The principal addenda to previous maximum Administrative Procedure Act requirements, contained in the FTC Act amendments, are: a statement of reasons for a proposed rule to be embodied in the initial notice of the proceedings; public disclosure of all written responses received; opportunity for oral presentations, including controlled rights of rebuttal and cross-examination; and a more elaborate statement supporting a regulation than the Administrative Procedure Act requires. The oral hearing may be "informal" and, as is true also under the Administrative Procedure Act's maximum requirements, the Commission is placed under outside pressure to disclose information in its own possession, on which it may rely, by two main factors: (1) the need to provide in the record on judicial review substantial evidence in support of a regulation being challenged, but not necessarily additional data which the agency does not think it necessary to include, and (2) its potential obligation to make disclosures on demand, pursuant to the Freedom of Information Act section of the Administrative Procedure Act.

The Toxic Substances Control Act contains similar provisions, some of which are spelled out in meticulous detail, and, in addition, provides for advice from a commission of outside experts concerning the initiation of rule making proceedings. The amendments authorize the Federal Trade Commission to issue trade regulation rules forbidding specific unfair acts or practices. As to other aspects of this legislation, see generally Kestenbaum, Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act, 44 GEO. WASH. L. REV. 679 (1976); Nelson, The Politicization of FTC Rulemaking, 8 CONN. L. REV. 413 (1976) [hereinafter cited as Nelson].

TheFTC Act amendments render the substantial evidence test applicable to judicial review of the regulations covered. Id. § 57a(e)(3)(A). Cumulative data, supportive of that in the record on which the regulation rested, need hardly be entered. However, good faith would require the inclusion of countervailing data which the agency took into account and which would have a bearing on the substantiality of the evidence on which it relied.

The Freedom of Information Act does not deal with the records of agency proceedings, but use of the Act may permit disclosure to take the place of discovery in a pending proceeding. The potentiality of such compelled disclosure during or after a rule-making proceeding may increase the likelihood of agency disclosures on the record, insofar as the Act's exemptions do not apply. See Fuchs, supra note 32, at 847 n.112; Nelson, supra note 89, at 441 n.106.
Development and Diversification

of requirements for testing suspect chemical substances and mixtures.\footnote{15 U.S.C.A. § 2603(e).} An unusual requirement obliges the Administrator of the Environmental Protection Agency, who administers the Act, to file a statement of reasons for not carrying forward within statutory time limits a proceeding to provide control regulations for an allegedly toxic substance of which he has been notified in accordance with the statute.\footnote{Id. § 2604(g).}

The purposes of these rule-making procedural requirements are, mainly, four-fold: (1) to provide adequate means, in a forum different from the representative legislature, for interested persons to participate in the proceedings, directly or through others;\footnote{The FTC Act amendments facilitate this purpose, as well as augment the fairness of the rule-making process involved, by providing for the Commission’s payment of the fees for representation of persons having an interest in participation, upon a showing of inability to pay these costs otherwise. 15 U.S.C. § 57a(h)(1) (Supp. V 1975). This provision is different from, but bears a relation to, the widely recommended policies of aiding poor persons to participate in agency proceedings of many kinds affecting them, and of providing by law for the representation of consumer interests in relevant agency proceedings. See 1 ADMINISTRATIVE CONFERENCE REPORTS (1971), supra note 14, at 13-20 (as to poor persons) (A.C.U.S. Recommendation No. 68-5, Representation of the Poor in Agency Rulemaking of Direct Consequence to Them, 1 C.F.R. § 305.68-5 (1977)); S. 200, 94th Cong., 2d Sess. 1975; 121 CONG. REC. S8423-24 (daily ed. May 15, 1975) and H10749-50 (daily ed. Nov. 6, 1975) (as to consumers).} (2) to secure for the agency relevant information and views, supplementing those which it possesses by virtue of its specialized knowledge and previous inquiries; (3) to provide means through the use of particular elements of the auditory process for participants to test the soundness of material introduced; and (4) to maintain, through judicial review or otherwise, a check on the legality, rationality and sometimes the fidelity to duty of the agency’s performance. Crucial points on the spectrum of rule-making processes now in effect in relation to these purposes are: (1) the adequacy of the published notice of proposed rule making to inform interested persons of the matters to which they should address their responses; (2) the means, provided statutorily, of consultation by the agency with others prior to action; (3) the extent to which participants in a rule-making proceeding should be given access to material coming from others outside the agency; (4) the extent to which the agency is to be required to disclose material in its hands and used by it in formulating new regulations; (5) the nature and extent of oral hearings and use of rebuttal and cross-examination which shall be allowed in a rule-making proceeding; (6) the amount of information to be supplied to a reviewing court concerning agency consideration of the issues before it; and (7) the extent to which a reviewing court may properly substitute its judgment for that of the rule-making agency in determining the validity of a regulation.

Aside from the provisions in the FTC Act amendments and Toxic Substances Control Act, already noted, some of the more significant
provisions in recent federal legislation specifying rule-making procedures going beyond those prescribed in the Administrative Procedure Act deserve some attention. The Consumer Products Safety Act\(^{102}\) and Marine Mammal Protection Act\(^{103}\) require that notices of proposed rule making include, respectively, the texts of rules proposed for adoption, and statements of facts and evidence in support of the proposals made. Several statutes require or specifically empower the rule-making agencies to consult other agencies or outside persons at some point in the process of consideration.\(^{104}\) Several others establish or authorize the creation of advisory bodies of outsiders, to some extent representative of interest groups, but more largely technical in character, for this purpose.\(^{105}\) Additional specific provisions for disclosure of material from extra-agency sources, acquired during agency rule-making proceedings, have not been identified; however, provisions for the ultimate inclusion of such material in the agency record on which judicial review will be based render its earlier disclosure more likely.\(^{106}\) Also, the holding of "public hearings" when opportunity for them is required, as it is under several statutes,\(^{107}\) would secure disclosure of written submissions during these hearings, except for trade secrets or other confidential material contained in them. An agency's disclosure of relevant material in its own files seems to remain free of comprehensive requirements, but obligations to include data in notices of proposed rule making, to have public hearings, to provide full statements in support of regulations when published, and to supply substantial evidence in support of a regulation being reviewed


Development and Diversification

judicially, all of which are imposed by some statutes, supply partial substitutes without rendering horrendous records mandatory. Opportunity for "public" or "oral" hearings is required with some frequency; but informal hearings usually are intended, as the legislation sometimes indicates by invoking section 553 of the Administrative Procedure Act. Relatively full statements or findings in support of final, published regulations are required by the Occupational Safety and Health Act and the Consumer Products Safety Act. These, like the more conventional "statement of . . . basis and purpose" which the Administrative Procedure Act generally requires, become part of the agency record which is used on judicial review. Other ingredients of the now-typical agency record for purposes of review in the United States courts of appeals are, in addition to the agency order (or regulation) itself, "the findings or report upon which" the order or rule "is based," and "the pleadings, evidence, and proceedings before the agency," or such portions thereof as may be designated by various appropriate means.

No consistent pattern or rationally related set of patterns of rule-making procedures emerges from the variety of statutory provisions just summarized. Many procedural differences result from varying traditions in particular areas of government operation or from shifting patterns of legislation, as well as from the interplay of group pressures and legislators' purposes which impinge on successive enactments. Recurringly discernible, nevertheless, are indications that the increasing variety

---


The reference in the National Traffic & Motor Vehicle Safety Act is to the Administrative Procedure Act as a whole; but section 553 applies, as it does to agency rule making generally, unless excluded by superseding statutory provisions.

110 The provision of the FTC Act amendments in this regard is exceptional. See note 93 supra.


114 See Hamilton, supra note 82, at 1314-15.
of procedural requirements represents efforts to make adjustments among
the ensuing processes: political struggle in formulating regulations; in-
vestigation by specialists to arrive at measures based on relevant factors
within their expertise; and the auditory process in agencies and courts
whereby inquiry is sometimes enlarged and, in any event, whereby
contending forces may be channeled and data and views entered and
tested.

Parallel Judicial Developments

Judicial decisions as to requisite agency rule-making procedures,
based on due process considerations or implied statutory requirements,
preceded and have to some extent paralleled the legislative developments
just reviewed. Early in the history of railroad rate regulation, a require-
ment arose that notice and hearing be given to a railroad company prior to
commission action lowering its rates, seemingly without regard to
whether only a single carrier or a larger number were involved.115 In
some instances of penally enforceable regulations, agency findings
accompanying the regulations as to facts which the statute makes prereq-
usite to a regulation, have been held constitutionally required.116 More
recently, following earlier suggestions,117 a few cases, especially in the
United States Court of Appeals and District Court for the District of
Columbia, have held, contrary to the previous general understanding,118
that agency rule making which may have adverse economic effects on
large numbers of people119 or result in impairment of first amendment
rights120 must, as a matter of due process, accord some basic auditory
procedures to persons concerned. An effort to avoid due process issues

115 Chicago, Milw. & St. P. Ry. v. Minnesota, 134 U.S. 418, 457 (1890). See also id. at
460 (Miller, J., concurring).
116 Panama Refining Co. v. Ryan, 293 U.S. 388, 432 (1935). See also United States v.
v. White, 296 U.S. 176, 185-86 (1935) (findings not required when prerequisite facts not
specified by statute).
117 See Fuchs, Constitutional Implications of the Opp Cotton Mills Case With Respect to
(1941).
118 The development and prevalence of this understanding that due process does not
require opportunity for hearings to be accorded in agency proceedings that lead to the
issuance of general rules is summarized in Nathanson, supra note 1, at 724-27. The
legislative analogy was relied upon to some extent to limit the kind of hearing required by
statute in Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 305 (1933), but
was criticized in ATTORNEY GENERAL'S COMMITTEE REPORT, supra note 10, at 101-02.
(Department of Interior rules affecting utilities serving more than 200,000 persons).
120 Quaker Action Group v. Morton, 460 F.2d 854 (D.C. Cir. 1971) (district court trial
required when agency proceedings held inadequate).
Development and Diversification

may also lead to decisions that similar rights arise by implication under particular statutes.\textsuperscript{121}

Nathanson has cogently demonstrated that the complex of significant procedural requirements, some of which allow room for flexible application according to agency discretion, contained in the Administrative Procedure Act when rule making must be on the record after opportunity for an agency hearing,\textsuperscript{122} could be held applicable more often than it has been.\textsuperscript{123} By that means, comparatively definite statutory prescriptions for some, but not all, aspects of agency procedure in formulating binding substantive regulations would apply in additional instances of agency rule making. The alternative adopted by the Supreme Court,\textsuperscript{124} of restricting the on-the-record requirement to instances in which statutes clearly impose it, confines the Administrative Procedure Act's requirements for rule making to the notice-and-response process and the prescriptions for publication and judicial review, leaving additional requirements, if any, to be derived from other sources. Aside from the due process source already mentioned and the specific statutory provisions previously summarized, other sources are (1) implied requirements of applicable statutes and (2) implied prerequisites to available judicial review.\textsuperscript{125} Even under Nathanson's alternative, these sources need to be drawn upon as to procedures not explicitly covered by the provisions of the Administrative Procedure Act which he would invoke.

Implied statutory requirements applied by judicial decisions to agency proceedings have dealt particularly with the agency obligation to give

\textsuperscript{121} The decision in Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), which held that deportation hearings were required to be conducted pursuant to the provisions of the Administrative Procedure Act now contained in 5 U.S.C. §§ 554, 556 and 557 (1970), with a hearing examiner (now called Administrative Law Judge) presiding, seems to this writer to have rested on the ground that an opposite interpretation of the Immigration Act gave rise to serious due process issues, rather than on a square holding that due process would otherwise be denied. See 339 U.S. at 50-51. The effect of the decision was largely overcome by a later statute which was sustained. Marcello v. Bonds, 349 U.S. 302 (1955); L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 709 (4th ed. 1976) [hereinafter cited as L. JAFFE & N. NATHANSON]. Either view sustains the argument of Nathanson, supra note 1, at 730, 739.

\textsuperscript{122} See text accompanying note 15 supra.

\textsuperscript{123} Nathanson, supra note 1, at 725-33.


adequate notice of the substance of proposed regulations;\textsuperscript{126} with the adequacy of agency disclosure, during the procedural stage prior to the issuance of regulations, that information or issues were being considered;\textsuperscript{127} with rights of response to evidence or of cross-examination;\textsuperscript{128} or with the adequacy of agency statements accompanying the issuance of rules.\textsuperscript{129}

Requirements as to agency procedure which arise as implied prerequisites to judicial review depend on the scope of the examination of an agency’s action which a court is required to undertake. The Administrative Procedure Act now provides the basic formula governing the scope of judicial review,\textsuperscript{130} which, however, may be varied by other statutes. Within that formula, the developing prerequisite is a sufficient indication by the agency that it has given adequate consideration to all relevant factors pressed upon it or set forth in the governing statute.\textsuperscript{131} The basis

\textsuperscript{126} The question most often litigated in this connection is whether the initial published notice gave an adequate indication that particular aspects of the proposed regulations, which later were considered, would arise. See, e.g., National Asphalt Pavement Ass’n v. Train, 539 F.2d 775, 779-82 (D.C. Cir. 1976); Common Carrier Conference v. United States, 534 F.2d 981 (D.C. Cir. 1976); Maryland v. EPA, 530 F.2d 215, 222 (4th Cir. 1975), vacated on other grounds, 97 S. Ct. 1635 (1977).

\textsuperscript{127} B.F. Goodrich Co. v. Department of Transp., 541 F.2d 1178, 1183-84 (4th Cir. 1976); Texaco, Inc. v. FEA, 531 F.2d 1017 (Emer. Ct. App. 1976), cert. denied, 426 U.S. 942 (1976); South Terminal Corp. v. EPA, 504 F.2d 646, 656 (1st Cir. 1974); Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954). On the basis of a practical judgment as to whether the needed information had actually been conveyed, the agency was sustained in each of the cases cited in this and the preceding footnote except the Maryland case. The South Terminal proceeding was remanded for other reasons. The question of adequacy of notice relates closely to that of the adequacy of presentation by the agency of factual material bearing on variant issues, with opportunity for other participants in the proceeding to respond. Cf. United States v. Nova Scotia Food Prods. Corp., 417 F. Supp. 1364 (E.D.N.Y. 1976) (FDA Commissioner’s use of materials in promulgation of food preparation regulation held adequate because, although the industry was not notified which particular sources were used, the sources were available publicly).

\textsuperscript{128} Natural Resources Defense Council v. United States Nuclear Regulatory Comm’n, 539 F.2d 824, 838-39 (2d Cir. 1976); National Asphalt Pavement Ass’n v. Train, 539 F.2d 775, 782-83 (D.C. Cir. 1976); National Nutritional Foods Ass’n v. FDA, 504 F.2d 761 (2d Cir. 1974), cert. denied, 420 U.S. 946 (1975); American Public Gas Ass’n v. FPC, 498 F.2d 718 (D.C. Cir. 1974).

\textsuperscript{129} AFL-CIO v. Brennan, 530 F.2d 109 (3d Cir. 1975) (applying a special statutory requirement of specific reasons for action); National Nutritional Foods Ass’n v. Weinberger, 512 F.2d 688 (2d Cir.-), cert. denied, 423 U.S. 827 (1975); Public Service Comm’n v. FPC, 511 F.2d 338 (D.C. Cir. 1975); Amoco Oil Co. v. EPA, 501 F.2d 722 (D.C. Cir. 1974) (relating to statutory requirement of specific findings).

\textsuperscript{130} See text accompanying notes 87-88 supra.

for this evaluation is the agency's conduct in admitting and excluding material offered by participants, in making its own contributions to the "record" or file, and in its statement accompanying the final regulation. The precise means by which compliance with this requirement of due consideration is to be achieved and demonstrated to a reviewing court remain largely in the discretion of the agency, supplemented by requirements which a reviewing court may impose.\textsuperscript{132}

Some statutes which do not provide for regulations to be based on the record after opportunity for an agency hearing provide at the same time that a reviewing court shall set a regulation aside if substantial evidence to support it or its factual foundation is lacking.\textsuperscript{133} Whether "substantial evidence" in this context means anything more than a sufficient evidentiary or factual base for rational conclusions, such as is required in any event, is not certain;\textsuperscript{134} but it should suffice for such a base to be provided in reliable form, by whatever formal or informal means.\textsuperscript{135}

### THE UTILITY OF JUDICIAL REVIEW

The ramifications of the scope of judicial review of agency actions, including regulations, prescribed by the federal Administrative Procedure Act, have been well explored so often\textsuperscript{136} that a further attempt at analysis

\textsuperscript{132} Pederson, \textit{supra} note 125, supplies an informed and thoughtful set of suggestions to agencies. \textit{See also} the illuminating discussion in Williams, \textit{supra} note 125.


\textsuperscript{134} \textit{See} Pederson, \textit{supra} note 125, at 48-51, and the comments of Judge Friendly on a variety of statutory "substantial evidence" provisions relating to review of regulations in Associated Indus., Inc. v. Department of Labor, 487 F.2d 342, 348-49 (2d Cir. 1973), \textit{cited in} Nathanson, \textit{supra} note 1, at 761 n.182. \textit{But cf.} Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474-76 (D.C. Cir. 1974) (McGowan, J.), \textit{cited in} Nathanson, \textit{supra} note 1, at 761 n.182, differentiating fact determinations from policy decisions in relation to the substantial evidence test.

\textsuperscript{135} Strictly speaking, as well as traditionally, substantial evidence relates to findings of fact and consists of evidence formally entered into a record; but with respect to rule making under 5 U.S.C. § 553(c) (1970), not required to be "on the record after opportunity for an agency hearing," a far wider range of recorded data, often relating to broader conclusions of fact as well as to policy, is embraced by the term. \textit{See} Verkuil, \textit{supra} note 125, at 203-06, 210-15.


Differences continue among judges over how to apply the established formulas for the scope of judicial review to complex technological determinations. Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc), \textit{cert. denied}, 426 U.S. 941 (1976), provides a striking illustration. The reason lies partially in the different nature of scientific fact (often probability) determination from that of ordinary legal determinations of fact or of causation. \textit{See} Gelpe
here would serve no useful purpose. The need to elicit adequate information from an agency concerning its consideration of regulations and the factual foundation for them, to serve as a basis for review, has been alluded to. Variations in this respect in different kinds of review proceedings, including receipt of evidence in court concerning agency operations, have been discussed recently by Nathanson in his latest article, as well as by other writers. The immediate need at this point is to consider the role of judicial review in (1) affecting the policies which emerge in agency regulations or, occasionally, in decisions not to issue rules and (2) procuring adherence by agencies to the interwoven political, investigative and auditory policy-making processes which are prescribed for them.

The basic principle as to the proper allocation of functions for shaping policy is clear: within statutory limits, the discretion to develop policy is in the agency, not in the reviewing courts which, accordingly, are not to substitute their views for those of the agency, properly reached and grounded. Arbitrary and capricious action, excesses of authority and abuses of discretion are, however, to be held invalid; and, in some instances, actions not supported by sufficient evidence (which might for this reason also be arbitrary and capricious) are likewise to be invalidated. Included in arbitrary and capricious action or abuse of discretion is action that has been taken without adequate consideration of


137 See text accompanying notes 131-35 supra.
138 Nathanson, supra note 1.
139 Currie & Goodman, supra note 113, at 41-50; Verkuil, supra note 125, at 212-14; Williams, supra note 125, at 413-25.
141 See, e.g., National Courier Ass'n v. Board of Governors of the FRS, 516 F.2d 1229 (D.C. Cir. 1975); National Ass'n of Indep. Television Producers & Distrib. v. FCC, 502 F.2d 249 (2d Cir. 1974).
142 For an application of this view, see South Terminal Corp. v. EPA, 504 F.2d 646, 663-65 (1st Cir. 1974).
Development and Diversification

factors which, under the governing legislation, are required to be taken into account, such as the economic impact of safety precautions or of pollution control standards.

The crucial determinations the courts must make on review of regulations dealing with complex subjects are often subtle and difficult. The courts’ approach determines whether, on the one hand, a necessary corrective to agency misfunctioning is being applied or, on the other hand, a court is usurping, or at least impeding, the policy-making function. Different observers will judge the same instances differently; and overall evaluations must relate to particular courts during specific periods of time. The use of a judicial check seems necessary, however, in order, inter alia, to afford remedies to persons injured by legally invalid action and to vindicate the public interest in avoiding arbitrary action and to secure the benefit of judicial determination of such underlying issues of law as what factors the governing legislation permits or requires the agency to consider.

It is relevant to mention here the spur to legally mandated agency action which judicial review has in some circumstances come to apply, and the corrective to improper influences upon an agency which the courts at times can provide, even as to rule making. Both relate to the operation of political factors which, if not counteracted, can paralyze or distort the policy making with which agencies are entrusted. Hence, an agency may sometimes be required to develop regulations which it has a statutory duty to issue for the benefit of persons who have access to the courts, but lack other means of inducing agency action. With respect to improper influences, although the Administrative Procedure Act’s safeguards against ex parte communications with agency decisional personnel have until now extended only to adjudication, there seems to be a growing disquietude that personal pressures by legislators or by interested groups to secure particular results could, nevertheless, under exceptional circumstances invalidate an agency regulation, standard or general authorization.


144 See Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) (duty of the Secretary of the Interior to regulate traders on Indian reservations).


146 In Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959), a rule assigning a television frequency to a community was held to have been vitiated by ex parte communications to Commissioners by the applicant in a closely linked licensing
It is true that the kind of judicial spur to legally mandated agency action which has been mentioned could easily impose severe burdens on the courts and seriously invade the area of official discretion as to when and how to use limited agency resources. However, the limitations of standing to bring proceedings against officials, coupled with appropriate judicial restraint, should establish effective safeguards against the imposition of undue burdens on agencies. On the other hand, judicial checks against improper efforts to influence rule making seem hardly workable or even proper. In rule making, the agency is free to seek relevant data and views wherever they may be found, with the duty to disclose the bases of its actions which have been discussed. Judicial invalidation of a regulation on the ground that a particular undisclosed improper influence had been brought to bear would rest, not upon failure to disclose pertinent grounds of agency action, but upon an ethical judgment that particular communications should not have taken place. Such judgments do not seem feasible. Fear of precipitating them, moreover, might tend to choke proceeding. However, later proceedings sufficiently removed the stigma to permit the same allocation to be made. See the same case at 294 F.2d 742 (D.C. Cir. 1961); Fort Harrison Telecasting Corp. v. FCC, 324 F.2d 379 (D.C. Cir. 1963), cert. denied, 376 U.S. 915 (1964). See also W. Gellhorn & C. Byse, Administrative Law: Cases and Comments 1012-18 (6th ed. 1974); L. Jaffe & N. Nathanson, supra note 121, at 688-94. As to pressure from a Senator, see Texas Medical Ass'n v. Mathews, 408 F. Supp. 303 (W.D. Tex. 1976).

The decision in Home Box Office, Inc. v. FCC, No. 75-1280 (D.C. Cir., filed Mar. 25, 1977), which has become available since the foregoing text was written, applies the Sangamon Valley principle to a situation in which unrevealed ex parte communications between interested persons and the Commission took place after the scheduled rule-making proceedings were closed and before the resulting regulations were issued. These communications, rather than the data and reasoning recorded in the open rule-making proceedings, appeared to have heavily influenced the outcome. Their full substance and import were not recorded and could not be made available to the court. The subject matter involved intensely competitive, large-scale economic interests as well as important public interests. Finding violation of the Commission’s procedural regulations by the ex parte communications, slip op. n.122, as well as a need by the court for enlightenment from “adversarial discussion among the parties,” slip op. at 91, the court enunciated a requirement that, if ex parte contacts occur, “any written document or a summary of any oral communication [received] must be placed in the public file established for each rule-making docket immediately after the communication is received so that interested parties may comment thereon.” Slip op. at 98. Recommendation 74-4 of the Administrative Conference of the United States, Preenforcement Judicial Review of Rules of General Applicability, 1 C.F.R. § 305.74-4 (1977), cited by the court, slip op. at 98-99, recommends to the same effect with regard to factual information considered by an agency. In the case itself the court ordered further agency proceedings, including opportunity for all parties to the former proceedings to participate, in order to produce a full report to the court concerning the previous ex parte communications. Slip op. at 100.

off desirable agency resort to relevant data and opinion. In this connection the integrity of legislators and agency personnel and the watchfulness of reporters and other unofficial observers must probably remain a principal means of securing agency performance which is faithful to high governmental standards. Maintenance of an adequate public file in pending rule-making proceedings, informal as well as formal, in which all pertinent communication between the agency and outsiders would be recorded, would provide an additional safeguard which agency action or a statute might well require.

CONCLUSIONS

In the continuum of legal means by which social purposes are effectuated through government, the phase which involves agency rule making, as it has here been described, seems certain to endure. Its details will continue to require attention, adaptation to particular purposes and even across-the-board improvement as experience and changing philosophies of government may dictate; but the more general planned combination of policy-making processes which it offers is essential in a democracy under modern conditions.147 Rule making provides a regularized opportunity for politically active persons and groups interested in particular matters to participate, giving them a legitimate outlet and making available to government their information and views. It gives a central place to investigation by specialists into specific problems, providing neutral data and solutions derived from expertise. It draws frequently on auditory procedure and judicial review, establishing safeguards against abuse or deficiencies, undergirding responsiveness to legislatively prescribed ends, and securing the rationality of the resulting regulations. Better means of discharging a vast range of governmental functions, as determined by legislation, have not been suggested. Indeed, resort to these means has taken place at an increasing rate, under legislative majorities and executive incumbencies of differing political complexions.

Current proposals for reducing the need for agency processes involve the simplification of welfare148 and federal-aid determinations149 and the “deregulation” of segments of the economy now subject to governmental controls.150 There may indeed be a need for some such

148 I.e., cash grants to beneficiaries who meet specified requirements.
149 I.e., conditional “revenue sharing” with state and local governments.
measures; but for each one that may be adopted, the imposition of other agency duties seems certain to take its place, both to deal with persisting economic problems such as unemployment and to cope with new threats to human health or to the environment. At the moment, even many scientists interested in so esoteric a research endeavor as recombinant DNA research wish the public, which will experience the consequences for good or ill, to share in critical decisions as to what shall and shall not be done—a sharing which probably would take place through agency processes. In place of some current instances of prohibitory regulation by agency rule, such as regulations limiting air or water pollution, governmental monetary charges to inhibit the conduct which is to be discouraged might be imposed instead of outright restrictions; but the fees to be charged and the precise conduct upon which they would be levied would still need to be determined. Frequently, no doubt, agencies would be called upon to make these determinations.

Improvement of agency and review processes, then, rather than significant curtailment of their use, offers the one realistic means of reducing the deficiencies which beset them at present. Stated in general terms, the means of improvement seem obvious, and their enunciation seems trite; yet the need for continuous consciousness of them and for persistent effort to translate them into specific measures justifies a brief discussion of proposals for change.

With respect to rule making, the current tendency toward increased use of binding regulations to resolve policy issues seems clearly desirable because of two main factors. One is that, in rule-making proceedings, attention is focused on a critical issue or set of issues that will arise later in specific instances, which can by this process be thoroughly explored in an atmosphere not charged by the immediacy of a specific case. The other is that the resulting determinations can be applied, when later need arises, with little added utilization of procedures.

Such an increase in the use of rule making should clearly not be carried to the length of subjecting essentially different situations to simplistic formulas. The danger of this consequence does not arise when interpretative regulations and general statements of policy (guidelines) are used instead of binding regulations, provided they remain genuinely open to agency reexamination when serious questions concerning them are raised. To avoid misconceptions they should be clearly labeled as what they are. Although they lack the conclusiveness and high probability of procedural economy of binding regulations, they can be given increased effectiveness and acceptance if they are formulated with the aid of informal participatory rule-making procedures, such as a number of important agencies employ voluntarily at present. Along with internal regulations and agency handbooks, these general guidelines also tend to produce responsibility and consistency in agency administration of statutes. Amendment of the Administrative Procedure Act to require the use
of public procedure prior to the adoption of interpretative rules and general statements of policy does not seem wise, however, because of the costliness of the procedural burdens it might impose and the possible discouragement of the use of such pronouncements that might result.151

The nature and importance of the interests at stake when binding regulations are under consideration often require the opportunities to participate in the rule-making process which the Administrative Procedure Act now typically affords. Some of the exceptions of certain subject matters, which the Act now contains, are outmoded and should be abolished.152 The participatory aspects of the Act’s processes can in many instances validly be confined to written presentations by interested persons after published notice, provided an ultimate agency statement of the basis and purpose of the regulation follows when the regulation is published, to facilitate decisions as to whether judicial review shall be sought and to aid in the review process itself.

The reasons for oral hearings and for the addition of some of the aspects of a judicial trial as features of some agency rule-making proceedings are too numerous and varied to be listed here, but depend largely on the public or social importance of the issues involved, the intensity of the interests at stake, and the kinds of facts at issue. It is correct to say, as often it has been, that information or testimony as to single-instance facts, such as the experience of an individual or firm under circumstances with which a regulation may deal, are most appropriately subjected to rights of rebuttal and even cross-examination. It does not follow that compilations of more widespread facts, which often are only cumulations of individual instances, and the reliability of expert testimony concerning them must forego similar testing. Neither can it be said that particular topics, such as "rates," call inherently for these incidents of a trial. "Rates" traditionally are charges dependent on investment, return on investment and competition on which the viability of an enterprise depends, whereas in the Florida East Coast case,153 they were payments for the use of borrowed railroad freight cars, designed to serve as a deterrent to retaining the cars. A need for trial processes as to the one kind of rate does not establish a need as to the other kind. Practice in these matters should remain open to agency discretion initially, subject to later judicial check, with the nature of the subject matter and proposed testimony to serve as the bases for decision.154 Obviously, agency manuals for officers presiding at hearings would help.

When proceedings involve any of the elements of a contest leading to determination by a deciding authority, the principle of adequate disclo-

151 See note 33 and accompanying text supra.
152 See note 14 supra.
154 For an illuminating discussion of means for determining the need for cross-examination, see Kestenbaum, supra note 89, at 694-709.
sure of data, contentions and deciding rationale should be determinative of several aspects of the procedure employed. An agency statement of proposed rule making which sufficiently reveals what is contemplated; timely disclosure of relevant material generated by the agency or received from others, adequate in content and arrangement to facilitate appropriate responses; and a statement by the agency explaining in rational fashion the grounds of its regulation are important in these circumstances. The product is then likely to receive, as well as to merit, the confidence of interested persons and the deference which courts traditionally pay to agency determinations and must continue to be able to pay if the system is not to break down.

Adherence to these and other elements of good rule-making processes is, of course, no guarantee of good results, much though it may contribute to them. A great deal will continue to depend on other factors which, on the whole, are more fundamental. One factor is well-considered statutory provisions that (1) set forth clear directives as to policies within which an agency is to operate and (2) contain procedural prescriptions that are well suited to aiding the agency to formulate clear subordinate rules. The recent legislation reviewed above with respect to procedural prescriptions is in some instances unduly restrictive. As to policy prescriptions, the legislation is frequently quite definite and clear, but sometimes too rigid and demanding to be carried out successfully. These prescriptions result from a laudable effort to forestall interest group pressures that might defeat agency attainment of statutory goals, or to avoid the opposite evil of provisions that are so vague or conflicting as to leave agencies without effective guidance.

The introduction of public participation into agency rule-making proceedings under minimal notice-and-response procedures, or more especially the addition of auditory processes, can be looked upon as enlarging the political aspects of policy making by encouraging interest groups armed with procedural rights to come forward, especially when the bestowal of those rights by statute results from a prolonged legislative battle.\footnote{Such is the view indicated by the title, but hardly the substance, of Professor Nelson's helpful article, \textit{The Politicization of FTC Rulemaking}. Nelson, \textit{supra} note 89.} Since the political factors are inherently present and will remain, the question is not whether they will be operative as the rule-making agency proceeds, but whether they shall operate wholly informally, often behind the scenes, or shall be regularized and subjected to the controls and checks which the recent influx of investigative and auditory processes was expected to provide. The latter alternative seems clearly preferable in many situations.

Another alternative would be for the legislature to reassert its authority more fully by itself enacting detailed rules in place of leaving many of them to agencies which all too often become the captives of interest
groups instead of serving the public ends laid down for them. At the agency level, "interest group liberalism," which seeks to distill policy from the interplay of contending forces, is said to have failed—as indeed it has in many instances. Yet it seems erroneous to maintain that, whatever ideals of law individuals and groups may rightly subscribe to for themselves, governmental policy can be shaped in the long run by other purposes than those which reflect a balance of the ideas and interests (economic and noneconomic) of those persons in society whose desires count—which in a democracy means everyone who is willing and able to come forward. Agency rule making must continue to reflect these ideas and interests in specialized operations, to the large extent that agency policy-making processes must still be drawn upon. The best that these processes—or any governmental processes—can do is to cast strongly into the balance those forces of vigilance, rationality and objectivity of decision which agency rule making is designed to reflect.

The quality of the policies developed by government agencies, as by other institutions, turns largely in the end on the competence and character of the individuals who make decisions and on the climate of opinion that surrounds them than on the processes they employ. These aspects of public administration turn on other factors than those here considered—on methods of personnel selection and management, especially the qualifications and training to be sought and cultivated, on the character of the nation's official and unofficial leadership, and on the changing aspirations of society. Unless these matters are well attended to, the better structuring of processes cannot produce great improvement of results. It can, nevertheless, contribute significantly to successful government if the other elements of statesmanship are present.
