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## Counter Revolution in the Federal Courts of Appeal - The Aftermath of Vermont Yankee

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# COUNTER REVOLUTION IN THE FEDERAL COURTS OF APPEAL — THE AFTERMATH OF *VERMONT YANKEE*<sup>1</sup>

## I. INTRODUCTION

In recent years, there has been growing judicial concern about the fairness of action by administrative agencies and the ability of courts to effectively review this action.<sup>2</sup> This concern<sup>3</sup> stems from the increased use of informal procedures<sup>4</sup> by agencies promulgating rules<sup>5</sup> or orders,<sup>6</sup> to ac-

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1. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

2. Kestenbaum, *Rulemaking Beyond the APA: Criteria for Trial-Type Procedures and the FTC Improvement Act*, 44 GEO. WASH. L. REV. 679, 689-90 (1976); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 379-80 (1974); Comment, *Administrative Law — Administrative Procedure — Notice and Comment Rulemaking — Vermont Yankee v. NRDC*, 1979 WISC. L. REV. 314, 326-27 [herein after cited as *Administrative Procedure*].

3. The courts felt that the increased use of informal procedures and the "on the record" talisman of *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973), would insulate agency action from effective judicial review. Under § 553 procedures, the litigant may not have the opportunity to discover and challenge the evidentiary materials upon which the agency action was based. The concern has been heightened by the perception of agency "failure" and the perceived need for more effective examination of agency decisions. Moreover, scrutiny of agency decisions can be limited to notice and comment proceedings when the agency's substantive statute provides for review in the courts of appeal. These courts do not have the machinery to flush out the reasoning behind an agency decision often based upon post hoc rationalization and a one-sided record. See generally S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 499-511 (1979).

4. An agency, if delegated the power by Congress to do so, has the discretion to accomplish congressional objectives either by informal rulemaking, formal rulemaking or adjudication. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Informal rulemaking is often called "notice and comment" rulemaking and is governed by 5 U.S.C. § 553 (1976). In pertinent part, the section requires the agency to publish a notice of the proposed rulemaking in the Federal Register. The notice must give the time, place and nature of the proceedings, the legal authority under which the rule is proposed, and either the substance of the proposed rule or a description of the issues involved. After notice has been given, the agency must allow interested parties the opportunity to comment on the rulemaking in writing or, at the agency's discretion, by oral presentation. Once the agency has considered all the relevant materials presented, it must set out in the rule a statement of its basis and purpose.

Rules promulgated via informal procedures are subject to judicial review and can be set aside if they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (1976). In making these determinations the court must review the whole record that was before the administrative agency when it made its decision. See *Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park Inc. v.*

comply with the congressional objectives set out in their substantive statutes. In response, certain federal courts of appeal have begun to impose upon these agencies more procedural safeguards than are required by either the Administrative Procedure Act (APA)<sup>7</sup> or substantive statutes.<sup>8</sup> These judicially imposed safeguards are more commonly known as hybrid procedures.<sup>9</sup>

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Volpe, 401 U.S. 402 (1971). See generally Barr, *Judicial Review of Informal Rulemaking Procedure: When May Something More Formal be Required?*, 27 AM. U.L. REV. 781 (1978).

Section 553(c) further provides that if the agency enabling statute requires that rules are to be made "on the record" after an agency hearing, the formal rulemaking provisions of §§ 556 and 557 apply. These sections, in essence, require adversarial trial-type procedures. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6:4 (2d ed. 1978). The Supreme Court has held that before §§ 556 and 557 procedures are required the agency enabling statute must specifically state that the rule is to be based "on the record." Therefore, the phrase "after hearing" does not trigger formal procedures. *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973).

One exception to the "on the record" requirement is a constitutional due process concern which is present when a small group of individuals is substantially affected by agency action which does not afford them a hearing. See *Londoner v. City of Denver*, 210 U.S. 373 (1908). *But cf.* *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (assessment promulgated by a general rule which affected all residents equally did not require individualized hearing to be consistent with due process).

The standard of judicial review for formal agency rulemaking or adjudication is provided for in 5 U.S.C. § 706(2)(E) (1976).

5. " 'Rule' means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . ." 5 U.S.C. § 551(4) (1976).

6. An order is defined as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing . . ." *Id.* § 551(6) (1976).

The process through which an agency formulates an order is called adjudication. *Id.* § 551(7). As with rulemaking, there are two types of adjudication, formal and informal. The APA does not provide for informal adjudicatory procedures but formal adjudication is governed by § 554. Again, as in formal rulemaking, the procedural safeguards of §§ 556 and 557 are required if an adjudicatory decision is to be based "on the record" after an agency hearing. See *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

It should be noted that the Supreme Court only considered rulemaking in *Vermont Yankee*; hence, it may not have precedential impact upon cases involving adjudication.

7. Act of June 11, 1960, 60 Stat. 237 (codified at 5 U.S.C. §§ 551-52, 553-59, 701-06 (1976)).

8. Substantive statute, organic statute and enabling statute all refer to the congressional statutory delegation of power to an administrative agency to perform essentially legislative functions.

9. Hybrid procedures in the context of this comment are procedures that are not mandated by the APA or an agency substantive statute but are imposed by the court on remand.

In response to the concerns stemming from the increased use of informal rulemaking, courts began requiring agencies to articulate in detail the grounds for their decisions and to

The Supreme Court responded to this judicial imposition of safeguards upon administrative agencies in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. (NRDC)*.<sup>10</sup> The Court totally rejected the notions that the APA established the minimum procedural safeguards and that courts could require additional safeguards.<sup>11</sup> The Court supported its holding by pointing out that prior case law<sup>12</sup> and the legislative history of the APA<sup>13</sup> revealed that the APA specified all procedures required of an agency promulgating a rule informally.<sup>14</sup> The Court

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respond in the record to criticisms and contrary evidence given by those opposing agency action. See *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972). See also Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons From the Clean Air Act*, 62 IOWA L. REV. 713, 729-33 (1977). These judicially imposed hybrid procedures are less formal than §§ 556 and 557 but more substantial than mere notice and comment requirements. Types of hybrid procedures which have been imposed are cross examination, *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495 (4th Cir. 1973); oral hearings, *International Harvester Co. v. Ruckleshaus*, 478 F.2d 615 (D.C. Cir. 1973); and written statements of methodology and inquiry conferences. See generally Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975).

There has been a strong debate over whether the use of hybrid procedures does in fact promote fairness and more efficient agency administration, or whether it creates tools which challenging parties can use to delay agency proceedings, force the agency to adopt a softer position, or discredit agency data. Congress has entrusted these agencies with the power to promote policy and safeguards for the public good. The courts should review agency action to keep agencies honest but should not contravene congressional prerogatives in the process. Compare Williams, *supra* note 9, at 443-45 and Wright, *supra* note 2, at 379-80 with Scalia, *Vermont Yankee: The APA, the D.C. Circuit and the Supreme Court*, 1979 SUP. CT. REV. 345.

10. 435 U.S. 519 (1978). Vermont Yankee Nuclear Power Corporation (Vermont Yankee) applied to the Atomic Energy Commission (AEC), now known as the Nuclear Regulatory Commission, for a license to operate its nuclear power plant. The AEC decided that before it would grant additional licenses it would determine through a generic rulemaking proceeding the environmental hazards of spent nuclear fuel. The results of this rulemaking would then be applied generally to subsequent on the record adjudicatory hearings required for plant licensing, hence dispensing with further consideration of the spent fuel issue. The Natural Resources Defense Council, Inc. (NRDC) intervened and objected to both the generic rulemaking proceedings and the granting of a license to Vermont Yankee. On review the Circuit Court of Appeals for the District of Columbia reversed both of the AEC's decisions on the grounds that the rulemaking procedure was inadequate because it failed to expose the spent fuel issue to sufficient adversarial probing, and therefore the licensing, which was based on defective rulemaking, was invalid. *NRDC v. NRC*, 547 F.2d 633 (D.C. Cir. 1976). The Supreme Court reversed this decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

11. *Id.* *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. at 524, 545-46.

12. *Id.* at 523-25.

13. *Id.* at 545-46.

14. *Id.* at 525, 545.

held that a reviewing court is precluded from imposing additional procedures upon administrative agencies<sup>15</sup> and should only determine whether an agency finding is "sustainable on the administrative record made."<sup>16</sup>

The Supreme Court acknowledged that when in the sphere of administrative rulemaking "a very small number of persons are 'exceptionally affected, in each case upon individual grounds,'" constitutional due process may require additional procedures.<sup>17</sup> It further noted that if an agency unjustifiedly departed from long standing procedure judicial correction may be required.<sup>18</sup>

Although the Court stated that it disagreed with the court of appeal's decision, it remanded the case "so that the Court of Appeals may review the rule as the Administrative Procedure Act provides."<sup>19</sup> The Court's grounds for remand seem to be the basis of considerable confusion. One commentator feels that the Court remanded the case to have the court of appeals review the agency's procedures to see if they comply with the APA.<sup>20</sup> Another argues that the lower court could review the administrative record to see if it adequately supported the agency's decision.<sup>21</sup>

If the Supreme Court did indeed remand so that an adequate record could be formulated by the agency, it appears that the Court itself violated its own ban on procedural innovation in the courts<sup>22</sup> because lower courts will remand agency action so that a more thorough record than is

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15. The Court held that "Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *Id.* at 543 (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1968)).

16. 435 U.S. at 549.

17. *Id.* at 542 (quoting *United States v. Florida E. Coast Ry.*, 410 U.S. at 245).

18. 435 U.S. at 542.

19. *Id.* at 549.

20. Scalia, *supra* note 9, at 359. Professor Scalia's opinion is based upon the Court's statement that "intimations in the majority opinion which suggest the judges who joined it likewise may have thought the administrative proceedings an insufficient basis upon which to predicate the rule in question. We accordingly remand so that the Court of Appeals may review the rule as the Administrative Procedure Act provides." 435 U.S. at 549.

21. Nathanson, *The Vermont Yankee Nuclear Power Opinion: A Masterpiece of Statutory Misinterpretation*, 16 SAN DIEGO L. REV. 183, 188 nn.25 & 26 (1979). Professor Nathanson predicates his opinion upon the same quote as Professor Scalia by construing the phrase "administrative proceedings" to mean the "resultant record." His opinion is further bolstered by Mr. Justice Rehnquist's explanation that if an agency finding "is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration . . . . The court should engage in this kind of review and not stray beyond the judicial province to explore the procedural format . . . ." 435 U.S. at 549 (citations omitted).

22. See S. BREYER & R. STEWART, *supra* note 3, at 519-20 n.78.

required by the APA can be generated. This will encourage if not compel an agency to impose further procedures upon itself in order to comply with the court order.

The decision in *Vermont Yankee* received a large degree of attention and criticism from respected commentators.<sup>23</sup> Few came out in favor of the opinion<sup>24</sup> and even fewer felt that it would have any lasting impact.<sup>25</sup> No matter their predisposition to the opinions, the majority agreed that the Supreme Court had left some gaping loopholes which the lower courts would use to circumvent the strong admonitions in *Vermont Yankee*.

This comment will delineate several deficiencies in the opinion as perceived by various commentators and selected cases on point will be analyzed.

## II. LOWER COURT COUNTER REVOLUTION

### A. Interpretation of Enabling Statutes

When a court reviews agency action it first must determine whether the agency has complied with the mandates of the substantive statute and legislative history. Consequently, some statutes have been interpreted to require more substantively from an agency than is required by the APA.<sup>26</sup>

In *Mobil Oil Corp. v. FPC*,<sup>27</sup> a case decided before *Vermont Yankee*, the D.C. Circuit Court held that, before it could determine what procedures were required of the FPC, it had to analyze the regulatory scheme envisioned by Congress when it passed the Commission's substantive statute<sup>28</sup> in order to determine what was necessary to "effectuate the policies of [the] regulatory statute."<sup>29</sup> Following its analysis, the court held that the FPC's section 553 rulemaking procedures had been inadequate because the substantive statute required "substantial evidence" before a court could approve the Commission's rate-making decisions. Therefore, the FPC had to allow "testing" of its evidence "by procedures sufficiently

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23. See, e.g., Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3; Scalia, *supra* note 9.

24. See, e.g., Breyer, *Vermont Yankee and the Court's Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978); Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978).

25. See, e.g., K. DAVIS, *supra* note 4; Nathanson, *supra* note 21; Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978).

26. Scalia, *supra* note 9, at 392-94.

27. 483 F.2d 1238 (D.C. Cir. 1973).

28. The Natural Gas Act of 1970, §§ 4, 5(a), 15 U.S.C. §§ 717c, 717d(a) (1954).

29. 483 F.2d at 1254.

adversary in nature to provide a reasonable guarantee of reliability."<sup>30</sup>

This idea of imposing additional procedures based on the statutory law was rejected in *Vermont Yankee* when the Court disagreed with the NRDC that the Atomic Energy Commission (AEC) substantive statute required procedures other than those required by the APA.<sup>31</sup> There is, however, some evidence that the theory still survives in the federal courts of appeal.

In *Association of National Advertisers v. FTC*<sup>32</sup> the D.C. Circuit Court upheld the Commission's promulgation of special rules for children's advertising proceedings. The court explained that while *Vermont Yankee* "restricts the ability of courts to refashion normal rulemaking procedures with judicially-conceived notions of administrative fair play, [i]t has no bearing on the power of courts to interpret and apply congressional directives."<sup>33</sup>

A similar view was given by the same court in *Geller v. FCC*.<sup>34</sup> Geller petitioned the FCC to promulgate new rules governing cable television because existing rules were not based upon what "would best serve the public interest."<sup>35</sup> The court interpreted the FCC's substantive statute<sup>36</sup> to require the Commission, on its own initiative, to determine whether rules promulgated for a prior purpose still served the public interest. As the interrelationship between the Commission's rules and the public interest were statutorily mandated, the court held that a review and remand of the FCC's regulations did not run afoul of the "strictures on imposition of judicially-created requirements on the rulemaking process recently highlighted in *Vermont Yankee* . . . ."<sup>37</sup> Therefore, despite the holding in *Vermont Yankee*, some courts still seem to feel that they can impose more upon an administrative agency than is required by the APA if an interpretation of the agency's substantive statute requires it.<sup>38</sup>

30. *Id.* at 1264.

31. 435 U.S. at 548. See Scalia, *supra* note 9, at 392-93. Professor Scalia points out that this process by the court is "barely distinguishable . . . from the common law power theory" that courts use to supplement the APA. *Id.* at 389-92. He bases his conclusion that *Vermont Yankee* rejects this theory on the Supreme Court's disagreement with the D.C. Circuit Court view that the NEPA required the development of new rulemaking procedures. 435 U.S. at 548.

32. 617 F.2d 611 (D.C. Cir. 1979).

33. *Id.* at 619 n.10.

34. 610 F.2d 973 (D.C. Cir. 1979).

35. *Id.* at 976.

36. Federal Communications Act of 1934 (codified at 47 U.S.C. § 303(r) (1962)).

37. 610 F.2d at 980 n.58.

38. It should be noted that this type of an approach can also be applied to judicial inter-

Although judicial interpretation of an agency's enabling statute may require more of that agency, the reviewing court's scope of review remains narrow. In an important recent decision<sup>39</sup> the Supreme Court reversed a Second Circuit opinion<sup>40</sup> which held that the Department of Housing and Urban Development (HUD) was mandated by the National Environmental Policy Act (NEPA)<sup>41</sup> to give environmental factors, such as overcrowding, determinative weight when it was considering the placement of low income housing. The Supreme Court's response relied heavily on *Vermont Yankee* and did not agree that the NEPA imposed such substantive requirements. The Court held that the only task for a reviewing court is to ascertain whether or not the agency considered the environmental consequences.<sup>42</sup> The court should not "interject itself within the area of discretion of the executive as to the choice of action to be taken."<sup>43</sup>

Therefore, at least with regard to the NEPA, courts cannot interpret that statute to require more substantively than the plain language either the NEPA or the APA provides.<sup>44</sup>

### B. Adequacy of the Administrative Record on Review

Another technique used by courts to require more from an agency procedurally is its appraisal of the adequacy of the record on review.<sup>45</sup> The only way a court is able to determine whether an agency has complied with all the procedures required by the APA, or any pertinent statute, is by reviewing the record compiled during the rulemaking proceedings.<sup>46</sup>

pretation of the standard of review, *Environmental Defense Fund v. Costle*, 578 F.2d 337, 344-50 (D.C. Cir. 1978); or the adequacy of the agency record on review, *Katherine Gibbs School Inc. v. FTC*, 612 F.2d 658, 663-64 (2d Cir. 1979). See notes 64-75 *infra* and accompanying text.

39. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) (*per curiam*).

40. *Karlen v. Harris*, 590 F.2d 39 (2d Cir. 1978).

41. 42 U.S.C. §§ 4321, 4332(2)(E) (1970).

42. 444 U.S. 223, 227 (1980).

43. *Id.* at 227-28 (citations omitted).

44. The Court stated in *Vermont Yankee*: "[W]e search in vain for something in NEPA which would mandate such a result . . . [I]t is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA." 435 U.S. at 548. Therefore, it has been observed "that only the plainest of language [will] satisfy the present Court" that a substantive statute requires more either procedurally or substantively than the APA provides. See Scalia, *supra* note 9, at 393-94.

45. For a thorough discussion, see Davis, *supra* note 23, at 16; Nathanson, *supra* note 21, at 205-06; Scalia, *supra* note 9, at 394-95; Wright, *supra* note 2, at 394-95; Comment, *Administrative Procedure*, *supra* note 2, at 333-36.

46. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923



Though a court cannot directly impose certain hybrid procedures on an agency,<sup>47</sup> many times the only way an agency can provide an adequate record is for it to follow adversarial procedures not mandated by the APA.

It should be noted that there are several facets to this type of an approach. Courts can determine that a record is inadequate because: (1) it does not specifically respond to a challenger's criticisms,<sup>48</sup> (2) the record does not provide adequate support for the rule,<sup>49</sup> (3) the court needs a more complete record to understand the agency's decisionmaking process,<sup>50</sup> or (4) the agency did not provide all the information it relied on in the record.<sup>51</sup> These possibilities for deviation from the strict mandates of *Vermont Yankee* are still viable because the Supreme Court never addressed the lower court's concern with the inadequacies of the Commission's record in that case.<sup>52</sup> Consequently, this technique seems to have become a pervasive approach among reviewing courts for setting aside agency action. In fact, the Court of Appeals for the Fifth Circuit in *East Texas Motor Freight Lines, Inc. v. United States*<sup>53</sup> specifically addressed the Supreme Court's oversight. The court was reviewing an Interstate Commerce Commission (ICC) decision granting a carrier temporary authority to transport commodities from Texas to Arizona.<sup>54</sup> The ICC argued that *Vermont Yankee* precluded the court from requiring the Commission to explicitly explain in the record the reasons for its decision. Although the court upheld the ICC decision, it stated:

We do not think that *Vermont Yankee* prevents this court from remanding for an administrative explanation in an appropriate case. The Court did not purport to address the principle that in order to preserve effective review, a court could demand a reasoned decision from an administrative agency. Unlike *Vermont Yankee*, the concern in this case is not with the adequacy of administrative fact finding but the effectiveness of judicial review.<sup>55</sup>

The D.C. Circuit Court took this dictum even further in *Weyerhaeuser*

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(1971).

47. 435 U.S. at 524.

48. See *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111, 120-21 (4th Cir. 1979).

49. See *Central Fla. Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978); *Aqua Slide 'N' Dive Corp. v. Consumer Prods. Safety Comm'n*, 569 F.2d 831 (5th Cir. 1978).

50. See *American Fed'n of Labor v. Marshall*, 617 F.2d 636, 670-73 (D.C. Cir. 1979); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1030 (D.C. Cir. 1978).

51. *National Crushed Stone Ass'n v. EPA*, 601 F.2d at 116-19.

52. 435 U.S. at 542. See text accompanying notes 19-22 *supra*.

53. 593 F.2d 691 (5th Cir. 1979).

54. The ICC is granted such authority under 49 U.S.C. § 10928 (1978).

55. 593 F.2d at 695 n.7.

*Co. v. Costle*.<sup>56</sup> There the court of appeals remanded the Environmental Protection Agency's (EPA) determination of the limitations of effluent discharges required by the Federal Water Pollution Control Act Amendments of 1972.<sup>57</sup> In discussing its ability to remand, the court stated that "[a]bsent a coherent discussion — in the record — of the factual 'basis' and legislative 'purpose' underlying EPA's conclusion . . . we are unable to rely on our usual assumption that the *Agency* . . . will rationally exercise the duties delegated to it by Congress."<sup>58</sup>

The court, careful not to impose specific procedures, remanded the action so that the agency could "conduct notice and comment proceedings aimed at reassessing and more fully explaining its conclusions . . ."<sup>59</sup> The type of procedures that would bring about the required results were not specified but the court makes it clear that, because informal rulemaking lacks adversarial testing, it is relatively useless to reviewing judges.<sup>60</sup> Therefore, it would seem that the court is discretely hinting to the EPA that more formal procedures would be necessary to reassess and explain its decision.

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56. 590 F.2d 1011 (D.C. Cir. 1978).

57. 33 U.S.C. §§ 1251-1376 (1948), as amended, Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977). Under these acts the EPA began a step-by-step process of issuing effluent limitations for each industry which discharges pollutants into United States waters. In *Weyerhaeuser*, American pulp and paper makers challenged the validity of EPA regulations which limited the 1977 through 1983 effluent discharges of their mills.

58. 590 F.2d at 1030 (citing 5 U.S.C. § 553 (1976)). The court had earlier explained that the degree of conciseness required of an agency when stating its "basis" and "purpose" for an informal rule varies with the nature of the regulations promulgated. If they are highly technical and call for scientific judgments, the court has to be sure that the procedures used to promulgate the regulations are ample to support them. 590 F.2d at 1024 n.11 (relying on *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972)). The court also stated that the dual "basis and purpose" statement requirement of § 553 suggests that the EPA's

explanatory statement should discuss both the factual premises, if any, and the policy considerations underlying the administrative action. This requirement not only aids the reviewing court in assuring adherence to considerations appropriate under the statute, but also permits the court to decide if the agency's conclusion is "sustainable on the administrative record made."

*Weyerhaeuser Co. v. Costle*, 590 F.2d at 1024 n.11 (citing *Vermont Yankee Nuclear Power Co. v. NRDC*, 435 U.S. at 549). Note, however, that there seems to be no such requirement in the APA. Scalia, *supra* note 9, at 395. This may be proof that the Supreme Court itself is guilty of requiring more from an agency on common law grounds. This seems to be the basis of the Court's decision in *Camp v. Pitts*, 411 U.S. 138 (1973). There the Court held that an agency can be required to provide "such additional explanation of the reasons for the agency decision as may prove necessary . . . to a proper assessment of the agency's decision." *Id.* at 143. See *Davis*, *supra* note 23, at 9.

59. 590 F.2d at 1031.

60. *Id.* at 1026.

It appears, then, that lower courts have taken advantage of the loopholes in *Vermont Yankee*. While they cannot impose additional procedures directly, they are not restricted from remanding agency action on substantive grounds. In the long run this tactic may be worse than imposition of procedures. Now the agency is just relegated to limbo on remand because it knows that something is wrong with the record but it does not know how to rectify it. Before *Vermont Yankee*, the agency knew how to square itself with a reviewing court. Today, the revolving door approach suggested in *SEC v. Chenery Corp.*<sup>61</sup> may become more of a reality. Furthermore, a real question with this form of review is whether the court will be able to divorce its determinations of the adequacy of the record from the adequacy of procedures.<sup>62</sup> There is a similar problem for the agency on remand. Creating a more detailed record does not necessarily require more procedural safeguards, but this may not be clear to the agency. Without some guidance from the court, the agency on remand will probably be compelled "to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings."<sup>63</sup> This is the exact thing Justice Rehnquist was trying to avoid in *Vermont Yankee*.

### C. Agency Departure from Well Settled Practices

According to the Supreme Court in *Vermont Yankee*, if an agency departs from a well settled practice, the reviewing court may have grounds for judicial intervention.<sup>64</sup> Usually courts will only intervene if agency noncompliance results in prejudice or substantial deprivation to the parties relying on prior agency practice.<sup>65</sup>

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61. 318 U.S. 80 (1943). See Nathanson, *supra* note 21, at 206. The idea suggested in *Chenery* is that although an agency's result may be acceptable, the reasoning behind it may not be. If this is the case, the court must remand to give the agency an opportunity to provide a more thorough statement of its reasoning and better documentation. This approach was vehemently rejected by Justice Jackson as a waste of agency, as well as judicial, time and money. *SEC v. Chenery Corp.*, 332 U.S. 194, 210 (1947) (Jackson, J., dissenting).

62. The Supreme Court explained this point in *Vermont Yankee*.

The Court below uncritically assumed that additional procedures will automatically result in a more adequate record . . . . But . . . the adequacy of the "record" in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes.

435 U.S. at 547.

63. 435 U.S. at 547.

64. 435 U.S. at 542. See Barr, *supra* note 4, at 803; comment, *Administrative Procedure*, *supra* note 2, at 329-31.

65. See Morton v. Ruiz, 415 U.S. 199 (1974). It should be noted that an agency can change its prior procedures, provided that it complies with the APA in doing so. See United

Although the Supreme Court did not define what might be considered a deviation from well settled practices of long standing, some of the lower courts have addressed this issue. In *Brown Express Inc. v. United States*<sup>66</sup> several carriers sought review of an ICC notice which provided that the Commission no longer had to notify existing carriers by phone, as it had done for forty years, of applications by new carriers for emergency temporary authority (ETA) to operate in the area.<sup>67</sup> The ICC argued that the notice constituted a general policy statement and as such was exempt from section 553 procedural requirements.<sup>68</sup> The Fifth Circuit held that the Commission's "notice" was a rule<sup>69</sup> governed by the requirements of section 553.<sup>70</sup> In rejecting the ICC's argument the court stated that "[t]he exemption of § 553(b)(A) from the duty to provide notice by publication does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated . . . ."<sup>71</sup> Therefore, the court's scope of review was not to determine whether the rule was "substantive" or "procedural" but whether the rule would have a "substantial impact" on those regulated.<sup>72</sup>

The ICC argued that its practice of informing other carriers of applications for ETA was an "informal nonmandatory custom" not required under its substantive statute<sup>73</sup> and never formalized in the ICC Field Staff Manual or by its adoption in a formal rulemaking proceeding. The court rejected this argument on the grounds that the notifications had been provided for over forty years, that the Field Staff Manual "virtually mandated" notification of existing carriers and that the reliance by these carriers on this procedure could result in a substantial economic loss.<sup>74</sup>

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*States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (FCC decision to limit the number of licenses issued to any one party did not prevent individuals from applying for exemptions).

66. 607 F.2d 695 (5th Cir. 1979).

67. The ICC's power to issue ETA was delegated to it by 49 U.S.C. § 10928 (1978).

68. 5 U.S.C. § 553(b)(A) provides that if notice and hearing is not required by statute, the notice and comment procedures of § 553 do not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice."

69. See note 5 *supra*.

70. The court found that the agency notice was not an interpretive rule because it in effect changed the Commission's methodology of granting substantive rights. 607 F.2d at 700. The notice was also not a general statement of policy because it did not tell what guidelines were to be used in awarding future ETA nor did it "set a goal that future proceedings may achieve." *Id.* at 701. Finally, the court determined that the notice was also not a procedural rule because it was a regulation of general applicability that had substantial impact on the regulated industry. *Id.* at 701-703.

71. *Id.* at 702.

72. *Id.*

73. 49 U.S.C. § 10928 (1978).

74. 607 F.2d at 702-03. Within one month a carrier, operating under the protested ETA,

On the basis of this case, there appear to be several factors which a court will take into account when determining whether agency action departs from well settled practice of long standing without substantial justification. These are: 1) the number of parties affected, 2) the economic or prejudicial impact on those parties, or the extent of their reliance on the old practice, 3) the length of time the practice had been followed by the agency, and 4) the extent to which the practice was in agency manuals or other statements of procedure.<sup>75</sup>

#### D. *Notions of Common Law Fairness and Constitutional Due Process*

The Supreme Court's statement in *Vermont Yankee* that "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies 'should be free to fashion their own rules . . .'"<sup>76</sup> has been interpreted to mean that lower courts still have the authority to apply due process, which must include "basic considerations of fairness."<sup>77</sup> It should be noted that this due process claim has received little support in the courts. The reason for this stems from the fact that due process procedural requirements vary from case-to-case. Simply because an agency may limit the right of a party to an adversarial type hearing does not mean that it has overstepped the bounds of due process. As long as an agency provides to interested parties notice and an opportunity for comment, as required by the APA or other statute, prior to adopting a rule, it may use informal rulemaking procedures. However, additional

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received revenues of \$485,934. *Id.* at 702.

75. It should be noted that the *Brown* decision points out how the departure from well settled practices idea can become intertwined with considerations for procedural and common-law fairness. The concepts of substantial impact and notice and comment requirements of § 553 are both fraught with the perception of fairness to the parties affected by agency regulation. In fact, Judge Clark points out that the Supreme Court has held that the notice and comment provisions of § 553 "were designed to assure fairness . . ." 607 F.2d at 701 (quoting *NLRB v. Wyman-Gardon Co.*, 394 U.S. 759, 764 (1969)). Moreover, the court notes that although it held § 553 required notice and comment procedures in that case, notions of common-law fairness might require notice and comment procedures to rulemaking exempt from such procedures in other cases. 607 F.2d at 703 n.7. See notes 79-94 *infra* and accompanying text.

This concept flies in the face of the purpose of the APA and the strict mandates of *Vermont Yankee*, where the Court held that the APA provided the maximum procedures required of an agency promulgating a rule. 435 U.S. at 524, 542-48. Nevertheless, in *Brown* the Fifth Circuit holds that common-law fairness may require more. Note that this idea as worded and placed in the opinion is totally insulated from Supreme Court review and can be resurrected at another time to serve as the basis of a decision. See Scalia, *supra* note 9, at 398-99.

76. 435 U.S. at 543.

77. Davis, *supra* note 23, at 16.

procedures may be required if the rulemaking rests on factual assumptions that would violate accepted notions of fundamental fairness if adopted without procedural safeguards.<sup>78</sup>

An example of the fundamental fairness notion is provided in *Weyerhaeuser Co. v. Costle*.<sup>79</sup> The petitioning companies sought review of EPA regulations limiting the amount of effluent discharges from their pulp, paper, and paperboard mill.<sup>80</sup> The regulations were to be promulgated informally under section 553(b)<sup>81</sup> notice and comment procedures. However, a problem arose when the EPA, after giving the petitioners four opportunities for notice and comment, recalculated its Final Limitations with neither notice and comment by the petitioners nor explanation for the deviation in the agency's record.<sup>82</sup> The petitioners, relying on new data, asserted that the figures set forth in the Interim Final Limitations were more accurate.<sup>83</sup> The EPA responded that, even if it started from scratch with the new data, it could justify the Final Limitation figures.<sup>84</sup> The court found this rationalization to be inadequate and remanded this case for "notice and comment proceedings aimed at reassessing and more fully explaining its conclusions."<sup>85</sup>

The D.C. Circuit noted that its review of the EPA's "procedural integrity in promulgating the regulations . . . [was] the product of [its] independent judgment, and its main reliance in ensuring that, despite [the EPA's] broad discretion, the Agency [had] not acted unfairly . . ." <sup>86</sup> The court based this assertion of judicial independence in reviewing agency procedures on "this country's historical reliance on the courts as exponents of procedural fairness."<sup>87</sup> The D.C. Circuit justified this type of review as a method of keeping the EPA honest and, hence, ensuring that the Agency had followed the APA in order to "maximize the susceptibility of the record to judicial review."<sup>88</sup>

Although the court showed its deference to *Vermont Yankee* by stating that it is generally up to the agency to select the type of techniques that are necessary to "accomplish the goal of public understanding and partic-

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78. See Barr, *supra* note 4, at 800-02. See also notes 59 & 75 *supra*.

79. 590 F.2d 1011 (D.C. Cir. 1978). See text accompanying notes 56-60 *supra*.

80. 590 F.2d at 1019.

81. 5 U.S.C. § 553(b). See note 4 *supra*.

82. 590 F.2d at 1029.

83. *Id.*

84. *Id.* at 1030.

85. *Id.* at 1031.

86. *Id.* at 1027.

87. *Id.* (citations omitted).

88. *Id.* at 1027-28.

ipation,"<sup>89</sup> there is nothing in the APA or the EPA substantive statute that would require any procedure "beyond" notice and comment.<sup>90</sup> The D.C. Circuit held that, in keeping with notions of procedural fairness, the more complex the regulations, the more rigorous the procedures used to promulgate them must be.<sup>91</sup> *Vermont Yankee* explicitly held that the APA provided the "maximum procedural requirements which Congress was willing to impose upon agencies"<sup>92</sup> no matter how complex the regulations might be. Ironically the court relied on *Vermont Yankee* as support for the proposition that if the record on review does not sufficiently substantiate the agency's finding then the case can be remanded for a more thorough record.<sup>93</sup> The D.C. Circuit has interpreted this to mean that if the record is insufficient then the agency procedures used in generating the record are likewise inadequate.<sup>94</sup>

### E. *Prohibition on Ex Parte Communications*

The prohibition on *ex parte* contacts is in line with the ideas of common law fairness, procedural due process and to some extent adequacy of the record.<sup>95</sup> Neither Supreme Court decisions nor specific provisions of the APA provide for *ex parte* contacts;<sup>96</sup> however, lower courts have utilized this method to set aside agency decisions that are, either in whole or in part, based upon information not disclosed in the record on review which is received by the agency after the notice and comment stage of rulemaking has been adjourned.

According to D.C. Circuit Judge Wright<sup>97</sup> the advent of the prohibition on *ex parte* contacts was heralded by the *Citizens to Preserve Overton*

89. *Id.* at 1028.

90. 5 U.S.C. § 553(b) (1976). *See* note 4 *supra*.

91. 590 F.2d at 1028. The court held that the "promulgation process must provide a degree of public awareness, understanding and participation commensurate with the resulting regulations." *Id.*

92. 435 U.S. at 524.

93. 590 F.2d at 1030 (citing *Vermont Yankee*, 435 U.S. at 549).

94. 590 F.2d at 1030. *See* notes 45-64 *supra* and accompanying text. For a discussion of the problems caused by this type of remand, *see* note 61 *supra* and accompanying text. Several cases ultimately decided on other grounds discuss fairness to the parties. *See, e.g.,* WNCN Listeners Guild v. FCC, 610 F.2d 838, 846 (D.C. Cir. 1979). For a discussion of basic fairness and procedural due process in the context of *ex parte* contacts, *see* National Small Shipments Traffic Conference, Inc. v. ICC, 590 F.2d 345 (1978); United States Lines, Inc. v. FMC, 584 F.2d 519 (1978).

95. *See* Ornoff, *Ex Parte Communication in Informal Rulemaking: Judicial Intervention in Administrative Procedures*, 15 U. RICH. L. REV. 73 (1980).

96. *See* Scalia, *supra* note 9, at 396.

97. Wright, *Rulemaking and Judicial Review*, 30 ADMIN. L. REV. 461, 464-66 (1978).

*Park, Inc. v. Volpe*.<sup>98</sup> In *Overton Park*, the Supreme Court held that, in order to determine whether an agency has acted arbitrarily or capriciously when informally promulgating a rule, the court must conduct "a thorough, probing, in-depth review,"<sup>99</sup> and must make a "searching and careful"<sup>100</sup> inquiry into the facts. In Judge Wright's opinion, for a court to follow the Supreme Court's mandate on review, all the facts and data upon which an agency based its decision, including *ex parte* communications, must be set out in the record.<sup>101</sup> It is not clear from subsequent Supreme Court decisions whether the Court meant for the holding in *Overton Park* to apply to *ex parte* contacts. However, in light of the proliferation of cases decided on this basis, it is apparent that this is what the lower courts interpret the decision to mean.<sup>102</sup>

Indeed, soon after *Vermont Yankee* had been decided, the D.C. Circuit, relying upon *Overton Park*, held that the Federal Maritime Commission's (FMC) reliance on *ex parte* contacts precluded adequate judicial review.<sup>103</sup> The challenger was thus denied an opportunity for comment as mandated by the FMC's substantive statute's requirement for a "hearing"<sup>104</sup> and, hence, this action violated fundamental fairness.<sup>105</sup> The court in this case had to interpret the FMC substantive statute before the Commission could decide whether agreements between shipping lines, that would normally be held to violate antitrust regulations, would be permitted as in the public interest. Although the court held that the statute did not require the hearing to be made "on the record," it did impose

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98. 401 U.S. 402 (1971).

99. *Id.* at 415.

100. *Id.* at 416.

101. Wright, *supra* note 97, at 465.

102. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977); but see *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 846 (D.C. Cir. 1979); *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111, 119 (4th Cir. 1979); *Blanco Oil Co. v. Federal Energy Regulation Comm'n*, 598 F.2d 152, 166 n.70 (D.C. Cir. 1979); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1030 (D.C. Cir. 1978); *National Small Shipments Traffic Conference, Inc. v. ICC*, 590 F.2d 345 (D.C. Cir. 1978).

103. *United States Lines, Inc. v. FMC*, 584 F.2d 519, 541 (D.C. Cir. 1978) (ocean carrier sought review of an FMC order approving an anticompetitive agreement between two other shipping lines). The standard for review in cases such as this is whether the agency's actions are arbitrary and capricious. 5 U.S.C. § 706(2)(A) (1976).

104. Section 15 of the Shipping Act of 1916, 46 U.S.C. § 814 (1970), delegates to the FMC the power to exempt anticompetitive agreements among overseas carriers from the antitrust laws when it is in the public interest to do so.

105. The court held that the public interest is not furthered by an agency's reliance upon *ex parte* contacts "[f]or such references and communications violate the ideals of fairness and public participation which are embodied in the statutory requirement of a hearing . . . ." 584 F.2d at 543. See also *id.* at 535, 536, 541.



"certain minimum constraints on the procedure followed by the agency."<sup>106</sup> According to the court, the FMC violated one of these constraints by relying on *ex parte* communications from other shippers. In distinguishing this case from *Vermont Yankee*, the court acknowledged that agencies have the freedom to establish their own procedures but do not have the "freedom to ignore statutory requirements."<sup>107</sup> It held that by not providing a hearing on the information received through *ex parte* communications, the agency had not acted in accordance with statutory requirements.<sup>108</sup> As further support the court held that *ex parte* communications obstruct judicial review under the arbitrary and capricious standard because the court does not have "the full administrative record that was before the [agency official] at the time he made his decision."<sup>109</sup>

Here again, a court has imposed more upon an agency than is mandated by the APA which, according to *Vermont Yankee*, is supposed to provide the maximum required procedures. It might be argued that the ideas of procedural due process and common law fairness, which are circumvented by agency reliance on *ex parte* contacts, fall under the "extremely compelling circumstances"<sup>110</sup> or "constitutional constraints"<sup>111</sup> exceptions in *Vermont Yankee*. Whether this is true is not yet known, but it is clear that, if an agency relies on undisclosed *ex parte* communications in making its decision, the agency action will probably be set aside.<sup>112</sup>

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106. *Id.* at 537.

107. *Id.* at 542 n.63.

108. The FMC relied upon statements made by other shipping lines in favor of the proposed anticompetitive agreement without notifying United States Lines, Inc. or giving them an opportunity to comment upon these statements.

109. 584 F.2d at 541 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 420).

110. 401 U.S. at 54.

111. *Id.* One commentator believes that the "compelling circumstances" exception can be used to justify the imposition of hybrid procedures so that a more adequate record can be generated. Barr, *supra* note 4, at 804.

112. *Contra*, *Katherine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 670 (2d Cir. 1979). There are other possible exceptions to the holdings in *Vermont Yankee*. One commentator has taken the view that had the APA, its legislative history and the combined legislative histories of the AEC's enabling statutes been correctly interpreted by both the D.C. Circuit Court and the Supreme Court, both courts would have realized that §§ 556 and 557 applied to the case. Therefore, he concludes that further procedural safeguards are required of the Commission before it can promulgate its rule. Nathanson, *supra* note 21, at 183.

Professor Davis points to § 559 of the APA to support his contention that courts may impose hybrid procedures to further common law notions of fairness. Section 559 provides that nothing in that subchapter limits or repeals "requirements imposed by statute or otherwise recognized by law." His interpretation of the statute and its associated legislative his-

## III. CONCLUSION

In light of the aforementioned appellate court decisions, it has become apparent that *Vermont Yankee* has been construed to stand for only one proposition. Reviewing courts cannot impose procedures on an agency beyond those mandated by the APA or other relevant statutes. It does not preclude a court from setting aside or remanding agency action on substantive grounds. Does, however, the mere prohibition of judicial imposition of hybrid procedures solve the problems that Justice Rehnquist was trying to avoid in *Vermont Yankee*?<sup>113</sup> When a court remands agency action on substantive grounds it still can impose its own notion of what is "most likely to further some vague, undefined public good,"<sup>114</sup> as well as "seriously interfere" with agency procedure prescribed by Congress.<sup>115</sup> Either congressional action or a more active role by the Supreme Court in the development of administrative law is necessary. *Strycker's Bay Neighborhood Council Inc. v. Karlen*<sup>116</sup> intimates that the Court plans to thoroughly cover each issue discussed in *Vermont Yankee* on a case by case basis providing a reasoned opinion on each point of law. There are problems with this approach though. Will the Court act soon enough to save agencies from the quagmire of the appellate court docket? Will the lower courts follow the Supreme Court's commands? If not, it would seem that only congressional amendment clarifying and updating the APA will prevent lower court intrusion into agency decisionmaking.

Jon A. Mueller

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tory leads him to believe that the phrase "otherwise recognized by law" allows courts to develop a common law of administrative procedure. According to Davis, because *Vermont Yankee* contravenes judicially created common law which imposes hybrid procedures, it would seem to stand in direct contradiction to § 559 of the APA. Davis, *supra* note 23, at 10.

After his survey of the APA, its legislative history and the legislative histories of the AEC's enabling statutes, Professor Nathanson contends that the rule which the Commission was trying to promulgate was one "required to be made on the record." As such it met the § 553(c) exemption and triggered the further procedural safeguards of §§ 556 and 557. Therefore, both the courts of appeal and the Supreme Court had neglected to apply the relevant provisions of the APA in *Vermont Yankee*. Nathanson, *supra* note 21, at 193. It is conceivable that a lower court could use either of these two approaches to impose hybrid procedures despite the *Vermont Yankee* holding. It should be noted that Professor Nathanson's point of view seems to be restricted to cases which relate to licensing of nuclear power plants or enabling statutes similar to the AEC's, whereas Professor Davis' position can be used in all administrative actions that fall under the domain of the APA and administrative common law.

113. 435 U.S. at 546-48.

114. *Id.* at 549.

115. *Id.* at 548.

116. 444 U.S. 223 (1980).

