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JUDICIAL IMPOSITION OF RULEMAKING PROCEDURES ON ADMINISTRATIVE AGENCIES:
THE IMPACT OF VERMONT YANKEE NUCLEAR POWER CORPORATION v. NATURAL RESOURCES DEFENSE COUNCIL, INC.

In 1946, Congress enacted the Administrative Procedure Act\(^1\) which established a procedural model "designed to achieve relative uniformity in the administrative machinery of the Federal Government."\(^2\) Foremost among the provisions of the APA is Section 553, which prescribes the procedures for informal rulemaking.\(^3\) Following the enactment of the APA, however, it has been debated whether reviewing courts can require procedures in addition to the statutory minimum found in Section 553.\(^4\) Several lower courts have required additional, that is, hybrid procedures such as cross-examination and oral hearings where the agency enabling act itself did not mandate them.\(^5\)

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2. See ATT'Y GEN. MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5 (1947). The Supreme Court previously recognized that the APA was "a new, basic, and comprehensive regulation of procedures on many agencies," Wong Yang Sung v. McGrath, 339 U.S. 33, 36 (1950) and that "it settles long-contended and hard fought contentions and enacts a formula upon which opposing social and political forces have come to rest." Id. at 40.
3. See note 19 and accompanying text infra.
This debate was resolved in Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc. The Supreme Court, in reversing the District of Columbia Court of Appeals, held that administrative rulemaking procedures and requirements are to be defined by the agencies and Congress, not by the courts. Henceforth, the courts are no longer free to impose hybrid procedures except in very rare circumstances.

Vermont Yankee is a consolidation of two petitions for review from the United States Court of Appeals for the District of Columbia, both concerning the licensing of nuclear reactors. The appellate court had remanded a

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7. In its holding the Court stated: "Agencies are free to grant additional procedural rights in their exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." 435 U.S. at 524.
8. The Court did not unconditionally reject the imposition of hybrid procedures, but instead stated: "This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare." Id.

In December, 1967, the Vermont Yankee Nuclear Power Corporation was granted a permit to build a nuclear power plant in Vernon, Vermont. See 4 A.E.C. 36 (1967). After extensive hearings before the Atomic Safety and Licensing Board and over the objections of the Natural Resources Defense Council, Inc. [hereinafter referred to as NRDC], the Atomic Energy Commission [hereinafter referred to as the AEC] granted the Vermont Yankee Nuclear Power Corporation a license to operate a nuclear power plant. The AEC’s ruling subsequently was affirmed by the Atomic Safety & Licensing Board in June, 1972. In accordance with the decision of the Appeal Board, the AEC in November, 1972, began rulemaking proceedings to consider the effects associated with the uranium fuel cycle in individual cost benefit analyses for light water cooled nuclear reactors on the environment. The Licensing Board did not use formal adjudicatory procedures in these proceedings. As a result of these proceedings, the AEC in April, 1974, issued a spent fuel cycle rule, approved the procedures used at the Licensing Board hearing, indicated that the hearing record provided sufficient data for the rule adopted, and ruled that to the extent the spent fuel cycle rule differed from the Appeal Board decision of June, 1972, the earlier decision would have no further precedential effect.

In the Aeschliman case, the Consumers Power Company applied in January, 1969, for a permit to construct two nuclear reactors in Midland, Michigan. Consumers was to become the primary customer of electricity, while the nearby Dow Chemical Company facility was the intended customer of the output of process steam. The location of the reactors in Midland, across the Tittabawassee River from Dow was in part necessitated by the fact that steam does not efficiently retain heat when transported over long distances. 547 F.2d at 624. Consumer Power’s application was examined by both the AEC and the Advisory Committee on Reactor Safeguards [hereinafter referred to as ACRS], as required by the Atomic Energy Act. The ACRS issued several reports which discussed specific problems and recommended possible solutions, referred to "other problems" cited in previous ACRS reports, and suggested that efforts be made to resolve such difficulties as they applied to the Midland situation. However, in 1970, both the AEC and the ACRS concluded that the facility comported with the Atomic Energy Act’s public health and safety standards and accordingly the construction permit was granted. At this time, Nelson Aeschliman and five other residents of nearby Mableton, Michigan, along with several local environmental organizations, protested the granting of the license and filed exceptions with
decision of the Atomic Energy Commission granting a license to the Vermont Yankee Nuclear Power Corporation to operate a nuclear power plant. At issue was the informal rulemaking procedure used by the AEC in formulating the spent cycle rule. This procedure was held to be inadequate by the court of appeals.

The Supreme Court, however, overruled the court of appeals and found the AEC's procedure to be adequate. Moreover, the Court stated that, in

the Atomic Safety & Licensing Appeal Board which affirmed the AEC's grant of the construction permit.

In 1973, one of the environmental groups moved the AEC to reopen the permit proceedings because of the revision of the Council on Environmental Quality regulations governing the preparation of environmental impact statements, where for the first time the necessity for considering energy conservation was included as one of the alternatives to a proposed project, and due to a subsequent AEC ruling indicating that all evidence of energy conservation should not necessarily be barred at the threshold of AEC proceedings. This the AEC refused to do. In a lengthy opinion, it chastised the environmental group for failing to present evidence to meet the agency's "threshold test", as well as for disregarding the minimal procedural formalities required for the Appeal Board to have notice of what was at issue.

10. The United States Atomic Energy Commission was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. § 5841 (Supp. IV, 1970), and its licensing and regulatory functions were transferred to the United States Nuclear Regulatory Commission, 42 U.S.C. § 5841 (Supp. IV, 1970). For the sake of clarity, however, the old designation, AEC, is used wherever appropriate throughout this Note.

11. The spent fuel cycle rule specified the numerical values for the environmental impact of the uranium fuel cycle in light water cooled nuclear reactors. These values would later be incorporated into a table, along with other relevant data, to determine the overall cost-benefit for each nuclear reactor operating license. 435 U.S. at 528.

12. The NRDC appealed the AEC's adoption of the spent fuel cycle and its decision to grant Vermont Yankee an operating license. The District of Columbia Circuit ruled, with respect to Vermont Yankee's license, that in the absence of effective rulemaking proceedings the AEC must deal with the environmental impact of fuel reprocessing and disposal in individual licensing proceedings. The court further held that although it appeared the AEC employed all the procedures required by the APA in Section 553, the rulemaking procedures were inadequate because they failed to assure full consideration of waste disposal, fuel reprocessing and other elements of the nuclear fuel cycle, noting that under the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4347 (1970)) the AEC was prohibited from licensing a nuclear power plant without giving consideration to any of these issues. The decision awarding a license to Vermont Yankee was accordingly remanded, and a rulemaking proceeding was ordered.

In Aeschliman, the petitioners appealed the grant of the construction permit. The United States Court of Appeals for the District of Columbia held that the environmental impact statement for the construction of the reactor was fatally defective in failing to examine energy conservation as an alternative, and that the ACRS report was inadequate and should be returned to the agency for further elucidation understandable to a layman. This case was also remanded.

13. Following this decision, Vermont Yankee sought review in the Supreme Court which reversed and remanded the lower court decision. The Court held: (1) the AEC acted within its statutory authority in considering the environmental impact of spent fuel processes in individual licensing proceedings; and (2) nothing in the applicable statutes or facts of the case allowed the appellate court to review and overturn rulemaking proceedings on the basis of procedures used or not used by the AEC in situations where the agency employed at least the statutory minimum. 435 U.S. 519, 525-37.
general, reviewing courts should not impose hybrid procedures.\textsuperscript{14} This language was especially significant because it expressly contravened a number of well respected decisions of the District of Columbia Appellate Court.\textsuperscript{15} The purpose of this Note is to explore the reasons for the Court's holding and to discuss its impact. Accordingly, it will review prior judicial interpretations of Section 553 and explain the rationale behind the recent hybrid rulemaking cases and discuss why those cases were not persuasive to the Vermont Yankee Court. It will next assess the Vermont Yankee rationale and its impact upon the future role of the courts in the administrative process and upon the fact/policy distinction in administrative law. This Note will also consider those instances in which the Vermont Yankee prohibition against hybrid rulemaking ought not to be controlling.

**Procedural Background Involving Rulemaking**

Before the nature of rulemaking can be understood, it is necessary to understand what is meant by the term "rule." Although not clearly defined by statute,\textsuperscript{16} a rule is characterized by the following indicia: (1) its general applicability; (2) its prospective nature; and (3) its concern with policy.\textsuperscript{17}

Informal notice and comment procedures have long been recognized as a favored method of formulating agency rules.\textsuperscript{18} When such informal procedures are followed, the agency must give notice of the proposed rule, provide an opportunity for interested persons to comment on it and formulate a general statement as to the basis and purpose of the rule ultimately adopted.\textsuperscript{19} This preference for notice and comment procedures is due to
the advantages of informal rulemaking over the more trial-like administrative procedures. Essentially, these advantages may be characterized as promoting both efficiency and fairness in agency proceedings. Rulemaking not only educates the agency as to all sides of an issue and to potential alternative courses of action, but also provides an opportunity for interested persons to participate in the administrative process.

**Judicial Construction of Section 553**

Early cases construed Section 553 as requiring only those notice and comment procedures delineated by the APA. Those decisions stressed that the agencies were free to fashion their own procedural rules and that judicial review, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

1. a statement of the time, place and nature of public rule making proceedings;
2. reference to the legal authority under which the rule is proposed; and
3. either the terms or substance of the proposed rule or a description of the subjects and issues involved . . .

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . .


21. Participation may be either in written or oral form, thereby avoiding cumbersome and protracted cross-examination. Since the agency itself controls the process, it can anticipate problems without waiting for others to bring such problems to light as is true in the adjudicatory model. The agency, therefore, will have a better opportunity to investigate the options available and accordingly to formulate and delineate regulations and standards.

22. Informal rulemaking is fair in that any interested party may participate in the rulemaking process. The agencies themselves encourage this participation by frequently seeking data and other information from those who would only remotely be affected by the rule.

23. See FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940) where the Court stressed the established principle that 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" and SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) which states "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." See also FCC v. Schreiber, 381 U.S. 279, 290 (1965) and Robinson, supra note 17, at 508.
cial review was limited.\(^2\) Absent certain qualifications, courts were not to impose procedural rules on administrative agencies.\(^2\)

During this time, however, several courts gave "teeth" to the minimal notice and comment proceedings found in Section 553. They required agencies to adequately detail the notice of any proposed rulemaking.\(^2\) Notices were held to be inadequate unless they contained the subject matter of the proposed rule and made reference to or incorporated any studies or reports upon which the agency relied.\(^2\)

In addition, some courts required that agencies sufficiently detail the "basis and purpose" statement to make judicial review more effective.\(^2\) Unless the statements included the agency's method of inquiry,\(^2\) the factual and other data it relied upon and its analysis and reasoning, the inquiry was considered inadequate.\(^2\) In certain instances, agencies were required to respond to significant criticisms made during the comment period.\(^1\) The courts imposed these additions to Section 553 primarily to ensure the effectiveness and to protect the integrity of the notice and comment procedures.

**Judicial Imposition of Hybrid Procedures**

Recently, however, other courts have determined that fundamental notions of fairness involve more procedures than those found in Section 553.\(^3\)

\(^{24}\) Several lower courts have defined the scope of judicial review as (1) establishing parameters of rationality, South Terminal Corp. v. EPA, 504 F.2d 646, 665 (1st Cir. 1974); (2) narrow, Chrysler Corp. v. Dept. of Transp., 472 F.2d 659, 669 (6th Cir. 1972); (3) limited to a "searching and careful" review of agency action to determine if it was within the statutory grant of authority, City of Chicago v. FPC, 458 F.2d 731, 745 (D.C. Cir. 1971), cert. denied., 405 U.S. 1074 (1972); and (4) establishing that the result is reasonable, is within the range of authority conveyed and is formulated in the manner prescribed, Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 343 (D.C. Cir. 1968).

\(^{25}\) Several lower court decisions have held that courts may not fashion procedural rules for administrative agencies "in the absence of substantial justification" and without an opportunity for further agency consideration, FPC v. Transcontinental Gas & Pipe Line Corp., 423 U.S. 326, 333 (1976); or unless there is an abuse of agency discretion, Bell Tel. Co. v. FCC, 503 F.2d 1250, 1266 (3d Cir. 1974).


\(^{28}\) See note 26 supra.

\(^{29}\) See note 45 infra.


\(^{32}\) See cases cited in note 5 supra.
As a result, agencies were required to adopt additional procedures in some actions governed by Section 553. Those courts which have imposed hybrid procedures have done so based upon the following rationales: (1) additional procedures provide a more thorough exploration of the issues; (2) they provide more procedural safeguards to those who might be substantially affected by the contemplated agency action; and (3) agency procedures are thought to enhance judicial review.

Cross-examination is one hybrid procedure which has been required.

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33. Two commonly imposed hybrid procedures are limited cross-examination and oral hearings. See generally Harvard Note, supra note 5.


35. See, e.g., Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971), where Judge Leventhal speaking for the court, stated "fairness may require an opportunity for cross-examination on the crucial issues." Id. at 1016.

36. See, e.g., Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1262 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632, 649 (D.C. Cir. 1973).

37. Four important cases where the court imposed cross-examination are Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973); Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971).

In *Mobil Oil*, the petitioners, producers of natural gas and other petroleum products, sought review of FPC orders setting the minimum rates required to be charged by petitioners for the transportation of certain liquids and liquifiable hydrocarbons. On review, the court concluded that Section 553 rulemaking procedures alone were insufficient in such proceedings. It held that, because the Natural Gas Act required "substantial evidence" as a prerequisite to judicial approval of the FPC's ratemaking decisions, the Commission must allow a "testing" of its evidence "by procedures sufficiently adversary in nature to provide a reasonable guarantee of its reliability." 483 F.2d at 1264. Procedures such as cross-examination and written interrogatories were suggested by way of illustration. *Id.* at 1257-64.

In *International Harvester*, the court held that "'soft' and sensitive subjects and witnesses" might require opportunity for cross-examination. 478 F.2d at 631. Although the court found the EPA's rulemaking procedures in regard to automobile emissions standards sufficient to give the petitioners a meaningful opportunity to be heard on the policy issues, it remanded the case to allow a limited opportunity for cross-examination on specific technical issues "in the interest of providing a reasoned decision." *Id.* at 649. Also, the court distinguished between imposing a general right of cross-examination for which "there is not insignificant potential for havoc," and the need for cross-examination on subjects "which could not be adequately ventilated under general procedures." *Id.* at 631.

In *Appalachian Power*, the Fourth Circuit held that an EPA hearing to consider "state implementation plans" to bring ambient air pollution levels down to conform to those prescribed by the Administrator of the EPA could be dispensed with only if the required state hearing had been "adequate". 477 F.2d at 502. The court explained: "What is required in all instances, whatever the character of the administrative action, is "the reality of an opportunity to submit an effective presentation," and if in the context of the issues involved, "cross-examination on the crucial issues" is found proper, such right should be recognized and upheld." *Id.* at 503.

In *Walter Holm & Co.*, the district court was ordered to issue a declaratory judgment that the plaintiffs, importers of Mexican tomatoes, were entitled to hearings with the right to cross-examination on "crucial" issues involved in tomato marketing control. The court stated that "fairness may require an opportunity for cross-examination on the crucial issues." 449 F.2d at 1016.

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when crucial issues were involved. According to those courts imposing cross-examination, it serves to elucidate the issues, challenge the declarant’s perception and believability, and assure more accurate information. However, it offers some parties certain unwarranted advantages vis-à-vis the agency because cross-examination often has been used both as a tool for delay and as a bargaining tactic. Moreover, it provides a means of exerting pressure on the agency to adopt a milder position, an opportunity to chill the readiness of experts to work for agencies and a means of scoring debating points by destroying agency witnesses, data and the like. Consequently, the imposition of cross-examination procedures in informal rulemaking has had detrimental effects on administrative agencies.

38. For descriptions of those issues which courts have deemed to be crucial and hence, have imposed hybrid procedures see, e.g., O’Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974) (broad issues of public health and safety); Friends of the Earth v. AEC, 485 F.2d 1031, 1032-33 (D.C. Cir. 1973) (possibility of immediate danger to life and health); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631 (D.C. Cir. 1973) (“soft” and sensitive subjects); Appalachian Power Co. v. EPA, 477 F.2d 495, 503 (4th Cir. 1973) (nature and “drastic impact of regulations”); Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1016 (D.C. Cir. 1971) (crucial issues of imports and the need to coincide with the Government’s foreign policy); American Airlines, Inc. v. CAB, 359 F.2d 624, 632 (D.C. Cir. 1966) cert. denied, 385 U.S. 843 (1966) (key questions and certain classes of cases).

39. Phillips Petroleum Co. v. FPC, 475 F.2d 842, 856-57 (10th Cir. 1971) (Seth, J., dissenting); Williams, supra note 5, at 440, 444.

40. By offering to waive the right to cross-examination in order to save time and agency expense, the possessor might be able to negotiate for any other benefit that the agency could provide.

41. Possession of the right to cross-examination may exert pressure on the agency to take a milder stance vis a vis the possessor. As Professor Williams explains it:

The milder the proposed rule, the more likely that the agency can completely escape the investment of resources that rulemaking through cross-examination techniques involves. Perhaps more important, the agency may be tempted to adopt the viewpoint of the challengers and thereby eliminate issues that would provoke extended cross-examination.

Williams, supra note 5, at 443.

42. Experts in various fields may be reluctant to work for administrative agencies for fear of being subjected to badgering and brutal "grilling" by opposing attorneys. Professor Hamilton states that procedures, such as cross-examination, have tended to cause alienation between the scientific community and agencies. Hamilton, supra note 5, at 1290 n.80.

43. Cross-examination of an expert witness may disclose the omission of certain precautionary or control procedures in his studies for the agency, thus making the witness look like a fool as well as discrediting the data and results of his study.

44. See Williams supra note 5, at 443-45; Wright supra note 5 at 387-88. Professor Williams felt that courts should impose cross-examination only when the proponent of cross-examination has at the minimum: (1) “identified with particularity the issues requiring cross-examination”; (2) “demonstrated the substantiality of the issues to be resolved by cross-examination”; and (3) “demonstrated that less onerous procedures will probably not be able to resolve the issue with sufficient accuracy.” Only then should he be able to seek the opportunity to cross-examine. ld. at 445.
In addition to cross-examination, courts have imposed other hybrid procedures. These include written statements of methodology,45 oral hearings,46 inquiry conferences,47 and use of written interrogatories.48 Like cross-examination, the debate over the effectiveness of these procedures also centers upon whether they facilitate further ventilation of the issues without hampering administrative efficiency.49

Although some courts and commentators believe that these procedures provide for a fairer rulemaking action, their use is not without dangers. Such procedures often lead to protracted delays in agency proceedings,50 destroy the agency's flexibility to make rules51 and prevent high level agency administrators from participating in the agency proceeding.52 Hence, the rationale behind these procedures, to provide more effective participation by interested persons in agency actions, may in some cases ultimately be destroyed.

ANALYSIS OF THE VERMONT YANKEE DECISION

The Vermont Yankee Court, however, considered the dangers of additional procedures and mandated a drastically limited role for the courts during review of agency action.53 The Court did not unconditionally reject hybrid procedures, but instead stated that they may be required only in very rare instances,54 justifying its decision by analyzing the legislative his-

45. A written statement of methodology is a statement provided by the agency in which the agency details, inter alia its mode of operation and the procedure it will follow and also defines essential terms used in its rulemaking proceedings. See generally Williams, supra note 5, at 448-51.

Three recent cases in which courts have imposed written statements of methodology include Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392-95, 402 (D.C. Cir. 1973) cert. denied, 417 U.S. 921 (1974); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631-33, 649 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 506-07 (4th Cir. 1973). In each of these instances criticism of a proposed rulemaking decision was facilitated.

46. Recent cases in which courts have imposed oral hearings include International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971); American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966) cert. denied, 385 U.S. 843 (1966).

47. An inquiry conference is one in which interested persons representing potentially affected industries or groups are permitted to deliver statements before an agency panel which can then question these individuals from the agency's own list of prepared questions or from those submitted by other interested parties. For a discussion of the original agency hearing, the remand hearing and a general discussion of the use of inquiry conferences in the International Harvester case, see Williams, supra note 5, at 451-54.

48. Reliance on written questions is time consuming and may require additional interrogatories or oral questioning to be effective.

49. Williams, supra note 5, at 455.

50. Id. at 443.

51. Id.

52. Id. at 444.

53. 435 U.S. at 524.

54. See note 8 supra.
tory of the APA. According to Justice Rehnquist, the legislative history indicated that Congress intended that the administrative agencies, rather than the courts, should have discretion in determining when additional procedural devices should be used.\(^5\) Actually, the cited language, while describing what the agency "might" do, did not say or imply that an agency's decision concerning which procedures to employ was unreviewable.\(^5\)

The Court, however, also articulated other more important reasons for rejecting judicially imposed hybrid procedures. The Court was concerned that possible judicial remand due to inadequate procedures would act as an incentive for the agencies to use adjudicatory procedures, and therefore that the advantages of informal rulemaking would be lost.\(^5\) Additionally, it feared that continual review or threat of review of agency procedures, even if designed to achieve the "best" result, would make agency proceedings totally unpredictable.\(^5\)

*Procedural Certainty v. Judicial Creativity*

Justice Rehnquist, by stressing the virtues of certainty and predictability in judicial review, also curtailed the future scope of judge-made procedural law. It is this facet of the opinion which has been criticized most exten-

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\(^5\) The Court relied upon the following language of the Senate Report, which explained Section 553 as follows:

This subsection states . . . the minimum requirements of public rule making procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal 'hearings,' and the like. Considerations of practicality, necessity, and public interest . . . will naturally govern the agency's determination of the extent to which public proceedings should go. Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures.

435 U.S. at 545, citing S. REP. NO. 752, 79th Cong., 1st Sess., 14-15 (1945). The following language in the House Report was also relied upon:

Uniformity has been found possible and desirable for all classes of both equity and law actions in the courts . . . . It would seem to require no argument to demonstrate that the administrative agencies, exercising but a fraction of the judicial power may likewise operate under uniform rules of practice and procedure and that they may be required to remain within the terms of the law as to the exercise of both quasi-legislative and quasi-judicial power . . . .

The bill is an outline of minimum essential rights and procedures . . . . It affords private parties a means of knowing what their rights are and how they may protect them. . . . [The bill contains] the essentials of the several forms of administrative proceedings. . . .


In addition, the ATT'Y GEN. MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31 (1947), lends further support to the Court's position that the agencies were given discretion in the choice of procedures in addition to those delineated in Section 553.

\(^5\) See note 102 infra for a discussion of the reviewability of an agency's action.

\(^5\) 435 U.S. at 546-47. See also Wright, **supra** note 5, at 387-88.

\(^5\) Id.
The criticism is grounded upon the precept that courts, in the performance of their adjudicative function, act to make as well as interpret law. The Vermont Yankee decision, it is contended, deprives Congress and the agencies of the benefit of judicial reasoning as to what constitutes appropriate procedures. Furthermore, this power to make law is viewed as being limited only by functional considerations such as the inadequacy of facilities for extensive fact gathering and the court's confinement to the facts of record. No such functional impediments exist in the judicial review of agency procedure.

In accordance with this precept, one prominent commentator maintains that the functions of the courts and agencies should "blend" together; that courts should be given creative latitude in making procedural law; and that the loss of this creativity would reduce the quality of administrative justice. This approach de-emphasizes the need for procedural certainty in favor of judicial "creativity" and the necessity to develop new law.

Thus, at the core of administrative law in general, and Vermont Yankee in particular, is the philosophical question of how far the courts should be free to make procedural law for administrative agencies. Basic to this inquiry is an examination of the relationship between courts and agencies. Traditionally, the relationship between the administrative agency and the reviewing court has been described as a "partnership."


60. Justice Holmes, for one, believed that the basic function of the judiciary is to fill in the gaps of interpretation left by the legislature in the enactment of statutes. Holmes stated: "I recognize . . . that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Others, such as Justice Cardozo, recognized that the exercise of legislative functions by the courts was necessary for liberal and enlightened judicial interpretation. B. Cardozo, The Nature of the Judicial Process 15-18 (1921). See generally Aldisert, The Role of the Courts In Contemporary Society, 38 U. Pitt. L. Rev. 437, 447-49 (1977) [hereinafter cited as Aldisert]; Davis, supra note 59, at § 2.17.

61. Aldisert, supra note 60, at 449.


63. Id.

64. The same commentator has also contended that the Vermont Yankee holding forbidding the judiciary to add to the procedural requirements of Section 553 should not be read literally. Id. at § 6.36. Instead, he considers Vermont Yankee to be an unreliable guide toward the future role of courts with respect to rulemaking procedures. Id. at § 6.37.

65. Davis, supra note 59, at § 2.17.

relationship denote one of close supervision over the agency which allows
the reviewing court to substitute its judgment in order to see that justice is
done? Or in contrast, is it one of deference in which the reviewing court
accepts the agency's determination if there is some evidentiary support, and
if the reasoning or policy judgments are not unreasonable? Or is it one in
which judicial supervision ranges between deference and substitutive judg-
dment depending upon the circumstances of each particular case? An analysis
of some recent cases has shown that the "partnership" relationship between
the courts and the agency depends upon the particular facts of each case.67
The philosophy of Vermont Yankee is fundamentally different from the ad
hoc approach of these decisions.

The Vermont Yankee opinion elevates procedural predictability and cer-
tainty over the necessity for the development of new procedural law during
judicial review. This emphasis on certainty has merit. Yet it should be rec-
ognized that the emphasis upon certainty may also require judicial interven-
tion. Certainty, for example, is often necessary to protect the expectations of
the parties. Parties to a proceeding expect long-standing agency procedures
to be fair and rely upon the agency to conduct a fair hearing in addition to
following the letter of the law. The courts should implement these fairness
expectations while determining whether the statute was followed. For exam-
ple, a party to an agency rulemaking proceeding of the Environmental Pro-
tection Agency68 may reasonably rely upon that agency's tradition of making
available written statements of its methodology prior to their final action.69
The lack of such a statement in a specific rulemaking action logically could
necessitate a remand on the theory that the failure to provide this statement
is a breach of agency precedent.70

The Vermont Yankee Court offered this theoretical argument in a constitu-
tional due process context, stressing that "unjustified departures from settled
agency practice, such as [the] agency's refusal to employ for a particular
rulemaking more extensive procedures that the agency has routinely af-
forded,” 71 may necessitate a remand in situations where a party has relied on the use of such procedures in a specific agency action. 72 Thus, courts should intervene in order to protect the expectations of the parties. Such an argument, however, is unlikely to be accepted unless the agency action is a "totally unjustified departure from well settled agency procedures of long standing. . . ." 73 This fairness due to participants, therefore, may necessitate judicial intervention. More importantly, however, such intervention can take place within the context of the Vermont Yankee opinion, a fact critics have failed to recognize.

**Expectation of Fairness**

The Court appears to believe that whether fairness to participants warrants judicial intervention depends upon an analysis of the nature of the administrative proceeding. Under Vermont Yankee, the imposition of hybrid rulemaking procedures is dependent upon an analysis of the number of parties affected and the character of the interests involved in the particular proceeding. The opinion borrowed two concepts from some early due process cases and held that hybrid procedures may attach when the number of parties is small and their interests are exceptionally affected. 74 In contrast, the difference in effect between the breach of a written agency rule and a breach of an unarticulated but clearly apparent agency tradition.

71. Brief for Federal Respondents at 47.

72. A similar conclusion was reached in Marine Space Enclosure, Inc. v. Federal Maritime Comm’n, 420 F.2d 577 (D.C. Cir. 1969), where the court reviewed a decision and order of the Federal Maritime Commission approving without a hearing a contract for the construction and maintenance of maritime passenger terminal facilities in the port of New York City. The District of Columbia Circuit held that in order to protect the public interest, yet be fair and non-discriminatory, some type of hearing before the Federal Maritime Commission was necessary. The court held that the failure to hold a hearing, as was general agency practice, was a breach of due process. The court stated:

> It is . . . surprising that the Commission would depart from its own prior decisions whether they be treated as having precedential quality or merely the signposts of reflective past determinations, and would approve such restrictions without even briefs and argument, and without discussing what points might further require an evidentiary hearing. It is surprising to the point of concern that the Commission would make such a departure in an opinion that offers the sparsest of findings and speaks in the most conclusory terms.

An agency may modify or even reverse its past policies and announcements, but the confidence of a reviewing court that these adjustments are made in accordance with the requirements of law is not enhanced when the prior precedents are not discussed, the swerves and reversals are not identified, and the entire matter is brushed off once over lightly.

420 F.2d at 584-585.

73. 435 U.S. at 542.

74. The holdings of Londoner v. Denver, 210 U.S. 373 (1908) and Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) illustrate this due process notion.

In Londoner, the Court held that property owners were entitled to a hearing prior to being assessed for street repairs because each assessment was established according to the particular effect of repairs on the value of each individual owners property. 210 U.S. at 385-6.
recent cases have tended to concern themselves only with the nature of the data at issue or the importance of the interests affected. Thus, where the issues were crucial or the data factual, additional rulemaking procedures were imposed. The courts, however, neglected to recognize that while trial-like procedures in a rulemaking proceeding may increase the procedural fairness to the affected parties, they also can lead to delays which in turn cause injury to society as a whole. Rulemaking involves different groups with different interests regarding relevant issues. Accordingly, any procedure which protects one group without regard to the interests of other groups acts to the detriment of society as a whole.

In short, Vermont Yankee focused the analysis where it should have been all along—upon the sensitive interplay between fairness and utility. For example, the Food & Drug Administration proceeding declaring the identity standard for peanut butter took nine years to complete. The issue in that proceeding was whether peanut butter should consist of 90% or 87.5% peanuts. It is unarguable that extensive procedures provide more protection to the manufacturers. But it is doubtful that the issue was important enough to command nine years of the FDA’s time or was worth the 7,700 pages consumed in studying it.

Although the peanut butter case is extreme, delay has been recognized as a significant problem of administrative agencies. The hybrid rulemaking cases, unfortunately, either have ignored or underestimated the detrimental effects of delay upon the agencies and, ultimately, upon the public. Vermont Yankee properly recognized that the need to expedite public business may prevail over the need for exhaustive ventilation of the issues even on more sensitive subjects than peanut butter. Consequently, where an unusually

In Bi-Metallic, however, it was held that property owners in Denver County were not entitled to any hearing prior to a general uniform increase in property valuations designed to match the valuation levels of other counties in the state. 239 U.S. at 444-5.

75. See note 38 supra.
76. See cases cited in note 5 supra.
77. For example, of the sixteen formal hearings that the FDA held during the 1960s, the average time lapse between the first rulemaking proposal and the final order was four years. Hamilton, supra note 5, at 1287. In two instances, the proceedings dragged on for over ten years. Id. Such proceedings tended to be drawn out, repetitious and unproductive.
79. Id.
80. Koch, supra note 78, at 300.
81. Hereinafter referred to as FDA.
83. Hamilton, supra note 5, at 1288.
84. Id.
85. See, e.g., SENATE COMM. ON GOVERNMENTAL AFFAIRS 5, STUDY ON FEDERAL REGULATION—DELAY IN THE REGULATORY PROCESS (July 1977).
86. The Vermont Yankee opinion concludes with a passage which intimates that the courts may be somewhat “result-oriented” in its approach to judicial review.
large class of persons would be affected by the action under consideration, it is administratively prohibitive to allow each interested party procedural protection beyond notice and comment procedures. 87 However, where few people would be affected and where the facts are complex, additional procedures still might be required under Vermont Yankee.

**Fact/Policy Distinction**

In contrast to the Vermont Yankee position, one noted commentator maintains that the appropriateness of procedures hinges upon whether the issues under discussion are primarily ones of policy or merely adjudicative facts. Adjudicative facts are those which answer the questions of who, what, when, where, how and why. 88 In the view of this commentator, adjudicatory procedures are appropriate when such facts are involved. 89 Policy questions, on the other hand, are those which require the exercise of judgment and discretion because they cannot be resolved with reference to particular facts. 90 Distinctions between the two are not always clear. 91 Nevertheless, some courts have required hybrid procedures in proceedings concerned with what they considered to be adjudicative facts. 92

The Vermont Yankee decision implicitly recognizes that this distinction is not always helpful when determining the type of procedures needed. Even if the issues involved are factual, the number of such issues might make adjudicative procedures inefficient. 93 If the issues involved policy questions, but only a few parties were affected, and if the acts contemplated would have a significant impact upon them, the opportunity to present proofs and oral arguments might prove useful. 94 Vermont Yankee focuses attention on

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Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action. . . . [The National Environmental Policy Act] is to ensure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decision making agency. Administrative decisions should be set aside . . . only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.

435 U.S. at 557-58.

88. TREATISE, supra note 17, at § 7.02.
89. Id.
90. Id.
93. In a controversy involving a large number of disputed facts, offering each party the opportunity to present detailed proofs and arguments could prove so cumbersome as to make the proceeding useless, thereby rendering the process inefficient.
94. The Court stated:

In prior opinions we have intimated that even in a rulemaking proceeding when an
such factors and away from the often irrelevant distinctions (for procedural purposes) between fact and policy. Consequently, this noted commentator is probably wrong when he argues that Vermont Yankee is not to be relied on. He is wrong not only because the tone of the opinion suggests that the Supreme Court is serious about its opposition to extensive judicial lawmaking regarding administrative procedures, but also because he ignores the impact of Vermont Yankee on the theories previously used to justify the imposition of hybrid procedures.

**Effect of Vermont Yankee on the Availability of Hybrid Procedures: A Guide to the Practitioner**

The Supreme Court's decision in Vermont Yankee will have far reaching effects on administrative procedure. Most significantly, it reverses the hybrid rulemaking cases. However, as has been shown, the decision is not an absolute bar to the imposition of hybrid procedures.

Practitioners may be able to argue that Vermont Yankee is inapplicable in certain instances if, for example, an agency tradition of hybrid procedures exists. A second argument for hybrid procedures, again in accordance with Vermont Yankee, is dependent upon an analysis of the number of parties and interests involved in the administrative proceeding. The argument could be made that even Vermont Yankee holds that due process may require hybrid procedures when the number of parties is small and their interests are exceptionally affected. However, where many people are

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agency is making a "quasi-judicial" determination by which a very small number of persons are "exceptionally affected, in each case upon individual grounds," in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process.


95. In several passages of its opinion, the Vermont Yankee Court stressed its opposition to extensive judicial imposition of rulemaking procedures. The Court stated:

> Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them . . . .

> Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments. . . .

435 U.S. at 524.

> But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances "the administrative agencies 'should be free to fashion their own rules of procedure and to pursue method of inquiry capable of permitting them to discharge their multitudinous duties.'"

Id. at 543.

96. See note 5 supra.

97. See notes 68-73 and accompanying text supra.

98. See note 74 supra.
affected, it is unlikely that procedural protection beyond the notice and comment procedures will be provided.99

Additionally, the practicing attorney who desires hybrid procedures could circumvent the limitation imposed by *Vermont Yankee* by requesting such additional procedures directly from the agency, which might well acquiesce100 in the request if it believed that increased cooperation would result. Furthermore, a practitioner desiring additional information should not merely request hybrid procedures. Rather, he or she should also claim that the information disclosed by the agency provided less than adequate notice or hampered effective participation during the comment period, thereby necessitating additional procedures. Such agency action is fully supported by precedent101 and does not conflict with *Vermont Yankee*.

Finally, if all of these options fail, the practitioner can attempt to demonstrate on review that the agency's action was arbitrary and capricious or an abuse of discretion.102 This option involves a demonstration that the best rule was not made considering the facts presented, rather than the more theoretical argument that a better rule would have resulted had more extensive procedures been afforded. Upon a showing of agency inadequacy, the reviewing court can set aside the decision and remand the case to the agency.103 The threat of review also may operate to discourage agencies from doing anything that might expose a questionable stance to judicial review.104 Upon such review, if the court feels that the agency performed satisfactorily and has used the appropriate procedures, it will probably uphold the rule. However, if the court is not satisfied with the agency's per-

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99. See note 87 supra.

100. Experience has shown that agencies cannot afford to "go to the mat" on every issue. Boyer, *Alternatives to Administrative Trial Type Hearings For Resolving Complex Scientific, Economic, and Social Issues*, 71 Mich. L. Rev. 111, 141 (1972).

101. See note 26 supra.

102. The law of administrative procedure requires that an agency engage in rational decisionmaking. Section 706 (2) (A) of the APA states in pertinent part: "The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2) (A) (1970).

The Supreme Court has held that to determine whether this standard has been met, a reviewing court must examine the record and "consider whether the decision was based on a consideration of relevant factors." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Unless the record provides an "indication of the basis on which [the agency] exercised its expert discretion," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 157 (1962), the agency's action cannot be sustained. *See Camp v. Pitts*, 411 U.S. 138 (1973); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Additionally, the agency must "articulate [a] rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168. *See also Verkuil*, supra note 5.

103. "It is submitted, further, that like any other exercise of agency discretion, an agency's decision whether to employ procedural devices not uniformly required by statute is subject to judicial review for abuse of discretion and should be set aside when such abuse is found." Clagett, supra note 5, at 70.

formance or the procedures it has followed, the court can remand the case or vacate the rule. 105

CONCLUSION

The Vermont Yankee Court, in holding that only in “rare circumstances” may a reviewing court impose additional rule making procedures, effectively overturned recent case law and reversed the trend of judicial imposition of hybrid procedures. Whether reviewing courts will ever be able to impose hybrid procedures is left unclear as a result of the Supreme Court’s failure to specify precisely what it meant by “rare circumstances.” Although clarification of this issue is needed, it is unlikely that courts will carve exceptions to Vermont Yankee based upon the traditional fact/policy distinction. Rather, the courts probably will use a more functional analysis which examines the interplay between fairness and utility. Until the issue is clarified, however, the skilled practitioner can avail himself of several methods to obtain additional procedural protection over and above that afforded by the minimal notice and comment procedures of Section 553 of the APA.

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