

Law and the Administrative Process

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Rulemaking — Alternative
description of basic concepts

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Most rulemaking at the federal level follows the path of informal rulemaking. Far less rulemaking occurs on a formal basis. We now turn to an examination of each of these types of rulemaking.

EXEMPT RULEMAKING

Before discussing informal and formal rulemaking it is helpful to recognize a number of **exemptions from rulemaking procedures**. Initially it should be noted that rules relating to military and foreign affairs are exempt from rulemaking procedures, as are agency personnel rules, and matters relating to public property, loans, grants, benefits, or contracts.⁸ These exemptions are understandable; however some commentators have criticized exempting rules concerning grants and benefits from rulemaking procedures. More complex are the exemptions for general statements of policy, interpretive rules, procedural rules, and rules that an agency develops where there is "good cause" not to follow rulemaking procedures. Section 553 of the APA exempts all these categories of rules from the usual rulemaking procedures.⁹ But because exempting rules deprives the public of participation in the rulemaking process, courts narrowly construe these exemptions. It should be noted that agencies have discretion to use rulemaking procedures to adopt these types of rules, and many would argue that doing so is likely to enhance their legitimacy.

General Statements of Policy

The APA does not define a "general statement of policy." However, in *Pacific Gas and Electric Co. v. FPC* (1974),¹⁰ the United States Court of Appeals for the D.C. Circuit observed that "[a] policy statement announces the agency's tentative intentions for the future."¹¹ In effect, a general statement of policy keeps the public informed as to an agency's intentions for positions it will likely take in the future, but it does not establish any legally binding rule.

Writing in the *Duke Law Journal*, Michael Asimow discusses the decision making aspect of general statements of policy, observing:

General policy statements are well calculated to control staff action and, because they must be published in the *Federal Register*, to inform the public. They provide authoritative guidance on what the staff is likely to do, yet unlike legislative rules they remain tentative, not rigid. Consequently, they leave decision makers room for flexible application; they do not foreclose further experimentation and learning from experience.¹²

In *Chamber of Commerce of the United States v. United States Department of Labor*,¹³ the D.C. Circuit in 1999 reviewed a directive issued by Occupational Safety and Health Administration (OSHA), pursuant to which each employer in selected industries would be inspected unless it adopted comprehensive safety and health program designed to meet certain standards. In some respects these standards exceeded those required by law. The directive further provided that the OSHA would remove a workplace from the primary inspection list, and reduce by 70 to 90 percent the probability that it will be inspected, if the employer participates in the agency's "Cooperative Compliance Program (CCP)." The Chamber of Commerce, as an organization of employers, challenged the directive contending it was an invalid legislative rule because OSHA had not adopted it through a notice-and-comment rulemaking proceeding. OSHA countered by arguing that its directive imposed no formal legal obligation upon an employer that chooses not to participate in the CCP. The D.C. Circuit Court of Appeals pointed out that it had previously held that whether a rule is a policy statement is to be determined by whether it (1) has only a prospective effect, and (2) leaves agency decision makers free to exercise their informed discretion in individual cases. "Both criteria," the court explained, "lead us here to the conclusion that the [OSHA] Directive is a substantive rule rather than a policy statement."¹⁴ (The Case in Point

BOX 6.2 Case in Point**The Difference Between Policy Statements and Legislative Rules****General Electric Co. v. EPA**

United States Court of Appeals for the District of Columbia Circuit 290 F.3d 377 (D.C. Cir. 2002)

The Toxic Substance Control Act (TSCA) prohibits the manufacture, processing, distribution, and use (other than in a "totally enclosed manner") of polychlorinated biphenyls (PCBs) unless the EPA determines that the activity will not result in an "unreasonable risk of injury to health or the environment." EPA regulations, adopted after notice-and-comment proceedings, specify methods for handling cleanup and disposal of PCB remediation waste and PCB bulk product waste. The regulations allow an applicant to establish a method of disposal that does not pose an unreasonable risk of injury to health or to the environment.

The Environmental Protection Administration (EPA) issued a "PCB Risk Assessment Review

Guidance Document" explaining two acceptable methods of calculating cancer risks that an applicant for a PCB cleanup plan could follow in order to demonstrate no unreasonable risk. EPA promulgated this Guidance Document without notice or comment concerning permissible risk assessment techniques for parties who might wish to use some alternative method for disposal of PCBs.

General Electric contested the Guidance Document, arguing that it was, in effect, a legislative rule that was not properly promulgated as required by the APA. The court agreed and held that because an applicant for a disposal permit had to use one of the two approaches to risk assessment and no other, the Guidance Document was a legislative rule. Because EPA intended the rule to have binding effect, it could not rely upon the statutory exemption for policy statement; rather it was required to observe the rulemaking procedures set out in the APA.

located in Box 6.2 may help to illustrate the difference between a policy statement and a legislative rule.)

Interpretive Rules

An interpretive rule merely states an agency's understanding of existing laws and rules. Interpretive rules often take the form of policy statements, opinion letters, guidelines, and even agency manuals. Although they meet the definition of a "rule" under Section 551(4) of the APA, they are not promulgated under the rulemaking procedures specified in Section 553. Thus, while obviously intended to have an effect on persons, they do not have the force of law. As stated by the United States Court of Appeals for the D.C. Circuit in 1980 "a rule is interpretive, rather than legislative, if it is not issued under statutory authority to make rules having the force of law or if the agency intends the rule to be no more than an expression of its construction of a statute."¹⁵ Interpretive rules do not create rights

nor do they affect the rights of anyone; they do not have the force of law. Although not binding on a court, more than a half century ago the United States Supreme Court observed in *Skidmore v. Swift Co.* that interpretive rules "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."¹⁶ Given the fact that agency rules are usually crafted by persons with expertise in the particular area being regulated, the Court's ruling is understandable. In *Chevron U.S.A. v. Natural Resources Defense Council* (1984),¹⁷ the Supreme Court in a landmark opinion stated that where the intent of Congress is not clear that courts should give deference to an agency's construction of a statute. Over the years there has been a conflict in the Courts of Appeals as to whether this *Chevron* deference applies to interpretive rules. (The *Chevron* decision is excerpted and discussed extensively in Chapter 9.)

It becomes important to distinguish a legislative (substantive) rule from an interpretive rule for two reasons. First, if the rule is an interpretive

one it is exempt from the notice and public participation requirements that we discuss later. Second, courts tend to give great weight to administrative interpretations, as long as they are reasonable and do not conflict with statutory or judicial interpretations. But determining whether a rule is interpretive is not always an easy task. Both classes of rules must be published in the *Federal Register*, but, as noted, an interpretive rule is exempt from being developed in a formal or informal rulemaking process.

In 2000 the Supreme Court addressed the conflict in the lower federal courts concerning application of the Fair Labor Standards Act (FLSA), which requires employers to pay overtime or grant "comp time" that allows employees to be off from work with full pay. Harris County, Texas established a plan that set a maximum number of "comp time hours" that an employee could accumulate. When an employee accumulated a certain number of comp time hours a supervisor could order the employee to use the accumulated comp time at specified times. The Department of Labor issued an opinion letter stating that employers could use compelled compensatory time as a means of complying with certain requirements of FLSA, but only if there was a prior agreement between the employer and the employee specifically providing for this practice. This conflicted with the county's approach. Several deputy sheriffs brought suit claiming that the FLSA does not permit an employer to compel an employee to use compensatory time in the absence of an agreement permitting the employer to do so. Their argument was consistent with the Department of Labor's opinion letter. The District Court ruled that the county's policy violated the FLSA, but the United States Court of Appeals for the Fifth Circuit reversed, holding that the FLSA did not speak to the issue and thus did not prohibit the county from implementing its policy. The Supreme Court granted review.

In *Christensen v. Harris County* (2000)¹⁸ the Court found that nothing in the FLSA or its implementing regulations prohibits a public

employer from compelling the use of compensatory time. But in an opinion by Justice Thomas, writing for a five-justice majority, the Court made a significant administrative law ruling. The Court held that interpretive rules such as the Department of Labor's opinion letter are "entitled to respect" pursuant to the Court's 1944 opinion in *Skidmore v. Swift Co.* referred to above, but they are not entitled to the "Chevron deference" announced by the Court in 1984. It follows that when a party challenges a rule promulgated by a federal agency it should be easier to prevail under the *Skidmore* doctrine applied in *Christensen* than to overturn an agency rule if the court were to apply the *Chevron* deference doctrine.

Following its approach in *Christensen*, the Supreme Court in *United States v. Mead Corporation* (2001) ruled that "a tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that . . . the ruling is eligible to claim respect according to its persuasiveness . . ." ¹⁹

Even in an instance where an administrative agency labels a rule as "interpretive," courts look to the substance (and not merely the label) of the rule. In doing so courts apply different criteria to make a legal distinction between interpretive and legislative rules. Formerly, if a court found that a rule in controversy had a "substantial impact" on the rights and interests of private parties it would likely reject the agency's classification of a rule as interpretive. But since 1978 the substantial impact test is no longer considered an independent basis to invalidate an interpretive rule otherwise exempt under the APA. Yet, it remains a significant criterion for review of interpretive rules.²⁰

In 1974, the Supreme Court ruled that a Department of the Interior regulation adopted as an interpretive rule purporting to make certain government benefits available only to Native Americans living on reservations was a legislative rule. Consequently, because the agency failed to comply with the APA notice-and-comment rulemaking procedures, the Court held the rule

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Court decisions from the United States Courts of Appeals, most frequently from the District of Columbia Circuit, furnish numerous examples of judicial determinations whether a rule is legislative or interpretive. For example in 1983 in *General Motors Corporation v. Ruckelshaus*,²² the D.C. Circuit reviewed a rule promulgated by the Environmental Protection Agency (EPA) construing the Clean Air Act. The rule allowed the EPA to require manufacturers to recall and repair a class of vehicles regardless of the age or mileage of a vehicle presented for repair. The court found the rule to be interpretive, not legislative, as the record did not indicate the EPA intended the rule to carry any weight beyond the agency's interpretation of the Clean Air Act.

On the other hand, several recent decisions from the U.S. Courts of Appeal have concluded that rules that an agency had characterized as interpretive were invalid. A recent decision from the U.S. Court of Appeals for the D.C. Circuit is illustrative. After originally complying with notice and comment requirements the Federal Communications Commission (FCC) issued a rule governing compensation to telecommunications companies for non-coin calls from pay phones. Later the FCC issued a First Reconsideration Order clarifying the original rule. More than four years after promulgating its initial rule the FCC issued a Second Reconsideration Order, which it characterized as an interpretive rule. But the effect was to change the original rule by altering existing payment arrangements to pay-phone service providers. In declaring the Second Reconsideration Order invalid, the court observed that while a clarification may be embodied in an interpretive rule that is exempt from notice and comment requirements, nevertheless a rule that works a substantive change in a prior regulation is subject to the APA's procedures. The court recognized that the FCC's First Reconsideration Order merely clarified the meaning of the original rule. But it found that

the Second Reconsideration Order could not stand because it changed not only the meaning, but also the very text of the original rule.²³

Procedural Rules

Procedural rules are internal rules adopted by administrative agencies to assist in carrying out the agency's duties and responsibilities. Section 553(b)(a) of the APA permits agencies to adopt procedural rules without prior notice; nevertheless a procedural rule is legislative in character and therefore has a legally binding effect. For example, in *Inova Alexandria Hospital v. Shalala*,²⁴ an agency rule permitted a Provider Reimbursement Review Board to dismiss an appeal when a Medicare provider failed to submit a final position paper to the board by the due date. The hospital claimed that even if the Medicare Act allows for a dismissal, a rule dealing with the failure to file papers on appeal, the board was required to promulgate the rule under the APA's notice-and-comment procedure. The court rejected the hospital's contention, saying, "[R]ules of agency organization, procedure, or practice" are exempt from the notice-and-comment provisions of the APA. . . . A rule fits within this exemption if it does not "alter the rights or interests of parties."²⁵

In *National Whistleblower Center v. Nuclear Regulatory Commission*,²⁶ the federal district court for the District of Columbia held that the Nuclear Regulatory Commission had authority to change a rule and apply an "unavoidable and extreme circumstances" test, in lieu of a "good cause" test, to assess requests for extensions of time in which to file contentions in nuclear power plant license renewal proceeding. The court pointed out that unless an agency's rules foreclose an effective opportunity for a party to make a case on the merits, rules need not be promulgated through notice-and-comment rulemaking.

Agencies are not required to adopt procedural rules, but if they do they are required to publish such rules in the *Federal Register*,²⁷ and once an agency adopts a procedural rule it is bound to

could not adhere to that rule. As with interpretive rules, meaning, courts look to the substance of rules, not the label, le.²³ that an agency places on them. Therefore, if a court finds that a rule that an agency has labeled as procedural has a substantial effect on the parties it regulates, the court will likely reject such rule as having been improperly adopted. For example, in *Brown Express, Inc., v. United States*,²⁸ a federal appellate court in 1979 held that even though it was adopted as a procedural rule, the Interstate Commerce Commission's rule eliminating its forty-year-old practice of notifying competing carriers of pending emergency temporary authority applications had a substantial impact on the motor carrier industry. Thus, rather than being exempt, the rule was controlled by informal rulemaking (notice-and-comment) requirements of the Administrative Procedure Act. The issue, the court explained, was not just whether a rule is *substantive* or *procedural*, but rather whether the rule will have a substantial impact on those regulated.

Two recent federal appellate decisions illustrate limits the courts impose in respect to procedural rules. In 1999, the United States Court of Appeals for the Fifth Circuit held that an agency could not enforce a handbook provision that went beyond requirements established by the agency's procedural rules.²⁹ The same year the D.C. Circuit found that an agency action vacating a "directive" was not exempt either as procedural rule or as policy statement.³⁰

In July 1998 the United States Department of Agriculture (USDA) Food Safety Inspection Service (FSIS) adopted a rule discontinuing face-to-face meetings with commercial food producers regarding proposed food labeling. The food producers brought suit challenging the rule. They conceded that USDA's rule appeared on its face to be procedural, but they contended it represented a significant value judgment and therefore was substantive and subject to rulemaking requirements. The Court of Appeals recognized that "agency housekeeping rules often embody a judgment about what mechanics and processes are most efficient" and held the USDA's rule was

procedural, and thus not subject to notice-and-comment rulemaking under the APA.³¹

The Good Cause Exemption

The APA also exempts rulemaking when an agency finds "good cause" that notice and public procedure is impracticable, unnecessary, or contrary to the public interest. Good cause will excuse both notice of proposed rulemaking,³² and notice of the rule by publication or service 30 days before its effective date.³³ For example, in *Northwest Airlines, Inc. v. Goldschmidt*,³⁴ the U.S. Court of Appeals for the Eighth Circuit court examined the validity of rules issued after an insufficient period for submission of comments. The court held that good cause was shown for limitation of the period for comment and for making the rule effective upon its being promulgated.

In 1973 the nation experienced gasoline shortages as a result of an embargo imposed by the Organization of Petroleum Exporting Countries (OPEC). The Federal Energy Office (FEO) found that the gasoline shortage was a temporary, but highly disruptive, national emergency, which had brought about long lines at gasoline stations and had prompted violence in some situations. It concluded that preferential treatment for regular customers was a serious alteration in established business practices—one that could result in some customers being served while others were wholly excluded. FEO adopted a rule prohibiting retail gasoline dealers from giving preference to regular customers and made its ruling effective immediately. In *Reeves v. Simon*,³⁵ a federal appeals court held that the agency had established good cause that the problem required immediate attention.

In *Pent-R-Books, Inc. v. United States Postal Service*,³⁶ a federal district court agreed that the postal service had good cause to implement a law prohibiting the mailing of sexually oriented advertisements to persons who had notified the postal service that they did not wish to receive

such material. Thus, the regulation became effective upon publication in the *Federal Register*.

When an agency invokes the **good cause exemption** it must incorporate its finding of good cause and a brief statement of reasons for the exception in the rules as issued.³⁷ An agency that adopts a rule under this exception effectively deprives the public from participation in the rulemaking process. Therefore, courts narrowly construe an agency's right to adopt rules under the good cause exemption to the APA.

Where an administrative rule has a bearing on proscribing criminal conduct, courts are likely to take a close look at the rule. In *United States v. Gavrilovic*,³⁸ the defendants were convicted of manufacturing a controlled substance. They argued on appeal that the drug mecloqualone was not a controlled substance at the time of their arrest. They contended the regulations placing the drug on a controlled list were invalid because they became effective less than 30 days after publication of the rules. The Eighth Circuit Court of Appeals said that the Administrator of the Drug Enforcement Administration had failed to show "good cause" within the meaning of Section 553(d)(3) of the APA to justify regulations which made mecloqualone a "controlled substance" just two days after publication of the agency's decision in the *Federal Register*.

INFORMAL AND FORMAL RULEMAKING

Rulemaking subject to the APA begins with notice. Section 553(b) of the APA stipulates that a **notice of proposed rule making (NPRM)** shall be published in the *Federal Register*, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice must 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.³⁹

Congress obviously intended that these requirements would give interested citizens an opportunity to participate in rulemaking and cause administrative agencies to be accountable to the public. In *Utility Solid Waste Activities Group v. EPA*,⁴⁰ the EPA argued that the petitioners received "actual notice" when it published a notice of the change of a rule on its Internet site and held a meeting attended by counsel for Utility Solid Waste Activities Group. The court in 2001 rejected the argument saying, "This court has never found that Internet notice is an acceptable substitute for publication in the *Federal Register*, and we refuse to do so now."⁴¹

Agencies frequently include a proposed rule in the notice although federal courts have held that the notice is sufficient as long as it fairly apprises interested parties of the issues involved and affords interested persons a reasonable and meaningful opportunity to participate in the rulemaking process. It need not specify every precise proposal that the agency may consider.⁴² Occasionally a proposed rule is relatively brief. More often the proposed rule is quite lengthy.

Informal "Notice-and-Comment" Rulemaking

Unless the statute creating the agency mandates to the contrary, Section 553 of the APA permits an agency to follow an informal (notice-and-comment) process of rulemaking. Informal rulemaking is designed to assist an agency in obtaining information and views from the public to enable it to promptly make a proper decision.

In an informal rulemaking procedure the agency is required to furnish interested persons an opportunity to participate through submission of written data, views, or arguments with or without opportunity for oral presentation, but

the agency has considerable discretion as to whether to allow interested parties to present evidence and arguments to the agency.⁴³ After consideration of the relevant matter presented and review of other materials the agency considers relevant, the agency issues final rules and must incorporate a concise general statement of their basis and purpose.⁴⁴

The APA requirements for informal rulemaking are relatively simple. Because formal rulemaking procedures are extremely time consuming, for the past several decades agencies have exhibited a definite preference to use informal rulemaking to administer federal laws. Probably over 90 percent of federal rulemaking is conducted on an informal basis. Congress, however, has required certain agencies to comply with additional procedures. For example, the Food and Drug Administration must follow extensive statutory procedures before granting approval of new drugs and medical devices.⁴⁵ Likewise the Environmental Protection Agency must follow elaborate procedures in regulating hazardous materials.⁴⁶

In some instances agencies label rules as exempt, characterizing them as interpretive or procedural or stating that they come within the "good cause" exemption that we discussed earlier. Courts narrowly construe exemptions and not infrequently invalidate such rules. For example, in 1999 the EPA issued certain technical amendments.⁴⁷ The EPA claimed the amendments were minor and should fall within the good cause exemption. The D.C. Circuit Court of Appeals rejected the agency's claims.⁴⁸ Thus, the EPA was required to proceed under the informal rulemaking procedures.

The late Kenneth Culp Davis, the author of a leading treatise on administrative law and a strong supporter of administrative government, once observed that informal rulemaking is "one of the greatest inventions of modern government."⁴⁹ Without question, informal rulemaking facilitates regulation. Moreover, by allowing interested persons a channel to exercise a degree of political power, the notice-and-comment procedure tends to alleviate the undemocratic

character of agency rulemaking. Those who are suspicious of the regulatory state tend to favor more demanding procedures that make it more difficult for agencies to impose rules.

Direct Final Rulemaking

A variation of informal (notice-and-comment) rulemaking is direct final rulemaking. The purpose is to expedite the rulemaking process when a rule is noncontroversial. It is a relatively new approach used by federal agencies. The agency publishes a final rule in the *Federal Register* with a statement that, unless a significant adverse comment is received within a specified period of time, the rule will become effective. At the same time an identical proposed rule is often published. If no significant comments are received the rule goes into effect. On the other hand, if such comments are received, the agency withdraws the direct final rule and proceeds to consider the comments as directed to a proposed rule. The Environmental Protection Agency, the Department of Agriculture, and the Department of Transportation are among the federal agencies that have extensively used direct final rulemaking.⁵⁰ Direct final rulemaking is distinguishable from "interim final rulemaking" discussed in Box 6.3.

Interim Rules

Although not specifically provided for in the APA, federal agencies often make an announcement that by a set date a particular rule is to be promulgated but may be changed after input to the agency as the notice-and-comment process ensues. The agency adopts a rule without prior public input and then invites postpromulgation comments directed toward the issue of whether the rule should be changed sometime in the future. The **interim rule** process is often used when there is urgency in reliance on the APA "good cause" provision that exempts prior notice and comment. It has the advantage of affording those who are to be affected an advance notice to "gear up" to comply with the proposed rule. After becoming effective,

BOX 6.3 Invitation for Public Comment on Proposed Change in EPA

Permit Requirements for Municipal Wastewater Treatment Discharges

Summary: Today, EPA is inviting comment on a proposed policy regarding NPDES permit requirements for treatment plants in publicly owned treatment works (POTWs) under peak wet weather flow conditions. Regulatory agencies, municipal operators of POTWs, and representatives of environmental advocacy groups have expressed uncertainty about the appropriate regulatory interpretation for such situations. Today's document describes both a proposed interpretation of regulations, as well as draft guidance to implement such an interpretation. EPA's intention is to ensure that NPDES requirements be applied in a nationally-consistent manner

that improves the capacity, management, operation and maintenance of POTW treatment plants and collection systems and protects human health and the environment.

Dates: Written comments on this proposed policy must be received by EPA or postmarked by January 9, 2004.

Addresses: Comments may be submitted electronically, by mail, or through hand delivery/courier. . . .

For Further Information, Contact: For questions about the substance of this proposed policy, contact . . . Office of Wastewater Management.

SOURCE: *Federal Register*, Volume 68, Number 216 (November 7, 2003)

interim rules are not usually withdrawn absent a significant comment. Critics argue that the interim rule process evades the APA requirements designed to allow public participation and as a result the process tends to greatly limit the probability that public input will be effective in molding a rule.

Formal Rulemaking

In contrast to the informal rulemaking process, the APA states that “[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing,” rulemaking must follow the provisions for formal adjudication.⁵¹ When **formal rulemaking** is mandated by a statute, an agency must conduct a **trial-type hearing** and afford interested parties an opportunity to testify, present witnesses and documentary evidence, cross-examine opposing witnesses, and present arguments.

As in informal rulemaking, the process of formal rulemaking starts with public notice of the proposed rule, but it then takes on a new dimension. The public comment that characterizes the notice-and-comment procedure of informal rulemaking is replaced by a trial-type hearing, cus-

tomarily presided over by an **administrative law judge (ALJ)**.⁵² The hearing has the trappings of an adversary court hearing with each party entitled to present a case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.⁵³ The ALJ makes findings of fact and conclusions of law and issues a preliminary opinion and forwards it to the members of the administrative commission, who issue a final decision. Although the hearing resembles a non-jury trial, the procedures are not as technical and the rules of evidence are relaxed. Agencies receive evidence that is material and relevant without regard to such restrictions as the “hearsay rule” applicable in civil and criminal trials. Finally, it should be noted that in formal rulemaking there is a ban on **ex parte contacts** by agency personnel and interested parties relevant to the merits of a proceeding.⁵⁴

When Formal Rulemaking Is Required An agency may opt to conduct formal rulemaking, but most do not. Before an agency is required to conduct a formal rulemaking proceeding there

must be a statutory mandate to have rules made "on the record after an opportunity for an agency hearing."⁵⁵

Questions as to just when a statute requires a formal (trial-type) hearing were resolved in 1973 by the Supreme Court in its landmark decision, *United States v. Florida East Coast Railroad*.⁵⁶ Historically the Interstate Commerce Commission (ICC) had conducted trial-type hearings when it established rules and regulations with regard to freight car service by railroads. But because of a shortage of freight cars on the nation's railroads, in 1966 Congress had enacted an amendment to the Interstate Commerce Act enlarging the ICC's authority to prescribe per diem charges for use by one railroad of freight cars owned by another. The statute stipulated that the ICC "may, after hearing," issue rules to establish incentive per diem charges for use of freight cars. Florida East Coast Railroad sought to set aside the ICC rule that imposed a per diem charge on any railroad that retained a boxcar of another railroad. Florida East Coast argued that the rates established by the ICC were invalid because the ICC refused its request for a formal hearing. The Supreme Court rejected the argument and held that the informal (notice-and-comment) type hearing was sufficient. Writing for the Court, Justice Rehnquist opined:

We think the treatment of the term "hearing" in the Administrative Procedure Act affords a sufficient basis for concluding that the requirement of a "hearing" contained in § 1(14)(a) [referring to the ICC Act]; in a situation where the Commission was acting under the 1966 statutory rulemaking authority that Congress had conferred upon it, did not by its own force require the Commission either to hear oral testimony, to permit cross-examination of Commission witnesses, or to hear oral argument. . . . The parties had fair notice of exactly what the Commission proposed to do, and were given an opportunity to comment, to object, or to make some other form of written submission. The final

order of the Commission indicates that it gave consideration to the statements of the two appellees here. . . .⁵⁷

The Court's ruling meant that the statutory language "after hearing" was not equivalent to the APA requirement that a rule be made "on the record after opportunity for an agency hearing." After the Supreme Court's decision it was clear that unless the agency statute specifically provided for a hearing "on the record" or a reasonable equivalent thereof, an informal rulemaking procedure would suffice. Relatively few federal statutes require "on the record" hearings, so the Court's decision had the effect of greatly increasing the use of informal rulemaking by federal administrative agencies.

HYBRID RULEMAKING

By the late 1960s the efficiency of informal rulemaking and the complexity of formal rulemaking caused informal rulemaking to become increasingly important. Yet critics complained that informal rulemaking did not satisfy traditional due process of law concerns because agencies were resolving contested factual issues without an opportunity for challengers to cross-examine the proponents of such facts. There was no legal difficulty if an agency chose to adopt additional procedural safeguards beyond the notice-and-comment type of rulemaking. Yet, in reviewing informal rulemaking, federal appellate courts began compelling agencies to provide procedures that were neither required by the APA nor mandated by Congress in the agency's enabling statute. Such enhanced procedures came to be known as **hybrid rulemaking**. Hybrid rulemaking is procedurally more elaborate than informal notice-and-comment rulemaking, but less elaborate than formal, adjudicatory rulemaking.

In a series of decisions during the 1970s the United States Court of Appeals for the D.C. Circuit reversed a number of informal rulemaking decisions because the agencies failed to provide

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due process procedures that were neither required by the Constitution, the agencies' enabling statutes, nor the APA. One of the most notable of the cases involved a proceeding by the Federal Power Commission (FPC) to set rates to be charged by pipelines that transported hydrocarbon products. In 1973, in *Mobil Oil Corporation v. Federal Power Commission*,⁵⁸ the issue involved an agency ratemaking rule promulgated through informal proceedings. The Court of Appeals for the D.C. Circuit held that the informal "notice-and-comment" rulemaking process of setting rates did not create a record that satisfied the standard of review to enable the court to determine if there was substantial evidence to support an agency's decision. The court observed:

Even if adverse parties submit controverting information in the form of comments, the procedure employed cannot be relied upon as adequate. A "whole record" . . . includes the process of testing and illumination ordinarily associated with adversary, adjudicative procedures. . . . Thus, it is adversary procedural devices, which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence "substantial" enough to support rates.⁵⁹

The court stopped short of requiring a formal rulemaking, adding:

The defect we find in the Commission's procedures here, and the resulting inadequacy of the evidence could be remedied by according the procedure described under sections 556 and 557 of the APA, but such complete adjudicatory procedures are not required. . . . What are required are procedures, which will . . . create a record that will allow a reviewing court to examine the agency's actions.⁶⁰

Even after the Supreme Court's 1973 ruling in *United States v. Florida East Coast Railroad*, federal appellate courts continued to impose procedural requirements for informal rulemaking. For example, the D.C. Circuit required

agencies to disclose data to interested parties in advance of rulemaking to enable interested parties to respond.⁶¹ These decisions caused the congressionally mandated informal proceedings to more closely mirror the requirements of formal rulemaking. As procedures for adoption of rules became very protracted some agencies even substituted adjudication as a policymaking alternative. Critics of these judicially imposed requirements often termed the result an ossification of the rulemaking process.

In 1973 the Court of Appeals for the D.C. Circuit reviewed a decision of the Atomic Energy Commission (AEC). AEC had initiated an informal rulemaking proceeding to determine the manner in which potential environmental damage resulting from disposal of spent nuclear fuel should be reflected in deciding whether to license nuclear power plants. The agency refused to grant the Natural Resources Defense Council's request to cross-examine witnesses. The Court of Appeals reversed the agency's ruling because the agency had failed to adopt procedures that would assure a "thorough ventilation of the issues."⁶²

The Vermont Yankee Case

The stage was now being set for a resolution of the problem of the judicially imposed requirements on informal rulemaking by federal agencies. The United States Supreme Court entered the picture to clarify an agency's procedural responsibilities. In 1978 the Court issued its landmark opinion in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.⁶³ The Supreme Court noted that the AEC had complied with the required APA procedures for informal rulemaking, and reversed the D.C. Circuit's decision. The Court recognized that agencies are free to grant additional procedural rights in the exercise of their discretion. Nevertheless, the Court ruled that reviewing courts are generally not free to impose such procedural rights if the agencies have not chosen to grant them. Writing for the Supreme Court, Justice Rehnquist cautioned reviewing courts against engrafting their

own notions of proper procedures upon agencies entrusted with substantive functions by Congress, observing:

. . . [I]f courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the "best" or "correct" result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ the "best" procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme, through which Congress enacted "a formula upon which opposing social and political forces have come to rest," . . . but all the inherent advantages of informal rulemaking would be totally lost.⁶⁴

Thus, after the Court's decision the issue of whether procedural due process requires rulemaking procedures beyond those required by the APA became an agency question, not a judicial issue.

The Supreme Court's opinion in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* is excerpted at the end of this chapter.

NEGOTIATED RULEMAKING

Congress enacted the Negotiated Rulemaking Act of 1990 (NRMA)⁶⁵ to encourage innovation in rulemaking consistent with the informal (notice-and-comment) rulemaking process. Congress now encourages the use of **negotiated rulemaking** (often referred to as "regneg") by certain agencies in the development of specific regulations. Likewise, the executive branch has now become an advocate for negotiated rulemaking.

To initiate negotiated rulemaking an agency must publish a notice in the *Federal Register*

announcing the establishment of a negotiated rulemaking committee and inviting persons to apply for, or nominate persons for, membership. If after considering comments and applications, the agency decides not to establish a negotiated rulemaking committee, it must publish notice of such a decision and the reasons for it in the *Federal Register*. To go forward, the committee meets publicly with a mediator and seeks to formulate a proposed rule. The negotiating process takes place before an agency issues a proposed regulation. If successful, the agency may, but is not required to, adopt the text arrived at by consensus as a proposed rule. At that point the agency follows the notice-and-comment requirements of informal rulemaking. Proponents of negotiated rulemaking claim that it speeds up the process of rulemaking and limits court challenges to final rules. Commentators have been favorably impressed with the idea of negotiated rulemaking; however, to date the process has been used in a relatively small number of rulemaking procedures.

ELECTRONIC RULEMAKING

Electronic rulemaking refers to the use of the Internet, email, and other electronic information technologies as means of enhancing public knowledge of and participation in agency rulemaking. This new phenomenon was given substantial impetus when Congress enacted E-Government Act of 2002.⁶⁶ The act is aimed at requiring federal agencies to expand their use of the Internet as a vehicle to deliver information to the public. This new statute creates a Federal Chief Information Officer within the **Office of Management and Budget (OMB)** and mandates the use of Internet-based technologies to enhance the management and promotion of electronic government services and public access to government information and services by establishing a broad framework of measures using Internet-based information technology.

EDITED CASE State v. Peters (Continued)

Inasmuch as the approval of the methods of blood analysis contained in Exhibit 3 is an attempt by the department of health to implement the law, as well as prescribe a policy of the department, the agency was required to comply with the statutory publication and filing procedure for adopting rules. . . .

In an analogous case, another state agency, the division of family services, had published a manual setting forth methods for computing the amount of Medicaid to be paid on behalf of a recipient of benefits to a nursing home. The court found such policy was a "rule" which affected substantial legal rights of the recipient and to be effective must satisfy the statutory publication and filing requirements. . . . In the absence of compliance with the statute the "rule" is void. . . .

Finally, the State urges the court to avoid requiring the department of health to publish the specific analytical methods to be used

because of the "endless list of variations" involved. We point out to the State that it is the statute, not this court, that requires publication of such methods. While it may be true that numerous inconsequential variations may exist in performing chemical analyses, we find it difficult to believe that the department of health cannot adequately describe the techniques, devices, equipment or methods in broad enough terms to allow for such variations and yet assure accurate results. In view of the gaping deficiencies in the regulations and the dangers posed by drunk drivers on the public highways, we urge the department of health to take appropriate steps to promulgate rules prescribing the methods or techniques approved for the analysis of blood samples for alcohol content.

The order suppressing the evidence of the blood alcohol test is affirmed.

Justices Crow and Greene, concurring.

ENDNOTES

1. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).
2. 5 U.S.C.A. § 551(4).
3. 1981 MSAPA § 1.102 (10).
4. 239 U.S. 44 (1915).
5. 332 U.S. 194, 203 (1947).
6. *Id.* at 202.
7. *Id.*, at 202-203.
8. 5 U.S.C.A. § 553(a).
9. 5 U.S.C.A. § 553(a)&(b).
10. 506 F.2d 33 (D.C. Cir. 1974).
11. *Id.* at 38.
12. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 388.
13. 174 F.3d 206 (D.C. Cir. 1999).
14. *Id.* at 213.
15. *Chamber of Commerce v. Occupational Safety and Health Agency*, 636 F.2d 464, 488 (D.C. Cir. 1983).
16. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).
17. 467 U.S. 837 (1984).
18. 529 U.S. 576 (2000).
19. 533 U.S. 218, 221 (2001).
20. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).
21. *Morton v. Ruiz*, 415 U.S. 199 (1974).
22. 724 F.2d 979 (D.C. Cir. 1983).
23. *Sprint Corp. v. Federal Communications Commission*, 315 F.3d 369 (D.C. Cir. 2003).
24. 244 F.3d 342 (4th Cir. 2001).
25. *Id.* at 349.
26. 208 F.3d 256, 262 (D.C. Cir. 2000).
27. 5 U.S.C.A. § 552(a)(1)(c).
28. 607 F.2d 695 (5th Cir. 1979).
29. *Davidson v. Glickman*, 169 F.3d 996, 999 (5th Cir. 1999).
30. *Chamber of Commerce of the United States v. U.S. Dept. of Labor*, 174 F.3d 206, 211-13 (D.C. Cir. 1999).

