that the agency had relied on otherwise undisclosed facts or legal arguments supplied by the consultants, their work in summarizing and analyzing the record had been a legitimate part of the agency's deliberative process.

Reluctance to force rulemaking into the mold of adjudicative procedure is also evident in the law's response to the issue of prejudgment in rulemaking. In Ass'n of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), the court concluded that the FTC chairman should not be disqualified from participating in a rulemaking proceeding to ban advertisements directed at young children, even though he had made statements and written letters indicating that he strongly favored some regulatory action against the advertisers. The court reasoned that administrators should be encouraged to speak their minds on the issues involved in pending rulemaking proceedings, so that they can engage in direct, candid dialogue with affected interest groups, and thereby assess the political acceptability of different policy choices. In rulemaking, therefore, the test for disqualification should not be whether the decisionmaker appears to have prejudged any fact issue (the test applied in adjudicative proceedings), [340]

but whether "clear and convincing evidence" shows that he has an "unalterably closed mind" on the pending matters.[20] One might suspect that the court's test will, as a practical matter, virtually immunize agency officials from the threat of being removed from a rulemaking proceeding for bias, even if they are highly partisan advocates for their cause. The case dramatically illustrates the extent to which courts now view rulemaking as a political process, in which value judgments and unprovable assumptions are more important than the kind of facts that can be found by a neutral, detached adjudicator.

1. D. EXECUTIVE OVERSIGHT

While courts have scaled back their attempts to supervise the rulemaking process in the years since *Vermont Yankee*, managerial activity within the executive branch has increased. At present the formal oversight function is exercised primarily by the Office of Information and Regulatory Affairs (OIRA), which engages in systematic scrutiny of proposed "significant" rules to determine whether they are cost-justified and consistent with administration policy. See pp. 64–67 supra.

To some observers, the extensive involvement of White House officials in rulemaking proceedings implicates the dangers of ex parte contacts in a 341

particularly glaring fashion: private meetings between OIRA and officials at rulemaking agencies have been thought to subvert the essential procedural regularity and openness of the rulemaking process. However, in Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (discussed at pp. 337–338 supra), the court defended White House participation in rulemaking proceedings: "Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single-mission agencies do not always have the answers to complex regulatory problems." The court thus declined to invalidate a rulemaking proceeding during which EPA officials had met with President Carter and his economic advisors but had not disclosed this meeting in the administrative record.[21] Nevertheless, the court suggested that disclosure of presidential contacts might be essential if the discussion brought important new factual information to the agency's attention. Accordingly, OIRA soon adopted a procedure for submitting such facts to the agency for inclusion in

the administrative record.

The court's endorsement of executive supervision facilitated the growth of the Reagan oversight program. During the program's initial years, however, there were persistent reports that OIRA was pressuring agencies to weaken regulations in ways that were antithetical to the spirit of the [342]

statutes they were administering. In 1986, under threat of congressional intervention, OIRA adopted a set of procedural reforms, including a commitment that its formal written communications to agencies would be released to the public after a final rule was issued. Controls on "conduit communications" (in which OIRA passes along to an agency the views of interested outside parties) were also tightened. In his overhaul of the oversight program in Executive Order 12,866 (1993), President Clinton instituted further safeguards: OIRA is now required to maintain a public log disclosing the status of rules while they are under review; and an agency must identify, in the notice accompanying a published rule, any changes it made at the suggestion of OIRA. In the George W. Bush administration, OIRA went even further, routinely posting its correspondence with agencies on its website. These reforms have served to improve the accountability of a reviewing office that, as a practical matter, usually operates independently of the President himself. However, informal contacts by the President's personal staff of policy advisors remain essentially unregulated by procedural checks in rulemaking, despite their increasing importance.

The executive orders' cost-benefit analysis requirements, along with impact statements required by statutes such as the Regulatory Flexibility Act, Paperwork Reduction Act, and NEPA have required agencies to devote significant resources

on what might be generally called "regulatory analysis."

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Reviewing courts do not review questions as to whether an agency properly complied with the executive orders, but cost-benefit studies do go into the rulemaking record and are considered during judicial review of the merits of a rule. Special legislative provisions may give courts a larger role, where agency reliance on cost studies is forbidden (Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001)), permitted (Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009)), or even required (Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011)).

1. E. RULEMAKING BY NEGOTIATION

The image of rulemaking as a political process, which underlies decisions such as *Sierra Club* and *National Advertisers*, has given impetus to efforts by some agencies to use structured bargaining among competing interest groups as a means for developing certain rules. Initially, these experiments in consensus-seeking, generally called "regulatory negotiation" or "reg-neg," were pioneered by the Administrative Conference. Later, Congress codified the basic process in the Negotiated Rulemaking Act of 1990, 5 U.S.C. § 561 et seq. In a typical regulatory negotiation, concerned interest groups and the agency itself send representatives to bargaining sessions led by a mediator. Membership on the negotiating committee is to be balanced among the various interests that might be affected by the ultimate rule. The agreement that results from these sessions is then forwarded to the agency, which

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normally will publish it as a proposed rule and follow through with the standard APA rulemaking process. However, the agency is not obligated to accept the participants' compromise as a final rule. See USA Group Loan Services, Inc. v. Riley, 82 F.3d 708 (7th Cir. 1996) (agency that repudiated reg-neg consensus agreement in its notice of proposed rulemaking was not guilty of "bad faith" negotiation).

At its best, regulatory negotiation can provide a superior format for encouraging cooperation rather than confrontation. If all affected interests, including the agency, participate in hammering out a consensual solution, the result is likely to be more acceptable to the participants than any policy that the agency or an external reviewer might seek to impose, leading to a faster end-stage process and a likelihood of avoiding a challenge in court. Even the proponents of regulatory negotiation acknowledge, however, that in some situations the technique is not worth trying, such as where the number of interests needing representation is unmanageably high, or where agreement would be possible only if some participants compromised on a fundamental issue of principle. To date, the percentage of rulemaking proceedings handled through regulatory negotiation remains fairly low. See Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49. S. Tex. L. Rev. 987 (2008).

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2. F. REQUIRED RULEMAKING

Agencies often choose to make policy in an individual adjudication rather than

in a rulemaking proceeding, and for the most part the law respects this preference. The APA provides procedural models for both rulemaking and adjudication, but it does not direct an administrator to use one form of proceeding rather than the other. Nor do most substantive regulatory statutes limit an agency's choice of procedural vehicle; typically, they simply authorize the administrator both to issue rules and to adjudicate particular cases. As for judicial constraints, the general rule is well established: "the choice between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (*Chenery II*).

As *Chenery* recognizes, agencies often have legitimate reasons to make policy through adjudication. The agency may feel a need to consider the policy first in a concrete fact situation, building rules only incrementally in the fashion of common law courts. It may sense that the issues are too complex, or not ripe enough, for across-the-board treatment. Fundamental differences of perspective may prevent the members of a multi-member agency from uniting behind a common policy. Alternatively, the agency may not even have thought that a new policy was needed until the final stages of an adjudication, when the cost and delay of starting a new proceeding would be considerable. The agency

may also have less attractive motives for shunning rulemaking: for example, it may calculate that it can avoid public or congressional criticism if its new policies are buried in fact-specific adjudications instead of being clearly articulated by rule. Usually, however, courts do not attempt to question the agency's motives or to second-guess its judgment as to how to develop policy.

Nevertheless, the *Chenery* principle has long troubled scholars and judges who

have believed that rulemaking has sizable advantages in terms of both efficiency and fairness, see p. 305 supra, and that some agencies rely too heavily on case-by-case adjudication to formulate policy. This critique has occasionally prompted courts to attempt to force agencies to make wider use of rulemaking in policy development. To date, however, exceptions to *Chenery* are rare and ill-defined.

A number of cases raising this issue have involved the National Labor Relations Board, which has been exceptionally reluctant to act through rules. In NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), the Board ordered Wyman-Gordon to provide union organizers with a list of the names and addresses of employees eligible to vote in an election to select a collective bargaining representative. The Board's directive was based on Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966), an earlier agency adjudication in which the Board had established the list requirement, but had made it applicable only in future cases. Wyman-Gordon claimed that the *Excelsior* requirement was equivalent to a "rule" and

was invalid because it had not been adopted in accordance with the APA rulemaking procedures. In the Supreme Court, the plurality opinion (for four Justices) strongly criticized the NLRB's failure to use rulemaking procedure to establish the *Excelsior* list requirement. Nevertheless, the plurality upheld the Board's action, because the agency had ordered Wyman-Gordon to produce the list during a valid adjudicative proceeding. Although the Board was not entitled to treat the *Excelsior* decision as conclusively settling the propriety of the list requirement (as a rule would have done, see pp. 293–297 supra), it was free to rely on that decision as a precedent while litigating against subsequent employers. That is just what it had done in Wyman-Gordon's case. In effect, therefore, the

Court held that an agency *may* develop new policies through adjudication, so long as each person to whom those policies are later applied is given an individual right to be heard on the question of whether the Board should modify or abandon its case-law "rule."

The issue of choice between adjudication and rulemaking returned to the Court in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). The agency certified a bargaining unit of Bell's buyers, who under previous Board policy would have been regarded as "managerial employees" who could not be given such rights. As in *Wyman-Gordon*, the company argued that a significant policy change of this nature had to be made in rulemaking rather than in an individual adjudication. Once again, the Supreme Court disagreed, reaffirming *Chenery* and stating that the Board's preference for adjudication [348]

in this case deserved "great weight." (The Court did indicate that a "different result" might have been required if the company had relied to its detriment on prior Board policy. However, this "different result" would probably not have been a demand for rulemaking. Generally, when courts discern unfair retroactivity in an agency order, their response is simply to hold that any attempt to apply the new policy to the respondent would be void as an abuse of discretion. See p. 107 supra.)

Notwithstanding this line of cases, the Court has on one occasion required an agency to engage in rulemaking. In Morton v. Ruiz, 415 U.S. 199 (1974), the Court reversed a decision of the Bureau of Indian Affairs denying benefits to Indians under a federal assistance program. The BIA had developed an internal policy of denying assistance to claimants who lived outside of the reservations, but it had never