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The *Vermont Yankee Nuclear Power* Opinion: A Masterpiece of Statutory Misinterpretation

NATHANIEL L. NATHANSON*

The opinion of the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*

assumes that the only statutory procedural requirements applicable to the rules issued by the Atomic Energy Commission (now the Nuclear Regulatory Commission) are those set forth in section 4 of the Administrative Procedure Act (APA)—now 5 U.S.C. § 553. However, careful study of the statutes involved demonstrates that sections 7 and 8 of the APA—now 5 U.S.C. §§ 556 and 557—were the controlling procedural provisions. The opinion also strictly limits the authority of the reviewing court to require more than the minimum procedural requirements set forth in 5 U.S.C. § 553. Because this ruling will seriously handicap reviewing courts, the APA should be amended to clarify its provisions and restore appropriate authority to reviewing courts.

**INTRODUCTION**

The opinion of Mr. Justice Rehnquist, written for a unanimous Court this past Term in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, carries to its ultimate conclusion the process of misinterpretation of the Administrative Procedure Act (APA) that was earlier developed by the same Justice, speaking for a divided Court, in *United States v. Florida East Coast Railway.* The issue of statutory interpretation in-

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3. 410 U.S. 224 (1973). The opinion in *Florida East Coast* was to some extent
volved in both these cases was fundamentally the same so far as the APA was concerned. This issue concerned the exact meaning and application of a rather ambiguous exception clause in the original section 4 of the APA—now found in 5 U.S.C. § 553—which reads: "When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection." The immediate effect of this exception clause is to determine whether agency rulemaking may be conducted in accordance with the so-called "informal procedures" set forth in section 553 of the APA, or must be conducted in accordance with the more formal, "adjudicatory" or "trial-type" procedures set forth in sections 556 and 557 of the APA. In actual practice the question is much more complicated than this simple statement of the issue because the analysis depends not only upon an interpretation of the APA but also upon an interpretation of the particular statute authorizing the agency rulemaking, the interrelation between the two statutes, any other applicable constitutional or statutory principles governing administrative procedure, and the relationship between administrative agencies and reviewing courts. All these complexities are well-illustrated in the Vermont Yankee case itself, even though Mr. Justice Rehnquist's opinion rather casually ignores most of them.

The Administrative Proceedings in Vermont Yankee

Vermont Yankee involved the application not only of the APA but also of the Atomic Energy Act of 1954 (AEA), the Administrative Orders Review Act (Hobbs Act), and the National Environmental Policy Act of 1969 (NEPA). The controversy began with extensive hearings before the Atomic Safety and Licensing Board and culminated with the grant—approved by the Atomic Safety and Licensing Appeal Board in June, 1972—of a license to


8. The Atomic Energy Commission (AEC or Commission) had delegated its review functions over Licensing Board decisions to the Atomic Safety and Licensing Appeal Board, subject to discretionary determination by the AEC itself of major or novel questions of policy, law, or procedure. 10 C.F.R. § 2.785(a), (d)(1) (1978).

The AEC was abolished by the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (codified in scattered sections of 5, 42 U.S.C.). The functions of the AEC were divided between the United States Nuclear Regulatory Commission (NRC) and the Energy Research and Development Agency (ERDA). NRC was substituted for AEC as the formal respondent in Vermont Yankee by order of the Court of Appeals for the District of Columbia. See 547 F.2d 633, 637 n.4 (D.C. Cir. 1976).
Vermont Yankee to operate a nuclear power plant. Specifically excluded from consideration at these hearings, over the objections of intervenor Natural Resources Defense Council (NRDC), was the issue of the environmental effects of operations to reprocess fuel or to dispose of nuclear wastes resulting from the operations of this plant. In November, 1972, however, the Atomic Energy Commission (AEC or Commission), in a notice making specific reference to the appeal board's decision on the Vermont Yankee license application, instituted rulemaking proceedings "that would specifically deal with the question of consideration of environmental effects associated with the uranium fuel cycle in the individual cost-benefit analyses for light water cooled nuclear power reactors." A supplemental notice of hearing issued by the Commission announced that, while discovery or cross-examination would not be available to the participants in the hearing, a staff report entitled Environmental Survey of the Nuclear Fuel Cycle would be available to the public before the hearing, together with extensive background documents cited therein. 

Participants would be allowed to file written statements and, time permitting, oral statements would be received and incorporated into the record. Persons making oral statements would be subject to questioning by the Commission or hearing board. No suggestion was made that participants could submit questions to be asked by the board. A two-day oral hearing was in fact held before a specially constituted hearing board. A request for full adjudicatory procedures was submitted on behalf of some of the intervenors (Consolidated National Intervenors and Union of Concerned Scientists), but was rejected by the Commission.

With respect to the substantive issue of the "long-term environmental effects of waste storage and disposal," the Commission's conclusion was that "sufficient data were presented regarding engineered waste storage facilities to justify the conclusion that the contribution of waste storage and disposal to the total environmental impact of the fuel cycle is relatively insignificant."

12. Record, supra note 9, at 393-94.
On petition for review in the Court of Appeals for the District of Columbia, the order of the Commission granting the operating license was "remanded to await the outcome of further proceedings in the rulemaking." The court also "set aside and remanded" the portions of the rule which had the effect of "cutting off consideration of waste disposal and reprocessing issues in licensing proceedings." The three-judge panel of the court of appeals was unanimous in both of these decisions, but there appeared to be a significant, though somewhat subtle, difference of opinion between Chief Judge Bazelon, speaking for himself and Circuit Judge Edwards, and Circuit Judge Tamm, speaking for himself. The Bazelon opinion emphasized the procedural inadequacies of the rulemaking proceeding in so far as it dealt with "the two phases of the fuel cycle which are the focal points for this appeal, reprocessing and waste disposal." More particularly, Judge Bazelon emphasized that the only discussion of high-level waste disposal techniques was supplied by a 20-page statement by Dr. Frank K. Pittman, Director of the AEC's Division of Waste Management and Transportation. This statement, delivered during the oral hearings, was then incorporated, often verbatim, into the revised version of the Environmental Survey published after the comment period.

The substance of this testimony was that environmental effects from the disposal of high-level nuclear wastes were negligible because it would be feasible to build a surface facility of moderate size that could safely contain all such nuclear wastes for at least 100 years. By the end of the period more permanent facilities would in all probability be available and, if not, the wastes could be retrieved and repackaged for another 100 years, and so on as often and as long as necessary. After emphasizing the vague and conclusory nature of this statement, Judge Bazelon went on to elaborate the procedural deficiencies that he regarded as decisive:

Many procedural devices for creating a genuine dialogue on these issues were available to the agency—including informal conferences between intervenors and staff, document discovery, interrogatories, technical advisory committees comprised of outside experts with differing perspectives, limited cross-examination, funding independent research by intervenors, detailed annotation of technical reports, surveys of existing literature, memoranda explaining methodology. We do not presume to intrude on the agency's province by dictating to it which, if any, of these devices it must adopt to flesh out the record. It may be that no combination of the

14. Id. at 655.
15. Id. at 647.
16. Id.
procedures mentioned above will prove adequate, and the agency will be required to develop new procedures to accomplish the innovative task of implementing NEPA through rulemaking. On the other hand, the procedures the agency adopted in this case, if administered in a more sensitive, deliberate manner, might suffice. Whatever techniques the Commission adopts, before it promulgates a rule limiting further consideration of waste disposal and reprocessing issues, it must in one way or another generate a record in which the factual issues are fully developed.\footnote{17}

In his concurring opinion Judge Tamm explicitly agreed with the conclusion of the majority that it is impossible to determine from the record before us whether the Commission has fulfilled its statutory obligation under NEPA in . . . deciding that the incremental environmental effect of storing the waste of an additional nuclear reactor is negligible, or whether it has uncritically adopted as its own the undocumented conclusions of a single witness that the waste storage issue is a “non-problem” with which the Commission need hardly concern itself at this time.\footnote{18}

Judge Tamm’s disagreement pertained to those parts of Chief Judge Bazelon’s opinion that chided the Commission for the inadequacies of its procedures and suggested various alternative procedures on remand. Judge Tamm summarized his views in these words: “[T]he deficiency is not with the type of proceeding below, but with the completeness of the record generated.”\footnote{19} He was also troubled because the “majority opinion fails to inform the Commission in precise terms what is \textit{sic} must do in order to comply with the court’s ad hoc standard of review”\footnote{20} and because “the majority’s insistence upon increased adversariness and procedural rigidity . . . continues a distressing trend toward over-formalization of the administrative decisionmaking process which ultimately will impair its utility.”\footnote{21} Judge Tamm’s idea of the appropriate remedy was not to impose ad hoc procedural requirements in an attempt to raise the level of petitioners’ participation, already adequate under section 553, but to remand for an explanation of the basis of Dr. Pittman’s statements and of the staff’s numerical conclusions, \textit{i.e.} for the documentation which the majority finds so conspicuously lacking.\footnote{22}

\textbf{Justice Rehnquist’s Opinion in Vermont Yankee}

Despite the apparent agreement between the majority and concurring opinions in the court of appeals that the administrative record was inadequate to support the Commission’s conclusions, Mr. Justice Rehnquist first addressed the question whether the

\footnotesize{\begin{itemize}
\item \textit{17.} \textit{Id.} at 653-54.
\item \textit{18.} \textit{Id.} at 658.
\item \textit{19.} \textit{Id.} at 659 (emphasis original).
\item \textit{20.} \textit{Id.}
\item \textit{21.} \textit{Id.} at 660.
\item \textit{22.} \textit{Id.} at 661.
\end{itemize}}
court of appeals "invalidated the rule because of the inadequacy of the procedures employed in the proceedings" or "merely held that the record was inadequate to enable the reviewing court to determine whether the agency had fulfilled its statutory obligation." He concluded that although some portions of the opinion "might initially lead one to conclude that the court was only examining the sufficiency of the evidence, . . . the remaining portions . . . dispel any doubt that this was certainly not the sole or even the principal basis of the decision." Justice Rehnquist then rejected the interpretation apparently adopted by Judge Tamm—that the opinion for the court rested on both the insufficiency of the "record" or of the "evidence" and the inadequacy of the procedures—and held only that in so far as the appellate opinion rested on the inadequacy of the procedure "it was wrong." The case was then remanded for determination of the sufficiency of the record.

In addressing the procedural question, Justice Rehnquist disposed quite summarily of the possibility that the procedures were constitutionally inadequate both because the respondent did not argue that proposition and also because "this was clearly a rulemaking proceeding in its purest form." The opinion then proceeded to elaborate this general proposition: "Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting

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23. 435 U.S. at 539.
24. Id. at 542.
25. Id. Mr. Justice Rehnquist does concede, however, that "[t]here are also intimations in the majority opinion which suggest that the judges who joined it likewise may have thought the administrative proceedings an insufficient basis upon which to predicate the rule in question." Id. at 549. Presumably the Justice meant the phrase "the administrative proceedings" to refer to the resultant record of the proceedings, as distinguished from the procedures.
26. Mr. Justice Rehnquist further explained the remand by saying:

We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must "stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration" . . . . The court should engage in this kind of review and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.

Id. (citations omitted).

For consideration of the merits of the problem of nuclear wastes, see Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm’n, 582 F.2d 166 (2d Cir. 1978) (sustaining the NRC’s denial of a petition for rulemaking procedures to determine whether nuclear reactor waste can be disposed of permanently without risk to public health and safety and for a moratorium on nuclear reactor licensing until the conclusion of such proceedings).
27. 435 U.S. at 542 n.16.
them to discharge their multitudinous duties."' 28 The opinion then rejected the propositions advanced by the respondent "that § 4 of the Administrative Procedure Act merely establishes lower procedural bounds and that a court may routinely require more than the minimum when an agency's proposed rule addresses complex or technical factual issues or 'Issues of Great Public Impact.'" 29 After some examination of the legislative history of the APA, the opinion concluded that "all of this leaves little doubt that Congress intended that the discretion of the agencies and not that of the courts to be exercised in determining when extra-procedural devices should be employed." 30 The opinion suggested that additional and "compelling reasons" for this construction were first, that "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"; second, that the decision of the court is "on the basis of the record actually produced at the hearing... and not on the basis of the information available to the agency when it made the decision to structure the proceedings in a certain way"; and finally, that "this sort of review fundamentally misconceives the nature of the standard for judicial review of an agency rule" because "informal rulemaking need not be based solely on the transcript of a hearing held before an agency." 31 "In sum," the opinion concluded on this issue, "this sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress." 32

CRITIQUE OF JUSTICE RENNQUIST'S OPINION IN VERMONT YANKEE

Interpretation of the APA, the Atomic Energy Act, and the Hobbs Act

A critique of Justice Rehnquist's opinion must begin with section 553 of the APA, which on its face is deceptively simple. Assuming that the exception clause with respect to rules "required to be made on the record" does not apply, section 553 requires

28. Id. at 543 (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940)).
29. Id. at 545.
30. Id. at 546 (emphasis original).
31. Id. at 546-47 (citation omitted).
32. Id. at 548.
only that there be appropriate notice of the proposed rulemaking, including "(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"; that "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"; and that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 33 But there is also no doubt that those who were responsible for the drafting of the APA, and those who took some active and knowledgeable part in the complicated negotiations which led to the final form of the statute, did not conceive of the statements accompanying the proposed or final rule, and the comments submitted thereon, as the full extent of the record for the purposes of judicial review. When the APA was going through its birthpangs, by far the larger portion of administrative rules were subject to review in the first instance not in the federal courts of appeal but rather in the federal district courts, either in suits to enforce them or in suits to enjoin their enforcement. The generally accepted concomitant of this type of review was that any contested issues of fact would be resolved by a judicial trial in the federal district court. 34 There might have been some difficulty and

33. 5 U.S.C. § 553(b), (c) (1976).
34. This is made abundantly clear in, for example, the following passage from the report of the Senate Committee on the Judiciary recommending S. 7, which eventually became the Administrative Procedure Act. S. Rep. No. 752, 79th Cong., 1st Sess. 28 (1945), reprinted in Senate Comm. on the Judiciary, Administrative Procedure Act Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 214 (1946):

The sixth category, respecting the establishment of facts upon trial de novo, would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8. It would also require the judicial determination of facts in connection with rule making or any other conceivable form of agency action to the extent that the facts were relevant to any pertinent issues of law presented. For example, statutes providing for "reparation orders", in which agencies determine damages and award money judgments, usually state that the money orders issued are merely prima facie evidence in the courts and the parties subject to them are permitted to introduce evidence in the court in which the enforcement action is pending. In other cases, the test is whether there has been a statutory administrative hearing of the facts which is adequate and exclusive for purposes of review. Thus, where adjudications such as tax assessments are not made upon an administrative hearing and record, contests may involve a trial of the facts in the Tax Court or the United States district courts. Where administrative agencies deny parties money to which they are entitled by statute or rule, the claimants may sue as for any other claim and in so doing try out the facts in the Court of Claims or United States district courts as the case may be. Where a court enforces or ap-
uncertainty in reconciling this type of judicial review with the presumption of validity accorded to administrative regulations\(^3\) and with the applicable substantive standards of judicial review, but the generally accepted view was that the burden of proof would be placed upon the challenger to establish that the rule or regulation under attack was arbitrary and capricious. This was no easy burden to sustain, but at least the challenger would have the benefit of the subpoena power and whatever other methods of discovery might be considered appropriate in contests with the Government.

Finally, there is no suggestion in the legislative history of the APA that those actively participating in its formulation and enactment thought that section 553 would significantly change this type of "de novo" judicial review of rules and regulations. It might, no doubt, have been anticipated that explanatory statements accompanying proposed or final rules, and comments on them by members of the public in the course of section 553 proceedings, could be introduced in the trial in the district court and so become part of the record for judicial review. There was, however, not the slightest suggestion that the record on judicial review would be limited to such explanatory statements or comments.

\(^3\) See Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935) (quoting Borden's Farm Prod. Co. v. Baldwin, 293 U.S. 194, 209 (1934)); When such legislative action [an administrative regulation] "is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary."
Both the Atomic Energy Act of 1954 and the Hobbs Act were enacted after the APA. The ways in which their substantive and procedural provisions fit into the pattern of the APA is not as simple or as obvious as Mr. Justice Rehnquist's opinion apparently assumes. Congress gave the Atomic Energy Commission broad authority to "make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this chapter." The Atomic Energy Act also contains a general provision that "[t]he provisions of [the APA] shall apply to all agency action taken under this chapter." In addition, section 2239(a) of the Atomic Energy Act provides:

In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Finally, with respect to judicial review, section 2239(b) of the Atomic Energy Act provided: "Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in the [Hobbs Act], as amended, and to the provisions of section 10 of the Administrative Procedure Act, as amended." The Hobbs Act and its successors in effect subjected AEC orders issued under section 2239 to review in the courts of appeals instead of in the district courts. On the face of the statutes there might be some doubt as to whether the rule involved in the Vermont Yankee case was indeed one "dealing with activities of licensees" and thus within the jurisdictional scope of section 2239(a) and (b). Nevertheless, because the court of appeals accepted jurisdiction of the petition to review the order adopting the rule, and the Supreme Court raised no objection, one must assume that review was pursuant to section 2239(a) and (b) of the Atomic Energy Act, and to the Hobbs Act.

Assuming this to be the correct basis for the jurisdiction of the

37. id. § 2231.
38. Id. § 2239(a).
39. Id. § 2239(b) (1970) (current version at id. § 2239(b) (1976)).
court of appeals, both the statutory language and the legislative history of all the statutes involved seem to point unmistakably to the conclusion that the rule of the Commission was one "required to be made on the record" within the meaning of the exception clause of section 553 of the APA. The legislative history of the APA overwhelming shows that this view would have been that of the framers of the APA because they clearly regarded then-current statutes providing for judicial review of rules on the record of the administrative hearing as requiring such rules to be made "on the record" within the meaning of section 553.42 Furthermore, the

42. This was implicit in the assumption, made both by those who first favored and by those opposed to the original versions of the APA, that provisions like those included in §§ 556 & 557 would apply to ratemaking rules and orders under the principal regulatory statutes then in effect, like the Interstate Commerce Act and the Natural Gas Act. This was the assumption made in the testimony of Commissioner Aitchison with respect to the applicability of the bills to rate proceedings, including general rate proceedings such as Ex parte 148. See Hearings on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the House Comm. on the Judiciary, 79th Cong., 1st Sess. (1945) (testimony of Commissioner Aitchison), reprinted in SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong., 2d Sess. 91-112 (1946). It was this testimony which led to changes in the bills so as to liberalize procedures applicable to rulemaking, and determining claims for money benefits and applications for initial licenses—changes which are now embodied in §§ 556 & 557. This assumption implicit in Commissioner Aitchison's testimony was made explicit in UNITED STATES DEPT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 29 (1947):

Statutes authorizing agencies to prescribe future rates (i.e., rules of either general or particular applicability) for public utilities and common carriers typically require that such rates be established only after an opportunity for a hearing before the agency. Such statutes rarely specify in terms that the agency action must be taken on the basis of the "record" developed in the hearing. However, where rates or prices are established by an agency after a hearing required by statute, the agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing. Sometimes the requirement of decision on the record is readily inferred from other statutory provisions defining judicial review. For example, rate orders issued by the Federal Power Commission pursuant to the Natural Gas Act (15 U.S.C. 717) may be made only after hearing; upon review in a circuit court of appeals or the Court of Appeals for the District of Columbia, the Commission certifies and files with the court "a transcript of the record upon which the order complained of was entered", and the Commission's findings of fact "if supported by substantial evidence, shall be conclusive". It seems clear that these provisions of the Natural Gas Act must be construed as requiring the Commission to determine rates "on the record after opportunity for an agency hearing". See H.R. Rep. p. 51, fn. 9 (Sen. Doc. p. 285). The same conclusion would be reached with respect to the determination of minimum wages under the Fair Labor Standards Act (29 U.S.C. 201), which contains substantially the same provisions for hearing and judicial review.

The Interstate Commerce Commission and the Secretary of Agriculture may, after hearing, prescribe rates for carriers and stockyard agencies, re-
framers of the Atomic Energy Act must have had some additional procedural requirements in mind when they singled out rules "dealing with the activities of licensees" as ones that should be subject to the hearing provisions of section 2239(a) and to the judicial review provisions of section 2239(b), thereby incorporating the judicial review provisions of the Hobbs Act. Finally, the legislative history of the Hobbs Act demonstrates quite clearly that the framers of that Act were relying upon the provisions of sections 556 and 557 of the APA, rather than the provisions of section 553, to assure an adequate record for judicial review.43 Neverthe-
less, the opinions of both the court of appeals and the Supreme Court in *Vermont Yankee* assumed without discussion that sections 556 and 557 had nothing to do with the case.

The principal point of the foregoing exercise is to establish that neither the opinion of the Supreme Court nor the opinion of the court of appeals represents a responsible effort to ascertain either the literal meaning or the apparent legislative intent of the APA and of the procedural provisions of the other statutes involved as applied to the *Vermont Yankee* situation. Viewed simply as a problem of determining the probable meaning of the statutes involved, without regard to the desirability of one result or the other, the conclusion seems to this writer practically inescapable that the combined effect of the APA, the Hobbs Act, and the Atomic Energy Act is to make "rules dealing with the activities of licensees" subject to sections 556 and 557 of the APA. It is obvious that the framers of the Atomic Energy Act were aware that, in the absence of such a provision, such rules would have been subject to section 553 of the APA. The only apparent reason for including those rules within the scope of section 2239(a) was to make them subject to more stringent hearing requirements than those imposed by section 553 alone. Such more stringent requirements were most economically achieved by an explicit requirement of an opportunity for hearing plus an incorporation by reference of the Hobbs Act, which in effect made such rules ones that were "required to be made on the record after opportunity for hearing."

Whether this would be a desirable result is, of course, arguable. To some courts and commentators the application of sections 556 and 557 to general rulemaking is anathema. To others, including the present writer, this is a very exaggerated view. To some of us

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sions . . . for the taking of evidence either by the agency or in the district court, when for one reason or another that is necessary because a suitable hearing was not held prior to initiation of the proceeding in the court of appeals.


It is obvious that the writers of the report must have had §§ 556 & 557, and not § 553, in mind when they said that the APA would assure that "the record . . . will be made in such a way that all questions for the determination of the courts on review, and the facts bearing upon them, will be presented and the rights of the parties will be fully protected."

44. This is apparently the view espoused by Professor Kenneth Davis. In *Administrative Law of the Seventies*, Professor Davis first commented with approval on Mr. Justice Rehnquist's opinion in *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973), especially on its conclusion that §§ 556 & 557 had no application.
His approval was based primarily on policy considerations, which he succinctly summarized in these sentences:

Even though the Court did not explicitly discuss them in its formal opinion, the surmise is a safe one that the Court was motivated by a belief that the machinery of trial-type hearings for across the board rulemaking has become more of a hindrance than a help to fair and efficient regulation. A trial in which all ICC-regulated railroads have unlimited right of cross-examination on what a nationwide charge ought to be when the purpose is to encourage quick return of boxcars is something less than a thing of beauty.

K. Davis, Administrative Law of the Seventies § 6.04-1, at 217 (1976). Professor Davis did not explain why he thought application of §§ 556 & 557 would imply "unlimited right of cross-examination" despite this qualifying sentence of § 556: "In rule making . . . an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." 5 U.S.C. § 556(d) (1976). Professor Davis also assumed that even though §§ 556 & 557 did not apply, the parties might still be entitled to "opportunity to cross-examine with respect to issues of specific fact" and that "[t]he agency still must consider whether an application for such opportunity should be granted, and the agency's denial of such opportunity still may be set aside by a reviewing court for abuse of discretion." K. Davis, supra at 217-18.

In the 1978 edition of his treatise, Professor Davis repeats substantially the same comment on the Florida East Coast case, together with this significant addition:

One who studies the case law summarized above in several sections of this chapter is likely to appreciate (a) that the fundamental push of the Supreme Court in Florida East Coast is in line with the thinking of the courts of appeals, which have been more often on the firing line, (b) that the development of law about procedures to supplement the procedure of notice and written comments is moving ahead with some rapidity and the achievements are significant, (c) that the meaning of Florida East Coast is not rejection of trials or of cross-examination in any and all circumstances in rulemaking but a much more selective use of trials and cross-examination, and (d) that the main effect of Florida East Coast is to allow the courts to apply to rulemaking under a statute providing for "hearing" the same procedural principles that courts apply when the statute imposes no requirement beyond § 553 procedure.


The foregoing passage is to some extent qualified by Professor Davis's later comment in the 1978 treatise dealing specifically with the Vermont Yankee opinion. This comment reads in part: "The Supreme Court's broad dictum in Vermont Yankee . . . , if taken literally apart from its context, would undo a large portion of the new law of rulemaking procedure that has been developed by the courts of appeals during the 1970s." Id. § 6:35, at 605. Professor Davis continues:

The sweeping generalizations in the Vermont Yankee opinion that courts may not add to the procedural requirements of § 553 are not a reliable guide to the future role of courts with respect to rulemaking procedure, because (1) as shown in the preceding section, the Court's words were much broader than the problem before it and far broader than what the Court evidently had in mind, (2) the sure-footed, painstaking, and cautious opinions of courts of appeals during the 1970s on rulemaking procedure are highly responsible and generally admirable and cannot be abolished by sweeping and abrupt generalizations that seem on their face to be precipitate, and (3) what the Court says about the law of rulemaking procedure is largely at variance with previous Supreme Court law, even though the Court indicated no intent to change its own law.

Id. § 6:37, at 611. Professor Davis also says:

Perhaps the Supreme Court in the various cases prescribing rulemaking procedure was merely interpreting constitutional and statutory provisions, but if so, the many federal courts that have added requirements to § 553 during the 1970s have been merely interpreting constitutional and statu-
ations would have permitted exactly the kind of administrative procedures adopted in both the Florida East Coast case and in the Vermont Yankee case, provided, of course, that no interested party was prejudiced thereby. Certainly it was the position of the agencies that there was no such prejudice and, if there was in fact prejudice, it is hard to believe that it could not have been cured by relatively slight changes in the procedure, without substantially sacrificing the legislative nature of the proceedings. In any event, irrespective of the comparative merits for rulemaking of section 553 procedures and of sections 556 and 557 procedures, it is hardly disputable that the framers of the APA were of the opinion that minimum section 553 procedures were not satisfactory for all types of rulemaking and that the framers of the

tory provisions. Some prefer that kind of unrealistic theory; others prefer the realism that in both instances the courts are the creators of the new law. Either way, what the Supreme Court has done throughout the twentieth century can be done by courts of appeals during the 1970s, the Vermont Yankee dictum to the contrary notwithstanding.

Id. at 615.

As indicated in the text, my only disagreement with Professor Davis in this regard is that I believe the courts of appeals would have been on stronger ground if they had relied more directly on the statutory provisions, including a "correct interpretation" of the APA, informed by both the relevant legislative history and appropriate constitutional considerations.

As indicated in the following passage:

To grasp the original understanding of the APA, it is important to appreciate, as some courts and writers have not done, that formal rule making must be "on-the-record;" it need not always be preceded by a "trial-type" or "evidentiary" hearing, implying the presentation of evidence by oral testimony with the right of all participants to cross-examine witnesses. The agency is given discretion to attach to formal rule making all or less than all the attributes of a trial-type or evidentiary hearing, depending upon what is required to elicit truth and understanding in the particular situation. To the same end, the agency is given discretion to attach some, or even all, the attributes of a trial-type or evidentiary hearing to informal rule making.

The current law governing rule making no longer reflects this original understanding. Congress and the courts are blurring the distinction between formal and informal rule making by requiring judicial review of informal rule making to be based exclusively on the record made during the notice-and-comment proceedings. Furthermore, to assure fairness to the parties and meaningful judicial review, Congress and the courts are also requiring agencies to adopt certain attributes of a trial-type hearing in the course of informal rule making.

Atomic Energy Act agreed with them so far as certain types of AEC regulations were concerned. In this connection it is pertinent to note that there has been no serious argument that the minimum section 553 procedures are always adequate if there is a substantial controversy with respect to the facts and if judicial review is to be on the record of the administrative hearing. It is also ironic that it is the previous opinions of the courts of appeals—insisting on more than the minimum procedures of section 553—which are primarily responsible for the so-called hybrid rulemaking procedures and their relatively elaborate records presented to the reviewing courts. These opinions have thus made it unnecessary for the Supreme Court to pass upon the validity of a "bare bones" section 553 proceeding as a method of presenting an adequate record for judicial review.

46. This general statement is consistent with the positions taken both by Professor Davis and by the Administrative Conference of the United States. Professor Davis, although he wholeheartedly supports § 553 proceedings as opposed to § 556 and § 557 proceedings, also fully supports the proposition that additional procedures, supplementing the basic notice and comment procedures, are appropriate when facts, especially "specific facts," are disputed. As he succinctly puts it:

Notice and comment procedure, without more, works beautifully for rulemaking that is based on the determination of policy questions, even when problems of broad and general facts are intertwined. But legislators, judges, agencies, and practitioners tend to favor additional procedural protection when fact issues are less broad and less general. Perhaps the dominant opinion is or tends to be that trials or some procedure including some of the main ingredients of trials are desirable on issues of narrow and specific facts.


It is also noteworthy that Judge Wright, who has written one of the strongest condemnations of over-judicialization of the rulemaking process, see Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375 (1974), was at least partly responsible for the per curiam opinion in Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), which engrafted an exceptionally strict prohibition against ex parte communications in § 553 rulemaking proceedings. The opinion in Home Box Office relies upon the same fair hearing and judicial review considerations which are dominant in other courts of appeals opinions encouraging additional procedures.


47. Among the outstanding opinions which have had this effect are Judge Leventhal's opinions in Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1972),
virtually indisputable that the development of such hybrid procedures would not have been regarded by those responsible for the APA as inconsistent with their purposes because they formulated the minimum procedural requirements of section 553 on the assumption that substantial issues of fact relating to the validity of rules would be tried out in the federal district court.

_Federal Courts of Appeals’ Extension of the Florida East Coast Ruling_

Nevertheless, these considerations do not excuse the courts of appeals from all responsibility for the distortion of the APA which achieved its culmination in the _Vermont Yankee_ opinion. Their contribution was the unquestioning acceptance of the general philosophy of the _Florida East Coast_ opinion and the application of that philosophy far beyond the immediate holding of _Florida East_ and _Kennecott Copper Corp. v. EPA_, 462 F.2d 846 (D.C. Cir. 1972); Judge Wilkey’s opinion in _Mobil Oil Corp. v. FPC_, 483 F.2d 1338 (D.C. Cir. 1973); Judge McGowan’s opinion in _Industrial Union Dep’t, AFL-CIO v. Hodgson_, 499 F.2d 467 (D.C. Cir. 1974); and Judge Friendly’s opinion in _Associated Indus. of N.Y. State, Inc. v. United States Dep’t of Labor_, 487 F.2d 342 (2d Cir. 1973).

In the _International Harvester_ opinion Judge Leventhal was careful to “distinguish between the assertion of a broad right of cross-examination, such as that argued to this court, and a claim of a need for cross-examination of live witnesses on a subject of critical importance which could not be adequately ventilated under the general procedures.” 478 F.2d at 631.

In the _Industrial Union_ case Judge McGowan said:

> What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another. Where that choice purports to be based on the existence of certain determinable facts, the Secretary must, in form as well as substance, find those facts from evidence in the record. By the same token, when the Secretary is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found persuasive.

499 F.2d at 475-76.

In the _Associated Indus._ case Judge Friendly said:

> We must confess we are not so sanguine as was Judge McGowan whether judicial review of legislative standards resulting from informal rulemaking will ultimately prove to be feasible. Courts may well end up doing much less than Congress intended or, a more likely and graver threat in these days of judicial activism, much more than Congress had wished . . . . With the agencies and the courts in a new form of uneasy partnership, . . . the former must take reasonable steps to enable the latter to carry out the task that Congress has imposed upon them.

487 F.2d at 354.

The common denominator of all of these comments is that they recognize that the bare bones of § 553 proceedings, satisfying only the minimum requirement established by Congress, will not always provide an adequate record for the purposes of judicial review.
Coast, which was concerned primarily with section 14(a) of the Interstate Commerce Act.\textsuperscript{48} The language of that section is sufficiently distinguishable from the ratemaking provisions of the Act, and could reasonably be interpreted as implicating only the section 553 procedural requirements without suggesting a similar result with respect to general rate orders under the Interstate Commerce Act or other pre-APA regulatory statutes like the Federal Power Act,\textsuperscript{49} the Federal Communications Act,\textsuperscript{50} the Civil Aeronautics Act,\textsuperscript{51} and the Natural Gas Act.\textsuperscript{52} This was particularly true in the absence of any statutory provision requiring judicial review of ICC rules on the record of the administrative hearing.\textsuperscript{53} Nevertheless, several of the courts of appeals, including the Court of Appeals for the District of Columbia, have held that general rules under those statutes are not required “to be made on the record” within the meaning of the APA, and are not subject to sections 556 and 557 even though they are subject to judicial review in the courts of appeals on the record of the administrative proceedings.\textsuperscript{54} The culmination of this development was reached in the opinion by Judge Fahy for the Court of Appeals of the District of Columbia in \textit{American Public Gas Association v. FPC},\textsuperscript{55} sustaining the procedures used by the Federal Power

\textsuperscript{49} 16 U.S.C. §§ 791a-797, 798-825r (1976).
\textsuperscript{51} Ch. 601, 52 Stat. 973 (1938) (repealed 1958).
\textsuperscript{53} The \textit{Florida East Coast} case was decided before the provisions of the Hobbs Act were made applicable to judicial review of ICC orders. \textit{See} Act of Jan. 2, 1975, Pub. L. No. 93-584, § 3, 88 Stat. 1917. Consequently, with review in a three-judge district court, there was no difficulty in supplementing a § 553 rulemaking record with additional evidence taken in the federal district court whenever disputed issues of fact had not been adequately ventilated in the administrative proceedings. There is no substantial doubt that this is what Congress originally intended when it provided for judicial review of ICC orders in the federal district court. When this method of judicial review was changed to review in the courts of appeals, it was apparently assumed that the provisions of the Hobbs Act, either for transfer to the district court or remand to the agency, would take care of such unusual cases. \textit{See also} Auerbach, \textit{Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review}, 72 Nw. U.L. Rev. 15, 26-28 (1977).
\textsuperscript{54} Some of these decisions, particularly Mobil Oil Corp. v. FPC, 483 F.2d 1233 (D.C. Cir. 1973), and Bell Tel. Co. v. FCC, 503 F.2d 1250 (3d Cir. 1974), are elaborately discussed in Nathanson, \textit{Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes}, 75 Colum. L. Rev. 721, 734-46 (1975).
Commission in issuing a nationwide maximum rate order for natural gas. Here too, as in Florida East Coast and in Vermont Yankee, the procedures could in all probability have been largely, if not entirely, sustained under sections 556 and 557, as well as under section 553, but that was not the principal theme of Judge Fahy's opinion. Instead, he reviewed the development in prior opinions of the general theory that sections 556 and 557 do not have to be complied with in the absence of specific language requiring rules to be made on the record, and he apparently accepted the Commission's contention that this theory would be equally true with respect to general rate orders issued under the Natural Gas Act. Judge Fahy also seemed to give some credence to the view developed by Judge Wiley in the Mobil Oil case that "the informal procedures of Section 553 of the APA and the more formal requirements of §§ 556 and 557, are not mutually exclusive." However, he did not directly face the question whether such a melding of formal and informal procedures was to be entirely discretionary with the agency or might occasionally be required by the reviewing court. Mr. Justice Rehnquist's opinion in Vermont Yankee has now stepped in to fill the gap by holding that such judicial interference with agency procedural discretion can be justified only by "constitutional constraints or extremely compelling circumstances."

Constitutional Constraints Requiring Judicial Interference

The qualifying phrase "absent constitutional constraints or extremely compelling circumstances" leaves some opening for later modification or alleviation of the impact of the Vermont Yankee opinion, but the likelihood of this in the near future is not very great. In a footnote, Mr. Justice Rehnquist made it clear that he was not impressed with the potentialities of a constitutional argument, although he said none was advanced by the parties in the Vermont Yankee case. Some commentators, including myself, have suggested that the constitutional right to a fair hearing at the administrative level is as pertinent in a rulemaking proceeding when judicial review is restricted to the administrative record as in adjudication, but Mr. Justice Rehnquist's footnote took no

56. 567 F.2d at 1067.
57. 435 U.S. at 542 n.16.
58. See Auerbach, Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review, 72 NW. U.L. REV. 15, 40 (1977); Nathanson, Probing the Mind of the Administrator: Hearing Variations and Stan-
account of that possibility. Professor Davis, in his critique of the Vermont Yankee opinion, eschews the constitutional ground and advances instead the conception of a federal common law of fair hearing and judicial review that would lead to substantially the same result. Mr. Justice Rehnquist did not have the full benefit of Davis's analysis in writing the Vermont Yankee opinion, but it is difficult to believe that he would have been any more impressed with the common law conception than he was by appeal to constitutional considerations or to the real legislative history of the APA. Furthermore, there may well be a strong tendency in the Supreme Court as a whole to avoid further elaboration of the Vermont Yankee philosophy until the courts of appeals have had considerable opportunity to work their own way out of the dilemmas it poses, just as Mr. Justice Frankfurter in his famous Universal Camera opinion, after suggesting that the courts of appeals would know how to apply its general philosophy, added: "This Court will intervene only in what ought to be the rare instance when the standard appears to have been mis apprehended or grossly misapplied.""60

Conclusions: Alleviation of the Impact of Vermont Yankee

Possible Amendment of the APA

If this prognosis is reasonably accurate, it leads naturally to the question whether the situation is now ripe for legislative intervention. Before attempting to answer this question directly, it is appropriate to take note of recent relevant legislation that may reveal the attitude of Congress toward similar problems. Outstanding examples of recent legislation dealing with administrative procedures in rulemaking are the Occupational Safety and Health Act of 1970 (OSHA), the Federal Trade Commission Improvement Act of 1975, the Securities Acts Amendments of 1975, the Toxic Substances Control Act enacted in 1976, the Department of Energy Organization Act enacted in 1977, and the

63. Id. § 2604(b) (4) (C).
64. 42 U.S.C.A. § 7131(c) (West Supp. 1978).
Clean Air Act Amendments of 1977.66 The procedural provisions of all of these statutes may be characterized as endorsing "hybrid rulemaking" in that they require more than the bare bones of section 553 but less than the full panoply of safeguards embodied in sections 556 and 557. Although several of these statutes assure a right of "oral presentation" in certain situations, only the Federal Trade Commission explicitly protects the right of cross-examination when there are "disputed issues of material fact," and "the Commission determines [cross-examination] (i) to be appropriate and (ii) to be required for a full and true disclosure with respect to such issues."67 The tendency revealed in these statutes to require more than section 553 but less than sections 556 and 557 suggests that Congress might not be averse to amending the APA so as to endorse the position of most of the courts of appeals rather than that of the Supreme Court in the Vermont Yankee case.

One way to accomplish this purpose might be to amend the APA to make it clear that rules which must be reviewed on the administrative record are also "required to be made on the record" within the meaning of the APA,68 and to make more explicit the significance of the exemptions for rulemaking from some of

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66. Id. § 7607.
68. This does not mean that statutes enacted subsequently to the APA may not have modified the effect of the "on the record" exception so as to free the particular agency involved from some or all of the strictures of §§ 556 & 557. See Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968).

In Investment Co. Inst. v. Board of Governors of the Fed. Reserve Sys., 551 F.2d 1270 (D.C. Cir. 1977), Judge McGowan developed the general position of the District of Columbia Circuit with respect to judicial review in the court of appeals on the basis of § 553 rulemaking proceedings. He explained that although the District of Columbia Circuit had formerly entertained the view that regulations promulgated after informal rulemaking were not reviewable in the courts of appeals under special jurisdictional statutes providing for review of orders, this was no longer the law of the circuit. Id. at 1276. This conclusion was partly based on the experience of the court, illustrated in this particular case, with the development in informal rulemaking proceedings of elaborate records clearly sufficient for the purposes of judicial review. Judge McGowan's conclusion was also partly based on the development of a "predominant case law construing jurisdictional statutes authorizing review of orders to include review of regulations." Id. at 1278. The holding in Investment Co. Inst. is not directly applicable to the Vermont Yankee situation because the hearing and judicial review provisions of the Atomic Energy Act, unlike those of the Bank Holding Company Act, referred explicitly to a certain type of licensing proceeding and to a certain type of rulemaking proceeding, both of which were made subject to the same hearing requirement and to the same kind of judicial review in the court of appeals. It would therefore require a considerable stretching of the language of the Atomic Energy Act to hold that the word "order" in § 2239(d) of the Atomic Energy Act included rules made in infor-
the procedural requirements of sections 556 and 557. More specifically, the amendment should make it clear that the agency may prescribe procedural regulations that would provide for the building of a record by the exchange of documentary materials without the intervention of an administrative law judge or any other specified officer of the agency, reserving to the agency itself the authority to decide whether an oral hearing, with or without an opportunity for cross-examination, should be held. Such an amendment of the APA would in effect codify, in very general terms, the procedural law which has been built up by the courts of appeals in the past decade.

Another possible amendment to the APA is the adoption of Dean Auerbach's proposal for a two-stage rulemaking procedure. The first stage would be held before issuance of the rule and would conform to the original understanding of section 553, with no thought of providing a record for judicial review. The second stage would be initiated by a protest after issuance of the rule and would consist of a hearing adequate for the purposes of resolving any disputed issues of fact, law, or policy raised by the protestant and of providing an adequate record for judicial review. The first stage would be mandatory in all cases not already excepted from section 553. The second stage would be optional but would be a precondition to the filing of a petition for judicial review.

Constitutional Right to a Fair Hearing

Of course, it is unlikely that such an amendment of the APA will be accomplished in the near future. Meanwhile, the courts of appeals must do the best they can with the implications of the Vermont Yankee opinion. To some extent they may have to face up to the possibility of "constitutional constraints" despite the cavalier dismissal of the issue in the Rehnquist opinion. A private party directly subject to a regulation which significantly inhibits his freedom of action or substantially impairs his property

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Special note should also be taken of Siegel v. Atomic Energy Comm'n, 400 F.2d 778 (D.C. Cir. 1968), holding that rulemaking proceedings conducted pursuant to § 2239(a) of the Atomic Energy Act need comply only with § 553 rather than with §§ 556 & 557. Presumably, both counsel for the intervenors and the court of appeals in Vermont Yankee regarded Siegel as dispositive of any claim that §§ 556 & 557, rather than § 553, applied to rulemaking proceedings under § 2239(a) of the Atomic Energy Act.


Attention should also be directed to the proposals for amendment of the APA found in S. 2490, 95th Cong., 2d Sess. (1978); S. 1721, 95th Cong., 1st Sess. (1977); S. 1720, 95th Cong., 1st Sess. (1977).
interests might be in a much stronger position to assert constitutional infirmities than an intervenor representing the public interest, such as the respondent in Vermont Yankee. Such a party might be able to build an impressive constitutional case for at least the basic ingredients of a fair hearing as to significant facts in dispute, even though those facts might pertain to the validity of the regulation rather than to conduct asserted to be in violation of the regulation.

Judicial Review of Sufficiency of Findings

Entirely apart from such a constitutional issue, there remains the responsibility of the reviewing courts with respect to the substantive validity of the regulation—an issue which cannot be entirely divorced from issues of procedural fairness. This was illustrated in Vermont Yankee itself where the exact line between Judge Bazelon's opinion emphasizing procedural deficiencies and Judge Tamm's opinion relying upon "insufficiency of the record" is difficult to draw. This problem is particularly apparent with respect to Dr. Pittman's testimony dealing with the disposal of nuclear waste. Judge Bazelon's objection was that this testimony was not subjected to the tests of cross-examination, interrogatories, or any other "probing of its underlying basis." Judge Tamm's objection was that the court could neither conclude confidently from this record whether the Commission's staff considered all relevant factors, including the facts petitioners call to our attention, in reaching the figures embodied in Table S-3; nor... conclude from Dr. Pittman's oral statements, substantially devoid of documentation, whether these figures represented conclusions drawn from more exhaustive research into the waste storage problem conducted by the head of the Commission division charged with this task.

Presumably, as Judge Bazelon suggested, questions or interrogatories directed to Dr. Pittman or to the Commission staff might have elicited the kind of information or documentation that Judge Tamm found wanting. Conversely, if questions or interrogatories with respect to the conclusory statements of Dr. Pittman or of the staff had been invited from all participants and had not been forthcoming, the reviewing court might have felt justified in treating such statements as the generally accepted or conventional

70. Record, supra note 9, at 776-800, 830-35.
72. Id. at 659.
wisdom of the various intellectual disciplines involved. Thus the substantiality of the record to support the ultimate findings or conclusions of the agency may indeed depend at least in part upon the adequacy of the procedures to assure a full exploration of the issues involved. If this should become the prevailing attitude of the reviewing courts, they could state their conclusions in substantive rather than in procedural terms and yet leave explicitly open the possibility that an opportunity for more exploratory procedures would add strength to the ultimate conclusions of the agency. Whether the adoption of such a formula for judicial review of agency determinations would indeed meet the strictures of the Vermont Yankee opinion is, to say the least, doubtful. A more promising approach would probably be to adopt the formula of the first Chenery decision, holding that although the result may be acceptable, the reasons are inadequate, and remanding with an opportunity to provide a better statement of reasons, including more complete documentation.

In any event, there seems to be general agreement on the proposition that direct judicial review in the courts of appeals of rules made in informal section 553 proceedings implies at least authority in the reviewing court to determine whether the administrative record is indeed adequate for the purposes of judicial review. How authority to make that determination can be divorced from oversight of the procedures used in developing the record is the puzzling question left in the wake of the Vermont Yankee opinion.

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