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VERMONT YANKEE AND THE EVOLUTION OF ADMINISTRATIVE PROCEDURE: ADDITIONAL COMMENTS AND REFLECTIONS

by

Patrick Charles McGinley*

THE SUPREME COURT's recent decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[1] represents a sweeping denunciation of lower federal courts' treatment of "notice and comment" rulemaking.[2] This commentary will review that decision and its impact on the development of administrative law.[3]

NOTICE AND COMMENT RULEMAKING

"Notice and comment" rulemaking under the Administrative Procedure Act (APA)[4] requires an agency to publish notice of proposed action in the Federal Register and afford interested persons an opportunity to submit comments. When a final rule is adopted it must be accompanied by a written explanation for its adoption.

This informal "notice and comment" procedure allows for considerably less participation by interested persons in the rulemaking process than the more formal APA "on the record"[5] or adjudicatory

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[1] 435 U.S. 519 (1978), *rev'g by a unanimous court* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976).

[2] For general discussions of "notice and comment" rulemaking *see*, Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974); Stewart, *The Development Of Administrative And Quasi-Constitutional Law In Judicial Review Of Environmental Decisionmaking: Lessons From The Clean Air Act*, 62 IOWA L. REV. 713, 729-33 (1977); Williams, *"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975); Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L. J. 38 (1975) [hereinafter cited as Pedersen]; Stewart, *The Reformation Of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) Fuchs, *Development And Diversification In Administrative Rulemaking*, 72 NW. U. L. REV. 83 (1977); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 6 (2d ed. 1978) [hereinafter cited as 1 K. DAVIS, ADMIN. LAW TREATISE].

[3] *See also* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: *Three Perspectives*, 91 HARV. L. REV. 1804 (1978); 1 K. DAVIS, ADMIN. LAW TREATISE, *supra* note 2, at §§ 6:35-6:37.

[4] 5 U.S.C. §§ 551, 553 (1976). *See* note 33, *infra*.

[5] *Id.* at §§ 553 (c), 556, 557.

rulemaking which involves trial-type procedures which may include the right to discovery and cross-examination.[6] "On the record" rulemaking is traditionally viewed as accompanying judicial or quasi-judicial proceedings, while "notice and comment" rulemaking is said to be legislative in character (interested parties may comment but the agency officials are free to rely on any factual information they desire without making much information available for judicial review or allowing public response thereto). APA "notice and comment" procedures do not require the compilation of an evidentiary record.[7] In addition, the written explanations for decision making required by the APA was originally seen as a formality and not rigorously reviewed.[8] The APA in section 704, however, directs the courts to review agency action.[9] Section 706 of the APA sets forth the scope of that review.[10]

The result of strict adherence to the literal requirements of the APA was that "judicial review of the merits of agency decisions was necessarily shallow and deferential."[11]

The lack of an adequate record upon judicial review has triggered lower federal courts to devise their own ways of insuring that they could carry out their reviewing functions in a meaningful manner. The courts have required agencies to disclose the factual basis underlying proposed and promulgated rules. Moreover, agencies have been directed to respond both to public comments and criticism of proposed rules and to the data set forth by the agency in support thereof. As a result of such court mandated proceedings there has developed in administrative proceedings what is generally known as "hybrid rulemaking." These judicially prompted procedures have generally resulted in extensively documented written records in federal agency rulemaking, thus significantly enhancing the quality of administrative decision making as well as the opportunity for meaningful judicial review.[12]

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[6]The scope of the "on the record" hearing mandate of section 553 (c) of the APA was limited in United States v. Florida East Coast Railway, 410 U.S. 224 (1973). For a critical examination of that case see, Nathanson, *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 (1975).

[7]*See, e.g.*, Pacific Coast European Conference v. United States, 350 F.2d 197 (9th Cir. 1965), *cert. denied*, 382 U.S. 958 (1965).

[8]*See, e.g.*, Automotive Parts and Accessories Ass'n v. Boyd, 407 F.2d 330, 337 (D.C. Cir. 1968).

[9]5 U.S.C. § 704 (1976).

[10]*Id.* at § 706.

[11]Stewart, *Vermont Yankee And The Evolution Of Administrative Procedure*, 91 HARV. L. REV. 1805, 1812 (1978) [hereinafter cited as Stewart].

[12]For commentary on "notice and comment" and "hybrid rulemaking" *see* note 2, *supra*.

VERMONT YANKEE: THE AGENCY PROCEEDINGS

Vermont Yankee involved the licensing of nuclear power plants and the "notice and comment" rulemaking procedures of the Nuclear Regulatory Commission (NRC). The focus here is on the rulemaking portion of the Court's opinion.

The rule challenged concerned the environmental effects of the disposal of nuclear wastes generated by atomic power plants.[13] Having been grated a permit by the NRC to build a nuclear power plant, Vermont Yankee applied for an operating license.[14] The Natural Resources Defense Council (NRDC) objected on several grounds and hearings were held on the application. Excluded from consideration at the hearings, over NRDC objection, was the issue of the environmental effects of the disposal of nuclear wastes to be produced by Vermont Yankee's plant. This ruling was affirmed by the NRC Appeal Board.[15]

Shortly thereafter the Commission, making specific reference to the Vermont Yankee license, initiated rulemaking proceedings pertaining to nuclear waste disposal, "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 . . . nuclear power reactors."[16]

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[13]Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 638 (D.C. Cir. 1976); indicated that the proposed plant would produce 160 pounds of plutonium wastes yearly during its forty-year life span. Said the Court of Appeals:

> Plutonium is generally accepted as among the most toxic substances known; inhalation of a single microscopic particle is thought to be sufficient to cause cancer. Moreover, with a half-life of 25,000 years, plutonium must be isolated from the environment for 250,000 years before it becomes harmless. Operation of the facility . . . will also produce substantial quantities of other "high level" radioactive wastes [which] . . . must be isolated from the environment for "only" 600 to 1000 years (footnotes omitted).

Id. at 638-39.

See also, Scientists' Institute for Public Information, Inc. v. AEC ("SIPI"), 481 F.2d 1079, 1098 (1973). *But see*, B. Cohen, *The Hazards in Plutonium Dispersal*, Institute for Energy Analysis, Oak Ridge, Tenn. (1975); Bethe, *The Necessity of Fission Power*, 234 SCIENTIFIC AMERICAN 21, 29 (1976).

It should be noted that the term "disposal" may be misleading; the only known means to "dispose" nuclear wastes is to store them in physical isolation for extraordinary time periods until they "break down" naturally.

[14]Licensing of commercial nuclear power plants involves two separate proceedings; first to determine whether the plant should be contructed and the second to determine whether the facility should be licensed to operate. See, Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396, 411 (1961).

[15]*In re* Vermont Yankee Nuclear Power Corp., 4 A.E.C. 930 (1972).

[16]435 U.S. at 528.

Proposed rules were published for public comment in the Federal Register.[17] In a supplemental notice of hearing the NRC set forth the procedures it intended to follow in conducting the rulemaking proceeding.[18] The environmental survey and extensive background documents (prepared by the NRC staff) upon which the proposed rule was premised were made available to the public before hearings were held. Participants in the hearings were afforded an opportunity to present their position. Representation by counsel was permitted; written and oral statements could be given and incorporated into the record. At the conclusion of the hearing, a transcript was made available to the public and the record remained open for thirty days for the filing of supplemental written statements.[19]

After the hearing the NRC issued a rule which required that in a nuclear power plant applicant's environmental report, the environmental effects of management of nuclear wastes should be factored into the environmental costs of licensing nuclear power reactors and should be set forth in a table that had been a part of the Commission's environmental survey. Most important from the environmentalist standpoint was the fact that the rule stated "no further discussion of such environmental effects shall be required"[20] in individual licensing proceedings.

Also of significance was the fact that the rule expressed the conclusion that the environmental effects of nuclear waste disposal were "relatively insignificant."[21]

VERMONT YANKEE IN THE COURT OF APPEALS

On appeal the Court of Appeals for the District of Columbia indicated at the outset that, "an agency may abuse its discretion by proceeding to a decision which the record before it will not sustain, in the sense that it raises fundamental questions for which the agency has adduced no reasoned answers."[22]

After thoroughly examining the administrative record the Court of Appeals found that the rule was supported only by

> generalities . . . not subject to rigorous probing—in any form—but when apparently substantial criticisms were brought to the Commissions's attention, it simply ignored them, or brushed them aside without an answer. . . .
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> . . . .

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[17]37 Fed. Reg. 24,191 (1972).

[18]435 U.S. at 529.

[19]*Id.*

[20]39 Fed. Reg. 14,191 (1974)(subsequently codified in 10 C.F.R. § 51.20(e)).

[21]435 U.S. at 530.

[22]Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 646 (D.C. Cir 1976).

> The Commission's action in cutting off consideration of waste disposal. . .issues in licensing proceedings based on the cursory development of the facts . . . was capricious and arbitrary.[23]

Thus, finding the record to be insufficient to support the rule the court set it aside and remanded to the agency.

THE SUPREME COURT REVERSAL

On certiorari, the Supreme Court reversed and in a harshly-worded opinion remanded to the Court of Appeals.[24]

Justice Rehnquist, speaking for a unanimous Court,[25] found that the Court of Appeals struck down the rule "because of the perceived inadequacies of the procedures employed in the rulemaking proceedings."[26]

The Court used strong language in rejecting the Court of Appeals' position on rulemaking procedures. The Court of Appeals, said the Supreme Court, had "seriously misread or misapplied "[27] applicable law by "engrafting their own notions of proper procedures upon agencies."[28] Justice Rehnquist found the court's decision to be a "serious departure from the very basic tenent of administrative law that agencies should be free to fashion their own rules of procedure."[29]

The sweeping language of the strident denunciation of the Court of Appeals centers on Justice Rehnquist's statement, "Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[30]

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[23] *Id.* at 653, 655.

[24] 435 U.S. at 549.

[25] Justices Blackman and Powell took no part in the consideration or decision of the case. *See* 435 U.S. at 558.

[26] *Id.* at 541. Respondents had argued "that the [Court of Appeals] merely held that the record was inadequate to enable the reviewing court to determine whether the agency had fulfilled its statutory obligation." Justice Rehnquist concluded that while the matter was "not entirely free from doubt" the lower court decision had been based on inadequate administrative *procedures*. *Id.* at 539, 541.

[27] *Id.* at 525.

[28] *Id.*

[29] *Id.* at 544.

[30] *Id.* at 543 (quoting Federal Communications Comm'n v. Schreiber, 381 U.S. 279, 290 (1965); Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940)). The Court indicated that this principle had been upheld in a variety of applications. *See, e.g.*, Civil Aeronautics Bd. v. Hermann, 353 U.S. 322 (1957); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Wallace Corp. v. National Labor Relations Bd., 323 U.S. 248 (1944); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943); Utah Fuel Co. v. National Bituminous Coal Comm'n, 306 U.S. 56 (1939); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933).

The Court went on to categorically reject judicial input into the development of agency rulemaking procedures, "all of this leaves little doubt that Congress intended that the discretion of agencies and *not that of the courts* be exercised in determining when extra procedural devices should be employed" (emphasis added).[31]

Several harms were perceived by the Court to flow from the approach advocated by the Court of Appeals. Agencies required to operate under a vague judicial injunction to employ the "best procedures" would result in agency overreaction—that is, the adoption of full adjudicatory (trial-type) procedures[32] in every case—seriously interfering with the statutory (APA) scheme. The result would be grossly overtaxed agencies which could no longer avail themselves of the efficiencies of informal "notice and comment" rulemaking. Most importantly, the Court found that the adequacy of the record should be judged not by the type of procedural devices employed, but rather by a determination of whether the agency has followed the procedures mandated by statute, here the APA. [33]

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[31]435 U.S. at 546.

[32]Such procedures would include pre-hearing discovery and cross-examination.

[33]5 U.S.C. § 553 (1976). Section 553 provides:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making 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 the law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, (emphasis added) this subsection does not apply—.

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

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

In concluding, Justice Rehnquist stated:

> In short, nothing in the APA, . . . , the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least a statutory minima, a matter about which there is no doubt in this case.[34]

IMPORT OF THE SUPREME COURT OPINION

The thrust of the Court's message in *Vermont Yankee* is clear. In disapproving judicial involvement in agency procedures the Court seems to cast aside the "hybrid rulemaking" procedures painstakingly developed by the courts of appeal over the last decade.[35] The lower federal courts have grafted those procedures on the "notice and comment" rulemaking procedures outlined in section 553 of the APA—precisely the type of judicial intervention condemned by the Court in *Vermont Yankee.*

In one fell swoop the Supreme Court has shaken the foundation of what Professor Davis has recognized as "the general excellence of the new system of rulemaking procedure that has suddenly developed during the 1970's . . . ."[36]

Davis attempts to dismiss *Vermont Yankee* as an unrealistic guide to the future role to be played by courts in administrative rulemaking procedure.[37] He bases this view on an analysis which concludes that the language of *Vermont Yankee* has implications much broader than the Court could possibly have intended because he finds that the Court's statements are "largely at variance with previous Supreme

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tunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a a restriction;
(2) *interpretative rules and statements of policy; or*
(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

[34] 435 U.S. at 548.

[35] 1 K. DAVIS, ADMIN. LAW TREATISE, *supra* note 2, at 611.

[36] *Id.* at 627

[37] *Id.* at 612.

Court law,"[38] even though the Court indicated no intent to change that law.

While Professor Davis views *Vermont Yankee* as aberrational, other distinguished commentators like Professor Byse welcome the Court's opinion "as a needed corrective to an unwholesome trend [development of hybrid rulemaking procedures] in the lower federal courts."[39] The upshot of Byse's commentary is that courts should play an extremely limited role in establishing rulemaking procedures for administrative agencies.

Says Byse:

> I agree . . . that there may be instances in which compliance with the minimum notice, comment, and statement requirements of section 553 would not produce an adequate record for review and that therefore additional procedures would be appropriate. But this observation hardly compels the conclusion that it is the province of the courts to impose such procedures. Additional procedures should not be imposed by the reviewing court, except possibly as a last resort or, as the *Vermont Yankee* opinion states, in compelling circumstances.[40]

Professor Byse opts for an approach adopted by the Administrative Conference of the United States.[41] The Administrative Conference recommendations, in effect, place the burden on the agency and not

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[38]*Id.* at 611. Professor Davis suggests that the Court misreads the two cases it relies on in concluding that the APA establishes maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Those two cases, United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), and United States v. Florida East Coast Railroad Co., 410 U.S. 224 (1973), "Neither . . . held *or said* anything at all about a maximum limit on courts or about unwillingness of Congress 'to have the courts' do or not do anything." 1 K. DAVIS, ADMIN. LAW TREATISE, *supra* note 2, at 612.

[39]*See* Byse, *Vermont Yankee And The Evolution Of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978) [hereinafter cited as Byse]. *See also* Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978).

[40]Byse, *supra* note 39, at 1824.

[41]The Administrative Conference of the United States was created in 1964 as a permanent federal agency, established by statute to be a peer of the major independent regulatory agencies. 5 U.S.C. §§ 571-75 (1976) (orginally enacted as 78 Stat. 615 (1964)). The Conference is comprised of 75 to 91 persons, a majority of whom always must be representatives from the various Executive Departments and federal agencies; private citizens are a strong minority of the composition of the Conference. The theory behind the creation of the commission is that the various federal agencies can work together effectively to revise and improve their practices and procedures.

the courts to develop adequate procedures to insure a full and fair hearing and reasoned administrative decision-making.[42]

Professor Byse recognizes that although in his view the agency has responsibility for deciding what procedures to use, the courts have their own role to play as reviewer of agency decisions. Byse suggests, however, that judicial grafting of procedural requirements onto agency and APA required procedures is not necessary to insure meaningful

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[42] 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 66-67 (1970-1972); ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1976 Report 44-47 (1977). The Conference suggests that procedures in addition to those outlined in the APA should sometimes be required by an agency where there are:

> circumstances tending to suggest the desirability of using such procedural devises are that (1) the scientific, technical, or other data relevant to the proposed rule are complex; (2) the problem posed is so openended that an agency may profit from receiving diverse public views before publishing a proposed rule for final comment; and (3) the costs that errors in the rule may impose, including health, welfare, and environmental losses imposed on the public and pecuniary expenses imposed on the affected industries and consumers of their products, are significant.

Id. at 45.

Professor Byse listed specific additional procedures which were suggested:

> 1. Providing from the outset for the possibility of two cycles of notice and comment when the agency anticipates that the issues will be unusually complex, as when the notice of proposed rule making is expressed in general terms.
> 2. Providing for a second cyle of comment when comments filed or the agency's response to such comments present important new issues or serious conflicts of data.
> 3. Incorporating in the notice a summary of the agency's attitudes toward the critical issues in the proceeding and a description of the data on which the agency relies.
> 4. Providing an explanation of the tests and other procedures utilized by the agency and a statement of the significance the agency has attached to them.
> 5. Holding conferences with interested groups to resolve, narrow, or clarify disputed issues.
> 6. Hearing argument of other oral presentation at which agency officials may ask questions, including questions submitted by interested persons.
> 7. Allowing cross-examination to resolve specific issues of fact when the agency considers that to be appropriate.

Byse, *supra* note 39, at 1825.

The Conference concluded:

> An agency should employ any of [these] devices . . . or permit cross-examination only to the extent that it believes that the anticipated costs (including those related to increasing the time involved and the deployment of additional agency resources) are offset by anticipated gains in the quality of the rule and in the extent to which the rulemaking procedure will be perceived as having been fair.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1976 Report 45-47 (1977).

judicial review. Rather, he accepts "remand [to the agency] for further consideration"[43] as the proper judicial route.

THE RATIONALE FOR DECISION: A CRITICAL VIEW

At the outset of this phase of discussion, one must emphasize the single most astounding aspect of the Supreme Court's opinion in *Vermont Yankee*. Having read and re-read the opinions of both federal courts here involved, I conclude that the Supreme Court's condemnation of the Court of Appeals is based upon assumptions that are unsupported by any fair interpretation of Judge Bazelon's opinion.

The Supreme Court's opinion states that "while the matter is not entirely free from doubt,"[44] the lower court voided the rule at issue "because of perceived inadequacies of the procedures employed in the rule making proceedings"[45] by the agency.

It is true that Judge Bazelon's opinion stressed the inadequacies of NRC fact finding procedures. Indeed, in stressing the inadequacy of such NRC procedures, Judge Bazelon suggested that different procedures might have to be employed by the NRC upon remand:

> 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.[46]

While setting forth suggestions for greater procedural flexibility in "notice and comment" rulemaking, the Court of Appeals' opinion falls far short of directing the agency to apply particular procedures; in fact Judge Bazelon emphasizes that, "[w]e 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. . . . *[T]he procedures* the agency *adopted in this case*, if administered in a more sensitive, deliberate manner, *might suffice*."[47]

If there be any remaining doubt as to whether the Court of Appeals was, as the Supreme Court alleged, interfering with an agency's freedom to fashion its own rules of procedure,[48] it should be dispelled by the lower court's unequivocal denial of such an intent: "By listing other techniques, . . . , which might aid the Commission in compiling an adequate record, we do not intimate that it must adopt any of

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[43]Byse, *supra* note 39, at 1827 (quoting 435 U.S. at 549).
[44]435 U.S. at 541.
[45]*Id.*
[46]547 F.2d at 653.
[47]*Id.* at 653-54 (emphasis added).
[48]435 U.S. at 544.

them. What is of concern to us is that the record after remand disclose a thorough ventilation of the issues."[49]

There is, in my view, simply no support for the Supreme Court's assertion that the Court of Appeals had "overturn[ed] the rulemaking proceeding on the basis of the procedural devices employed . . . by the Commission . . . ."[50]

The lower court's focus on the procedures employed, was a practical attempt to inform the agency of ways in which what was an inadequate record could be adequately supplemented. It was clearly the adequacy of the record in the first instance that triggered remand—the discussion of additional procedures was merely intended as a helpful suggestion rather than a judicial mandate—and as such was mere surplusage, not at all essential to the decision to remand.

Thus it appears that the Supreme Court's harshly worded criticism of the Court of Appeals' opinion and its seeming rejection of evolving hybrid-rulemaking procedures is based on assumptions completely debased by a cursory reading of the lower court's opinion.

It is certainly important to discuss the relative inaccuracy of the Supreme Court's analysis of the lower court opinion; however, such a discussion does not detract from the fact that *Vermont Yankee* is the law, so to speak. Thus, in reflecting upon the import of the case one must grapple with its substantive impact on administrative law. The crux of *Vermont Yankee* is its implications on the fact-finding procedures which attach in "notice and comment" rulemaking.

While the Supreme Court emphatically rejected judicial interference with agency discretion in developing such procedures, the Court would be hard pressed to disagree with the proposition that Congress itself has sanctioned judicial intervention of far greater import. In section 706 of the APA, Congress imposes on a reviewing court the duty to, *inter alia:*

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;[51]
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> . . . .

Congress has recognized the courts as the primary watchdog of administrative agencies. The courts may strike down agency action which misinterprets enabling legislation; they may remand because the agency (as determined by a review of the record) has acted ar-

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[49] 547 F.2d at 654 n. 58.
[50] 435 U.S. at 548. *See* note 34 and accompanying textual material, *supra.*
[51] 5 U.S.C. § 706 (1976).

bitrarily; and they may void agency action which impinges on constitutional rights. In short, it is an overriding congressional concern that agencies act according to their statutory charters to carry out congressional directives, and moreover, that agencies act with deference to constitutional concerns.

Although not raised in *Vermont Yankee*, it could logically be argued that the power of the courts to oversee agency procedures may fairly be implied from section 706 of the APA. It seems an inescapable conclusion that a court may be greatly impeded in ferreting out administrative action which subtly, expediently or otherwise exceeds statutory authority. Can legislatively mandated judicial review be effective if agencies are given procedural *carte blanche*? Would a Congress which granted substantive judicial review powers to the courts have intended at the same time to completely bar them from overseeing procedural matters which could just as easily be used to circumvent a statutory mandate?[52]

Professor Davis argues in the same vein that the *Vermont Yankee* court could not have meant that courts may not do their own thinking:

> in the light of their own understanding of procedural justice, when they carry out 5 U.S.C. §706(2)(D), which provides: 'The reviewing court shall— . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—. . .(D) without observance of procedure required by law . . . .' The last word is 'law' not 'statute,' and 'law' includes the ever-growing common law.[53]

Moreover, contrary to the suggestion of the *Vermont Yankee* court, there is nothing in the legislative history of the APA that suggests that Congress intended that only agencies may decide when and what procedural devices should be used in "notice and comment" rulemaking.

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[52]It is said that constitutional separation of powers concerns deter the courts from intervening in congressional fact-finding and law-making procedures, and by analogy the courts should not interfere with the quasi-legislative activities of administrative agencies, e.g., "notice and comment" rulemaking.
See Byse, *supra* note 39.

While such separation of powers arguments may be persuasive when judicial intervention in congressional procedures is involved, the same argument carries considerably less cogency when applied to administrative agencies. Thus, while Congress may doubtless be the judge of its own legislative procedures, it is submitted that when it bestows upon an agency the power to flesh out general legislative mandates, the procedures utilized by such an entity are not similarly sacrosanct nor are they so intended by Congress. A quasi-legislative decision by an agency is, very simply, not the same as legislative action by Congress itself. If it were the same, Congress would not in the APA have authorized judicial review. To reiterate, the overriding concern of Congress is that agencies follow statutory directives—and Congress intends that the Courts play an important role in achieving this end.

[53]1 K. DAVIS, ADMIN. LAW TREATISE, *supra* note 2, at 610.

The legislative history referred to in *Vermont Yankee* does indicate that agencies are to be given discretion in fashioning procedures; but in that history there is absolutely no explicit or implicit support for the proposition that Congress intended that the judiciary be barred from input into all procedural questions. Congressional prohibition of judicial oversight, at least in some minimally intrusive way, makes little sense.

On the contrary, there is no entity in our governmental system more experienced or better equipped than the judiciary to oversee the maintainance of procedures which insure both compliance with statutory mandates and a fair hearing for all concerned. Is there anything in the nature of an administrative agency that suggests it and it alone is best equipped to decide such issues? To put the question is to answer it.

It should not be overlooked that the procedural model recommended by the Administrative Conference of the United States and endorsed as a preferable alternative to judicial intervention by Professor Byse[54] is, in large part, a creature of hybrid rulemaking procedures developed by the lower federal courts.[55] It should also be observed that the Supreme Court in *Vermont Yankee* overlooked a very recent indication of congressional approval of judicial intervention in agency procedures. In enacting the Clean Air Act Amendments of 1977,[56] Congress included the essence of hybrid rulemaking into its amendment to the judicial review section.[57] In so doing Congress indicated its acceptance of evolving hybrid rulemaking.[58]

Moreover, Congress explicitly authorizes courts to become involved in reviewing agency procedures in section 307(d)(9)(D) of the Clean Air Act. The House Report states:

> In deciding whether or not . . .reversal is warranted on procedural grounds, the court is directed to consider two factors. The first is whether the Administrator's determination on the procedural point is 'arbitrary or capricious.'

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[54]Byse, *supra* note 39, at 1825-26.

[55]*See* Stewart, *supra* note 11, 1819. Professor Stewart states:

> The . . . best approach is for courts to provide guidance for administrators and litigants by requiring the use of hybrid procedures likely . . . to produce an adequate record for judicial review. Judicial leadership in this area has in most instances been tempered by realistic awareness of the need for administrative flexibility and the drawbacks of excessive procedural formalities. The highly useful "paper hearing" innovations, which have resulted from a process of judicial prod and agency response, have been endorsed by Congress and the Administrative Conference (footnotes omitted).

[56]42 U.S.C. §§ 7401-7642 (1977).

[57]42 U.S.C. § 7607 (1977).

[58]*See* Pedersen, *supra* note 2, at 45.

> The second is whether procedural errors 'were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.'[59]

The Clean Air Act Amendments pointedly affirm congressional faith in the judicial review function in general, and the courts' development of hybrid rulemaking in particular. In light of congressional action with regard to judicial review of agency procedural matters it seems all the more obvious that the focal point of congressional concern with regard to judicial review of agency "notice and comment" rulemaking (be it substantive or procedural) is not to guard against judicial usurpation of agency perogatives—but rather, quite rightly—to insure that the agencies fully comply with their statutory mandate. To the extent that deficient agency procedures interfere with this object the courts (utilizing their experience and expertise in procedural matters) can and should play a limited, albeit important, role in overseeing agency procedures.

Summarizing the impact of *Vermont Yankee* on administrative law, Professor Davis' analysis of the case is worth repeating:

> The Vermont Yankee opinion is largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority. The Court lacks power to change the law through sweeping generalizations that are unsupported by close analysis. When the Court is unanimous, it has enormous power to change the law by carefully considering all facets of the problem before it and by systematically answering the reasonable questions about the problem that an informed person would raise. The Vermont Yankee opinion is not that kind of opinion.[60]

One can only hope that *Vermont Yankee* is, indeed, aberrational and that the courts may continue their enlightened oversight of the evolution of administrative procedures.

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[59]H. R. REP. NO. 294, 95th Cong., 1st Sess. 2, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1077, 1401.

[60]1 K. DAVIS, ADMIN. LAW TREATISE, *supra* note 2, at 616.