A Specific Proposal for Hybrid Rulemaking

I. INTRODUCTION

Since its passage by unanimous vote of both houses of Congress in 1946[1] the Administrative Procedure Act ("APA")[2] has governed adjudication[3] and rulemaking[4] by federal administrative agencies. Rulemaking, under the APA, is the agency process for formulating "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy."[5] It is the procedure appropriate for formulating policies and regulations affecting large numbers of persons. This is in contrast to adjudication, an adversarial or "trial-type" proceeding in which factual issues, concerning a limited number of parties, are subject to "final disposition."[6]

The APA[7] provides two models of rulemaking: formal and informal. "Formal rulemaking," held "on the record,"[8] is subject to the same section 556 and section 557[9] procedural requirements as is adjudication: opportunity for oral presentation, cross-examination and rebuttal.[10] Reviewing courts are to set aside agency rules "unsupported by substantial evidence"[11] present in the record. Nor-

1. *See* Williams, *Fifty Years of the Law of the Federal Administrative Agencies—And Beyond*, 29 FED. BAR J. 267, 268 (1970).

2. P.L. 79-404, 60 Stat. 237 (1946) (as codified in 5 U.S.C. §§ 551-559, 701-706, 1305, 3106, 3344, 4301, 5335, 5362, 7521 (1976 & Supp. II 1978)).

3. 5 U.S.C. § 554 (1976 & Supp. II 1978).

4. 5 U.S.C. § 553 (1976).

5. 5 U.S.C. § 551(4) (1976).

6. 5 U.S.C. § 551(6) (1976); *see* Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585 (1972).

7. 5 U.S.C. § 551-559, 701-706, 1305, 3106, 3344, 4301, 5335, 5362, 7521 (1976 & Supp. II 1978).

8. 5 U.S.C. § 553(c) (1976).

9. 5 U.S.C. §§ 556, 557 (1976 & Supp. II 1978).

10. 5 U.S.C. § 556(d) (1976). Note, however, that "[i]n 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." *Id.*

11. 5 U.S.C § 706(2)(E) (1976).

mally, the agency produces a written opinion discussing the evidence and stating its factual findings, to facilitate judicial review.[12]

By contrast, section 553 "informal rulemaking" proceedings consist mainly of general notice of the proposed rule and receipt of public comments.[13] No record is developed and no trial-type hearing is provided.[14] Agency decisions need not be based either wholly or in part upon comments received, and the agency is free to consider, without notice to the public, any information it deems relevant.[15] Judicial review is limited to a very deferential standard; rules may be invalidated if found to be arbitrary and capricious or an abuse of discretion but not if merely contrary to the weight of the evidence presented.[16]

The flexible and relatively speedy procedures employed in section 553[17] rulemaking may be generally appropriate to policymaking, but, when policy decisions are necessarily based upon complex factual determinations, there must be a greater opportunity for public participation, agency accountability and stringent judicial review. The solution, then, is to design a "hybrid rulemaking" procedure which offers full exploration of factual issues and a high degree of agency accountability without the cumbersome trappings of an adjudicatory proceeding.

This note will explore the history of both judicial and nonjudicial attempts to produce a hybrid rulemaking procedure. Part II focuses on the 1978 Supreme Court case, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* ("*Vermont Yankee*"),[18] which ended judicial efforts to create such a hybrid procedure through the creative use of remands to an agency for further proceedings. Included in this section is a discussion of those modifications which courts have successfully grafted onto statutorily mandated minimum procedures and which are still oper-

12. *See* 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 (1977).

13. 5 U.S.C. §§ 553(b), 553(c) (1976).

14. 5 U.S.C. § 553 (1976). *See* 5 U.S.C. §§ 556(d), 556(e) (1976) for trial-type procedures and record-making requirements for adjudication and formal rulemaking.

15. 5 U.S.C. § 553 (1976). Note that in formal rulemaking the record "constitutes the exclusive record for decision . . ." 5 U.S.C. § 556(e) (1976).

16. 5 U.S.C. § 706(2)(A) (1976).

17. 5 U.S.C. § 553 (1976).

18. 435 U.S. 519 (1978).

ative today despite the *Vermont Yankee* decision.[19] Part III outlines the suggestions for hybrid rulemaking generated by academic debate and explores a few examples of the somewhat spotty congressional activity[20] in this field. A specific series of amendments to the APA[21] and a section-by-section analysis of these proposals are included in Part IV. This proposal represents but one possible method for incorporating the best suggestions presented in judicial, academic and legislative activity into a cohesive procedure designed to achieve more responsible policymaking in areas requiring complex factual determinations.

II. VERMONT YANKEE AND THE JUDICIAL ATTEMPTS AT HYBRID RULEMAKING

Vermont Yankee[22] concerned an appeal[23] from action taken by

19. *Id.*

20. *See, e.g.*, the special rulemaking procedures of The Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976); the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 45, 46, 49, 50, 52, 56, 57a, 57b, 57c, 2301-2312 (1976 & Supp. III 1979); the Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. I 1977).

21. 5 U.S.C. §§ 551-559, 701-706, 1305, 3106, 3344, 4301, 5335, 5362, 7521 (1976 & Supp. II 1978).

22. 547 F.2d 636 (D.C. Cir. 1976), *rev'd* 435 U.S. 519 (1978).

23. The Vermont Yankee case actually concerns two appeals. Appeal Number 74-1385 involved a proceeding to license the Vermont Yankee Nuclear Power Plant near Vernon, Vermont. Petitioners Natural Resources Defense Council, Inc., and other public interest groups, *see* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 637 n.2 (D.C. Cir. 1976), sought consideration of the environmental effects of nuclear wastes to be generated by the reactor, in accordance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4346 (1976).

Licensing proceedings encompass two determinations; first, whether the facility should be constructed, and second, whether it should be licensed to operate. License proceedings are held before a three-member Atomic Safety and Licensing Board, 42 U.S.C. § 2241 (1976), and reviewed by the Atomic Safety and Licensing Appeals Board. The Nuclear Regulatory Commission, however, considers appeals which present "major or novel questions of policy, law or procedure." 10 C.F.R. § 2.785(a) (1981), 42 U.S.C. § 2241(d)(1) (1976). *See* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 637 n.4 (D.C. Cir. 1976).

The Appeals Board held that Licensing Boards need only consider nuclear wastes in the context of transportation and need not consider the operations of the reprocessing plants or the disposal of wastes in individual licensing proceedings. *In re* Vermont Yankee Nuclear Power Corp., ALAB-56, 4 AEC 930 (June 6, 1972), I-JA 72, 76. *See* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 637 n.5 (D.C. Cir. 1976). Petitioners appealed.

the Atomic Energy Commission ("Commission") (now in part the Nuclear Regulatory Commission ("NRC")).[24] The Commission had concluded that the environmental effects of the nuclear fuel cycle, including waste disposal,[25] were "relatively insignificant."[26] It promulgated a rule requiring certain numerical values to be factored into the cost-benefit analysis for an individual reactor, and stated that "[n]o further discussion of such environmental effects shall be required."[27]

Petitioners contended that the rulemaking procedures employed by the Commission "denied them a meaningful opportunity to participate in the proceedings as guaranteed by due process."[28] The Commission had utilized the required section 553[29] procedures, by scheduling an informal hearing and soliciting oral and written comments.[30] Subsequent notice designated a three-member presiding board, and stated "the procedural format for the hearing will follow

The second appeal, No. 74-1586, concerns the rulemaking proceedings instituted with respect to the Appeals Board decision. 37 Fed. Reg. 24,191 (1972) (II-JA). It is this second appeal to which this note refers.

24. The Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 abolished the Atomic Energy Commission ("AEC"). AEC regulatory functions were delegated to the Nuclear Regulatory Commission (substituted as formal respondent in this action) while its developmental functions were transferred to the Energy Research and Development Agency ("ERDA") (now the Department of Energy) ("DOE"). "Commission" will refer to both the AEC and the NRC for the purposes of this note.

25. "The most important nuclear wastes are those produced directly in the nuclear fuel, the so-called high level wastes . . . .

"In the chain reactions which produce nuclear power, the uranium nuclei are fissioned into two nuclei . . . [or] uranium may be transformed into heavier elements. . . . [T]he elements thus produced are called the actinide elements. A large fraction of the fission products and all the actinides are unstable, and their decay to stable nuclei constitutes the radioactivity of used reactor fuel.

". . . The most important nuclei, in terms of waste disposal hazards, are the fission products strontium-90 (29 year half-life) and cesium-137 (30 year half-life), and the actinides plutonium-238, plutonium-239, plutonium-240, and americium-241 (86 year, 24,400 year, 6,600 year and 433 year half-lives respectively)." Bodansky and Schmidt, *Safety Aspects of Nuclear Energy*, in THE NUCLEAR POWER CONTROVERSY 18, 19 (A. Murphy ed. 1976).

26. 39 Fed. Reg. 14,190 (1974) (II-JA, 508).

27. 39 Fed. Reg. 14,188, 14,191 (1974) (II-JA 507, 509) (codified as 10 C.F.R. § 51.20 (1975)). *See* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 638 n.7 (D.C. Cir. 1976).

28. Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 643 (D.C. Cir. 1976).

29. 5 U.S.C. § 553 (1976).

30. 37 Fed. Reg. 24,191 (1972).

the legislative pattern, and no discovery or cross-examination will be utilized."[31] Petitioners did not contend that the Commission had no authority to proceed with a section 553 rulemaking procedure rather than with adjudication; instead, they relied on the line of cases mandating, under certain circumstances, judicial imposition of procedural requirements beyond the minimum prescribed by the APA.[32] The Government conceded that while "considerations of fairness" under "exceptional circumstances" might justify additional procedures, the proceedings of the Commission in this case had adequately ventilated all issues.[33]

Judge Bazelon, writing the opinion of the Court of Appeals for the District of Columbia, recognized that "[a]bsent extraordinary circumstances, it is not proper for a reviewing court to prescribe the procedural format which an agency must use to explore a given set of issues."[34] But this practice, he continued, does not preclude scrutiny of the entire record to ensure that "genuine opportunities to participate in a meaningful way were provided, and that the agency has taken a good, hard look at the major questions before it."[35] The court must "satisfy itself that the decision was based 'on a consideration of the relevant factors' "[36] and that "not only a diversity of informed opinion was heard, but that it was genuinely considered."[37]

Reviewing the record, Judge Bazelon concluded that the Commission had relied on "vague assurances by agency personnel that

31. 38 Fed. Reg. 49 (1973); *see* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 643 n.22 (D.C. Cir. 1976).

32. Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 643 n.23 (D.C. Cir. 1976).

33. *Id.* at 643 nn.24, 25.

34. *Id.* at 644.

35. *Id.*

36. *Id.* at 646 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

37. Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 646 (D.C. Cir. 1976). Note that in a § 553 rulemaking proceeding, the APA does not required the agency to consider comments received or to answer criticisms submitted. *But see* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 421 (1974) ("Obviously, a prerequisite to the ability to make a meaningful comment is to know the basis upon which the rule is proposed. . . . It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, critical degree, is known only to the agency.").

problems as yet unsolved will be solved,"[38] rather than fully exploring the potential environmental effects of nuclear waste generation, and, as a result, that "this type of agency action cannot pass muster as reasoned decisionmaking."[39] Refraining from imposing any particular additional procedures,[40] Judge Bazelon did suggest a number of procedures which could help to more fully develop the record.[41] In the alternative, he said, "the procedures the agency adopted in this case, if administered in a more sensitive, deliberate manner, might suffice."[42] If compassionately read by the Supreme Court, this statement could have saved the D.C. Circuit's decision from reversal. It did not compel the agency to employ any additional procedures; it merely required that the record after remand disclose a "thorough ventilation of the issues."[43]

In his concurring opinion, Judge Tamm favored remand to the agency solely because the record was inadequate to support the agency decision.[44] This substantive approach, however, is inferior to the "procedural review of informal rulemaking"[45] advocated by Bazelon. In highly technical areas, judges are "institutionally incompetent to weigh evidence for themselves,"[46] and judicial decision-making is likely to be more reasoned if primarily focused upon agency procedure rather than agency data. Judge Tamm feared that such procedural review would create agency uncertainty as to how much procedure is required, thus leading to the over-formalization of informal rulemaking.[47] Tamm did, however,

38. Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 653 (D.C. Cir. 1976).

39. *Id.*

40. "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." *Id.*

41. His suggestions included "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." *Id.*

42. *Id.* at 653-54.

43. *Id.* at 654 n.58.

44. *Id.* at 658.

45. *Id.* at 657 (Bazelon, C.J., separate statement).

46. *Id. See id.* at 657 n.9.

47. Judge Tamm feared over-formalization would result as administrators clothe their actions " 'in the full wardrobe of adjudicatory procedures,' until the advantages of informal rulemaking . . . are lost . . . ." *Id.* at 660 (Tamm, J., separate statement) (quoting Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 387-88 (1974)).

acknowledge that under extraordinary circumstances, there are those "rare cases" in which just this sort of judicial intervention is required.[48]

The only real difference between Tamm and Bazelon is one of degree. Both agreed that procedural review by the courts could be justified where " 'basic considerations of fairness' require procedures more adversarial that those prescribed by section 553."[49] Tamm, however, dissented[50] from Bazelon's assessment of nuclear waste disposal[51] as an issue deserving more elaborate decision-making procedures than those required, for example, for licensing a television station.

The Supreme Court also disagreed with Judge Bazelon.[52] Writing for the majority, Justice Rehnquist acknowledged that "there are . . . circumstances which would . . . justify a court in overturning agency action because of a failure to employ procedures beyond those required by the [APA],"[53] but he qualified the statement by noting that "such circumstances, if they exist, are extremely rare."[54] In the absence of such extraordinary circumstances, the Court concluded that the judiciary may not require any procedures beyond those bare minima required by the APA.[55] Construing Judge Bazelon's opinion as necessarily requiring such additional procedures,[56] the Court held that "this sort of review fundamentally misconceives the nature of the standard for judicial review of an agency rule"[57] and "can do nothing but seriously interfere with [the administrative] process prescribed by Congress."[58]

48. Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 660-61 (D.C. Cir. 1976).

49. *Id.* at 661.

50. *Id.* at 660.

51. "An illuminating perspective is provided by D. Farney, *Ominous Problem: What to Do with Radioactive Waste*, 5 SMITHSONIAN MAG. 20,—(1974): "The entire recorded history of mankind is but a fraction of the 250,000-year storage time of plutonium. Neanderthal man appeared only 75,000 years ago." *Id.* at 652 n.54.

52. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

53. *Id.* at 524.

54. *Id.*

55. *Id.*

56. "The [Circuit] Court also refrained from actually ordering the agency to follow any specific procedures . . . [citations omitted] but there is little doubt in our minds that the ineluctable mandate of the court's decision is that the procedures afforded during the hearing were inadequate." *Id.* at 541-42.

57. *Id.* at 547.

58. *Id.* at 548.

The Supreme Court decision severely curtailed judicial use of remands to encourage agencies to employ procedures beyond those required by the APA[59] and thereby generate more adequate evidentiary records. There is little doubt that either an expansion of the doctrine of "extraordinary circumstances" justifying such impositions or a congressional mandate for the regular use of hybrid rulemaking procedures is now necessary. "[W]hen we are faced with questions of the complexity and magnitude of nuclear power," Judge Bazelon has written, "only full-ranging inquiries with broad opportunity to participate can provide us the assurance that . . . all the questions are explored."[60] Further, according to Professor Richard Stewart, the Court ignores the "shift by agencies from adjudication to rulemaking in deciding policy, and the corresponding need for developing new procedures that will generate an adequate evidentiary record enabling courts to review the substantive validity of agency decisions."[61]

The need for hybrid rulemaking goes beyond a mere reaction to the *Vermont Yankee*[62] decision. Since 1946, two polar trends have developed in the field of administrative law. Responding to the increase in volume and complexity of their work, agencies have replaced case-by-case adjudication with rulemaking proceedings for the formulation of administrative policy.[63] Such informal rulemaking procedures have the advantage of great freedom from the strict procedures necessary for individual fairness found in adjudications.[64] The growing realization of the great legislative power delegated to federal agencies, however, coupled with a mounting distrust of the soundness of agency decision-making, has led courts to scrutinize more closely the substantive bases of these decisions.[65] Presently, the APA provides little aid in reconciling these tensions. Formal, "on-the-record" sections 556 and 557 rulemaking, mimicking adjudicatory proceedings in its cross-examinations and

59. 5 U.S.C. § 551-559, 701-706, 1305, 3106, 3344, 4301, 5335, 5362, 7521 (1976 & Supp. II 1978).

60. Bazelon, *Risk and Responsibility*, 65 AM. BAR ASS'N J. 1066, 1069 (1979).

61. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978) [hereinafter cited as Stewart].

62. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

63. Stewart, *supra* note 61, at 1811.

64. *See* Am. Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966).

65. Stewart, *supra* note 61, at 1816.

modified trial-type procedure, has been seriously curtailed since 1973.[66] Informal, section 553 rulemaking, however, provides no rulemaking record for judicial review of the merits of agency action. Agency explanations, traditionally required to be at most a cursory overview, rarely aid in the difficult task of review.[67]

Interestingly enough, the Supreme Court in *Vermont Yankee*[68] acknowledged the need for a formal record in informal proceedings, when it spoke of reviewing "notice-and-comment" rulemaking on the basis of an evidentiary record.[69] This is consistent with earlier Supreme Court decisions requiring a record for review which supports informal agency decision-making.[70] Thus, the *Vermont Yankee*[71] decision implicitly approves the very sort of judicial intervention it purports to forbid.

Ultimately, of course, the Supreme Court opinion could serve a useful function as a restraint on judicial intervention in areas of authority clearly delegated to an agency. This goal, however, can only be served if an adequate record is generated for judicial review, obviating the need to remand for further proceedings and data collection. The Supreme Court has not offered any guidance in this area. Nevertheless, several options present themselves. *De novo* review by federal district courts is available for fresh development of the facts[72] where review is not statutorily lodged in a court of appeals.[73] Unfortunately, *de novo* review is lengthy, subject to the inherent problems of judicial decision-making in areas of agency expertise, and disfavored by the Supreme Court.[74] Al-

66. *See* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973), in which the Supreme Court gives a very restrictive reading to the trigger mechanisms for §§ 556, 557 formal procedure.

67. Stewart, *supra* note 61, at 1812.

68. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

69. *Id.* at 547. *See* Stewart, *supra* note 61, at 1816.

70. *See* Camp v. Pitts, 411 U.S. 138 (1973) (per curiam); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Stewart, *supra* note 61 at 1816.

71. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

72. 5 U.S.C. § 706(2)(F) (1976).

73. Stewart, *supra* note 61, at 1817-18 n.51.

74. "It is quite plain from our decision in [Overton Park] that *de novo* review is appropriate only where there are inadequate factfinding procedures in an *adjudicatory* proceeding, or where judicial proceedings are brought to enforce certain administrative actions." Camp v. Pitts, 411 U.S. 138, 141-42 (1973) (per curiam). (emphasis added)

ternatively, the "on-the-record" requirement[75] which takes cases from informal section 553 rulemaking to the formal sections 556 and 557 rulemaking format could be construed more broadly, thus subjecting far more rulemaking to the more stringent trial-type proceedings. This route has been advocated,[76] but was inexplicably cut short by the Supreme Court.[77] Third, *ad hoc* review of agency actions, (an "I know it when I see it"[78] method), could be employed for case-by-case determinations of the adequacy of agency procedure, but this approach leads to the very uncertainty and potential over-formalization of proceedings which troubled both Judge Tamm and Justice Rehnquist.

Probably, then, the answer to the dilemma of agency freedom juxtaposed with judicial oversight is a hybrid procedure which guarantees a well-developed and comprehensible record. The procedure should be prescribed by statute, to eliminate uncertainty and over-formalization, and its areas of applicability clearly defined, to overcome the Supreme Court's denunciation of judicial overextension.

It is not difficult to find inspiration for the concept of hybrid rulemaking. Courts have long been active in relaxing APA requirements to allow for more reasoned and just results of agency actions. Judicial innovations have included liberalizing the ripeness doctrine[79] and standing requirements[80] and requiring an evidentiary record supplemented by agency explanations, despite the section 553 failure to provide for such a record.[81] These cases indicate a judicial trend towards substantive review unhindered by procedural (ripeness and standing) or statutory (section 553 freedom from record-making) obstacles.

Courts have also felt free to require agencies to employ other non-traditional procedures in section 553[82] rulemaking. In the en-

75. 5 U.S.C. § 553(c) (1976).

76. *See, e.g.*, Nathanson, *The Vermont Yankee Opinion: A Masterpiece of Statutory Misinterpretation*, 16 SAN DIEGO L. REV. 183 (1978).

77. *See* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973).

78. Stewart, *supra* note 61, at 1818.

79. *See* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

80. *See* United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Ass'n of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970).

81. *See* Camp v. Pitts, 411 U.S. 138 (1973) (per curiam); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

82. 5 U.S.C. § 553 (1976).

vironmental field, this has occurred on several occasions.[83] In *International Harvester Corp. v. Ruckelshaus*,[84] the D.C. Circuit Court of Appeals remanded an Environmental Protection Agency ("EPA") denial of a time extension for auto company compliance with new emissions standards and required the EPA to add two new procedures: an "opportunity for cross-examination"[85] and a consideration of matters not previously presented by the parties to the EPA for comment, "including material contained in the technical Appendix filed by the EPA in 1972 subsequent to its [original] Decision."[86] In *Appalachian Power Co. v. EPA* ("*Appalachian Power*")[87] the Fourth Circuit Court of Appeals expounded upon its conception of an "adequate"[88] hearing, which involved cross-examination and some opportunity for an effective challenge to the EPA approach. The D.C. Circuit, in *Portland Cement Association v. Ruckelshaus*[89] expanded upon the "EPA approach" reference in the *Appalachian Power*[90] decision. In considering the EPA rule imposing air pollution standards on newly constructed Portland cement plants, that court declared that the record indicated the manufacturers had had an inadequate opportunity to participate, primarily "due to the absence of disclosure of the detailed findings and procedures of the tests."[91] "Obviously," the court stated, "a prerequisite to the ability to make a meaningful comment is to know the basis upon which the rule is proposed."[92]

III. Suggestions for Hybrid Rulemaking from Non-Judicial Sources

A. *Academic Publications*

Agitation for the creation of a hybrid rulemaking proceeding is not limited to the judicial sphere; suggestions are forthcoming from

83. *See generally* Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. Chi. L. Rev. 401 (1975) [hereinafter cited as Williams].

84. 478 F.2d 615 (D.C. Cir. 1973).

85. *Id.* at 649. Note that the court did say that the cross-examination could be confined "to the essentials, avoiding discursive or repetitive questioning." *Id.*

86. *Id.*

87. 477 F.2d 495 (4th Cir. 1973).

88. *Id.* at 502.

89. 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

90. 477 F.2d 495 (4th Cir. 1973).

91. Portland Cement Ass'n v. EPA, 486 F.2d 375, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

92. *Id.* at 393 n.67.

both Congress and academic circles. From the latter, one scholar has suggested utilization of the so-called "paper hearing"—a form of written cross-examination. Richard Stewart, in his article *Vermont Yankee and the Evolution of Administrative Procedure*,[93] proposed a procedure involving the following elements:

(a) Publication of proposed rules with detailed explanation of their bases;
(b) Public availability of evidentiary and analytical documents (with the exception of intra-agency memoranda) prepared or used by the agency;
(c) The right of interested persons to submit comments and data, to become publicly available;
(d) Public availability of agency documents prepared or used by the agency in response to the comments;
(e) Opportunity for a second round of public comments; and
(f) Publication of the rule adopted, with detailed explanation of its decision and the reasons the agency failed to accede to any critical comments that were relevant and significant.[94]

This procedure has a distinct advantage; it is relatively inexpensive and time-efficient, especially in view of the increased availability of agency data and methodology subjected to public criticism. Thus, the meaningful opportunity to participate is provided, in accordance with *Appalachian Power*,[95] without requiring time-consuming and often unutilized oral cross-examination.[96]

Stephen Williams, in his oft-cited article *Hybrid Rulemaking under the Administrative Procedure Act: A Legal and Empirical Analysis*,[97] outlined a series of possible procedures which might be used in conjunction with informal rulemaking. These include written statements of methodology to be available to public and industry criticism,[98] public hearings with oral and written questions,[99] interrogatories[100] and on- or off-the-record conferences between interested persons and agency technical staff.[101] Each of these procedures has its advantages. Details of methodology allow more so-

93. Stewart, *supra* note 61.
94. *Id.* at 1813-14 n.36.
95. 477 F.2d 495, 502-03 (4th Cir. 1975).
96. *See* Williams, *supra* note 83, at 443-45.
97. Williams, *supra* note 83.
98. *Id.* at 448-51.
99. *Id.* at 451-54.
100. *Id.* at 454.
101. *Id.* at 454-55.

phisticated comments to be solicited from industry and the public. Interrogatories are cumbersome and may require follow-up, but are likely to produce carefully worded and precise answers to detailed questions. Conferences produce somewhat sloppier answers to these questions, but allow a freer exchange of ideas with more follow-up. On-the-record, these conferences allow interested persons to compel an agency to formulate an official statement of its reasons. Off-the-record, conferences are more open, more honest and more focused on the issues.[102]

Another scholar has approached the question of agency thoroughness and accountability from a different angle. In his 1975 article, *Formal Records and Informal Rulemaking*,[103] William Pedersen stated that judicial review is hampered by agency record-making and current litigation strategy.[104] Called upon to defend agency decisions, attorneys will recreate an "historical record,"[105] which consists of thousands of pages of documents. Many were never used during the rulemaking, but are submitted to the court in the hope that somewhere in the mass of paper a justification for the rule may be found.[106] Buried under the enormous, unorganized record, Pedersen stated, no real scrutiny of an agency's original consideration of criticisms submitted or its decisional data-base is possible.[107]

In response to this confusion and ad hoc justification, Pedersen proposed a rulemaking "docket" which will serve as the exclusive record for review:

> First, a rulemaking docket would be established for each proposed rule. . . .
>
> Second, at the time the rule was first proposed in the Federal Register, all documents which the agency decided were of central relevance to the rule would be placed in the file. To ensure that these documents actually had been critically reviewed and were not dumped in for whatever help they could give, each one would have to be discussed in the preamble to the proposed rule or in the accompanying technical support document.
>
> Third, all public comments received during the comment pe-

102. *Id.* at 448-55.
103. 85 YALE L.J. 38 (1975) [hereinafter cited as Pedersen].
104. *Id.* at 70-73.
105. *Id.* at 62-64, 66-70.
106. *Id.* at 66-67.
107. *Id.* at 70-73.

> riod and all transcripts of hearings held concerning the proposal would likewise be placed in the comment file upon receipt by the agency.
>
> Fourth, all documents which become available after the proposal had been published and which the agency decided were of central relevance to the rulemaking would likewise be placed in the file.
>
> Fifth, to ensure that the public comments, hearing transcripts and post-proposal documents had been considered, all important issues raised in them would once again have to be discussed in the preamble to the final rule or in the accompanying technical support document.
>
> Sixth, the final rule, with its support document, would close the file. *The contents of the file would be the exclusive record for judicial review.* (emphasis in the original)[108]

Such a formal, exclusive record may reduce the volume of peripheral materials considered on review, require agencies to truly consider the public comments and criticisms received, ensure public availability of documents the agency in fact has relied upon in its rulemaking and focus the court's attention upon those areas in which actual dispute between agency and public or industry findings exist.[109]

B. *Congressional Action*

Congress, too, has sought to ensure increased and more meaningful public participation in rulemaking, despite its natural tendency to defer to agency expertise on matters of procedure as well as substance.[110] Even knowing that agencies are always free to employ procedures beyond the APA[111] minimum, Congress has such extra procedures in, among others, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Magnuson-Moss Act")[112] and the Clean Air Act of 1977.[113] Congressional attention,

108. *Id.* at 79.

109. *See* Am. Petroleum Inst. v. Costle, 609 F.2d 20, 23-24 (D.C. Cir. 1980) ("In sum, the [exclusive docket requirement of the Clean Air Act Amendments] promotes public participation in rulemaking, reasoned decisionmaking on the record, and judicial review of the agency decision based on the data and reasoning before the agency at the time the decision was made.").

110. *See, e.g.*, note 20 *supra*.

111. 5 U.S.C. § 551-559, 701-706, 1305, 3106, 3344, 4301, 5335, 5362, 7521 (1976 & Supp. II 1978).

112. 15 U.S.C. §§ 45, 46, 49, 50, 52, 56, 57a, 57b, 57c, 2301-2312 (1976 & Supp. III 1979).

113. 42 U.S.C. §§ 7401-7642 (Supp. I 1977 & Supp. II 1978). The Clean Air Act

in these two Acts, has focused on the procedures for notice, record-making and public participation.

Notice, under the Magnuson-Moss Act,[114] requires publication in the Federal Register, in which the agency states "with particularity the reason for the proposed rule."[115] Later the agency must make publicly available the written comments it received.[116] Under the Clean Air Act,[117] notice is a more elaborate affair. Notice of the proposed rule must be accompanied by a statement of its basis and purpose.[118] The statement must include a summary of the factual data support, methodology and major legal interpretations and policy of the rule.[119] In addition, the EPA must cite references to pertinent findings, recommendations and comments by the Scientific Review Committee and the National Academy of Sciences.[120] If the proposed rule differs from these recommendations, an explanation of the deviation must be provided.[121]

The record compiled in a Magnuson-Moss Act[122] rulemaking proceeding includes the rule, a statement of its basis and purpose,[123] transcripts of hearings and cross-examinations, written submissions and "any other information which the [Federal Trade] Commission considers relevant to such rule."[124] Although both petitioners and the Commission may submit additional materials with leave of the court,[125] the final rule must be based on the record.[126] The Clean Air Act[127] formalizes this record-making procedure and

includes the Clean Air Act of 1963 (P.L. 88-206) and amendments made by the Motor Vehicle Air Pollution Control Act (P.L. 89-272, 1965), the Clean Air Act Amendments of 1966 (P.L. 89-675), the Air Quality Act of 1967 (P.L. 90-148), the Clean Air Act Amendments of 1970 (P.L. 91-604), the Comprehensive Health Manpower Training Act of 1971 (P.L. 92-157), the Energy Supply and Environmental Coordination Act of 1974 (P.L. 93-319), Clean Air Act Amendments of 1977 (P.L. 95-95) and Safe Drinking Water Act of 1977 (P.L. 95-190).

114. *See* note 112 *supra*.

115. 15 U.S.C. § 57a(b)(1) (1976).

116. *See* 15 U.S.C. § 57a(b)(2) (1976). See also F. GRAD, TREATISE ON ENVIRONMENTAL LAW 2-108.16 to .20 (1978) [hereinafter cited as F. GRAD].

117. *See* note 115 *supra*.

118. 42 U.S.C. § 7607(d)(3) (Supp. I 1977).

119. 42 U.S.C. §§ 7607(d)(3)(A)-7607(d)(3)(C) (Supp. I 1977).

120. 42 U.S.C. § 7607(d)(3) (Supp. I 1977).

121. *Id.*

122. *See* note 112 *supra*.

123. 15 U.S.C. § 57a(e)(1)(B) (1976).

124. *Id.*

125. 15 U.S.C. § 57a(e)(2) (1976).

126. *See* 15 U.S.C. § 57a(b)(4) (1976). *See also* F. GRAD, *supra* note 116.

127. *See supra* note 113.

requires the Administrator to create a docket[128] which is open to the public at reasonable hours.[129] Placed in the docket as they become available are all Federal Register publications (including notice), written comments, transcripts of hearings, all drafts of the proposed rule accompanied by supporting documentation, interagency writings and public comments submitted and any new, important documents available after publication of the proposed rule.[130] The final rule must be accompanied by a detailed statement of basis and purpose akin to that required for the proposed rule.[131] If the final rule differs from that proposed, an explanation must accompany the rule, along with responses to each significant comment or issue raised during the hearings.[132] Finally, the rule may not be based, in part or whole, upon items not found in the docket, and the docket forms the exclusive record for review.[133]

Public participation in rulemaking is possible through the hearing process. Hearings held pursuant to the Clean Air Act[134] consist of written and oral submissions.[135] The Magnuson-Moss Act,[136] however, employs a more elaborate procedure. Interested persons may submit written comments and give oral testimony.[137] In addition, though, the Commission must permit rebuttal submissions and cross-examination to obtain "full and true disclosure"[138] whenever it "determines that there are disputed issues of material fact it is necessary to resolve."[139] Thus, in an abstractly defined fact-finding situation, Magnuson-Moss Act[140] rulemaking utilizes some adjudicatory techniques.[141]

128. 42 U.S.C. § 7607(d)(2) (Supp. I 1977).
129. 42 U.S.C. § 7607(d)(4)(A) (Supp. I 1977).
130. *Id.*
131. 42 U.S.C. § 7607(d)(6)(A)(i) (Supp. I 1977).
132. 42 U.S.C. §§ 7607(d)(6)(A)(ii), 7607(d)(6)(B) (Supp. I 1977).
133. 42 U.S.C. §§ 7607(d)(6)(C), 7607(d)(7)(A) (Supp. I 1977).
134. *See* note 113 *supra*.
135. 42 U.S.C. § 7607(d)(5) (Supp. I 1977). Note that 5 U.S.C. § 553 (1976) allows interested persons to submit "written data, views or arguments *with or without opportunity for oral presentation*." Id. § 553(c). (emphasis added).
136. *See* note 112 *supra*.
137. 15 U.S.C. § 57a(c)(1)(A) (1976). *See* note 135 *supra*.
138. 15 U.S.C. § 57a(c)(1)(B) (1976). Note that under § 57a(c)(2) the Commission may make rules to limit cross-examination, and under § 57a(c)(3) it may require groups with the same or similar interests to appoint a representative to conduct the cross-examination for all.
139. 15 U.S.C. § 57a(c)(1)(B) (1976).
140. *See* note 112 *supra*.
141. *See generally* SEC v. Chenery Corp., 318 U.S. 80 (1943).

A less piecemeal approach than those described above was attempted in 1976, when the House of Representatives considered a bill[142] which would have, among other things, amended APA section 553[143] to provide more elaborate rulemaking procedures. A docket, similar to the one utilized for rulemaking pursuant to the Clean Air Act,[144] would include records of all aspects of the rulemaking procedure. Notice would include a draft text of the proposed rule and the major issues it would raise. In addition to the Federal Register notice, the agency would attempt to alert those persons most likely to be affected by the rule. Public participation would be enhanced by the more detailed notice, by an opportunity for written comment and for oral testimony in the presence of agency personnel, and by public availability of agency data and methodology. In addition, an agency would be obligated to select additional procedures if it determined that there was significant controversy over a factual issue of material importance to the substance of the rule.[145] Although the full House rejected the bill,[146] this is probably not an indication of congressional abandonment of hybrid rulemaking. The section 553[147] amendments were not of central importance, as the bill generally concerned increased public participation in rulemaking and the institution of the controversial "legislative veto."[148]

Finally, in addition to congressional action in the field of hybrid rulemaking, the Administrative Conference[149] has considered possible changes in section 553.[150] Altering its 1972 position[151] that no specific amendments should be adopted, the Conference adopted a

142. H.R. 12048, 94th Cong., 2nd Sess.; 122 CONG. REC. 31615 (1976).

143. 5 U.S.C. § 553 (1976).

144. *See* note 113 *supra*.

145. *See* H.R. REP. No. 1014, 94TH Cong., 2nd Sess. (1976).

146. September 21, 1976. *See* 122 CONG. REC. 31615, 31669 (1976).

147. 5 U.S.C. § 553 (1976).

148. *See* 122 CONG. REC. 31615, 31617-40 (1976). For a discussion of the legislative veto, *see generally* Ivanhoe, *Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto*, 26 AM. U.L. REV. 1018, 1046-61 (1977).

149. The Administrative Conference is a permanent federal agency, founded in 1953, created to further the development of administrative law by creating a forum for federal administrators and private citizens to work together to revise and improve federal practices. *See generally* Williams, *Fifty Years of the Law of the Federal Administrative Agencies—And Beyond*, 29 FED. BAR J. 267 (1970).

150. 5 U.S.C. § 553 (1976).

151. U.S. ADMINISTRATIVE CONFERENCE, 2 REPORT OF THE ADMINISTRATIVE CONFERENCE, Recommendation 72-5 (1972).

recommendation in 1976[152] instructing agencies to utilize procedures beyond simple notice and comment in appropriate circumstances. Suggestions included two cycles of notice and comment, responding to comments, incorporating at the notice stage a summation of the agency's attitude toward critical issues and a description of the data on which the agency relies, indicating where the data may be obtained, explaining agency methodology, holding public conferences, allowing limited cross-examination and hearing oral argument.[153] Circumstances under which the agency was recommended to consider such additional procedures are defined by the presence of unusually complex scientific issues in a problem area so open-ended that the agency is likely to profit from receiving diverse opinion, especially when the cost of erroneous rulemaking (including health, welfare and environmental costs) are significant.[154]

IV. A SPECIFIC PROPOSAL FOR HYBRID RULEMAKING

A. *Section-by-Section Analysis of a Proposed Amendment to the Administrative Procedure Act*

The proposal which follows this analysis is designed to accomplish five goals: (1) to provide a workable mechanism for identifying those policy determinations sufficiently important and factually based as to deserve more stringent rulemaking procedures; (2) to increase public participation in rulemaking by more informative notice, greater availability of support documents and increased use of information-gathering procedures; (3) to permit agencies to continue to use their special expertise when designing the best combination of procedures for generating a particular rule; (4) to increase agency accountability by requiring the development of an exclusive record for review; and (5) to heighten judicial scrutiny by providing both an organized record and a more stringent standard of review.

Part 1 of the proposal amends the scope of section 553 by adding another exception to the existing "military or foreign affairs" and "agency management . . . or . . . public property" exceptions.[155]

152. U.S. ADMINISTRATIVE CONFERENCE, 3 REPORT OF THE ADMINISTRATIVE CONFERENCE, Recommendation 76-3 (1976).

153. *Id.*

154. *Id.*

155. 5 U.S.C. §§ 553(a)(1), 553(a)(2) (1976).

Under this new exception, Congress is to designate, when enacting a new statute or re-examining an old one, whether rules promulgated in pursuance to it are to be developed by hybrid rulemaking procedures. If so designated, these rules are excepted from section 553 and are covered by new section 553a. This approach, in which Congress directly determines the type of rulemaking procedure to be used, is not overly burdensome. Congress has already shown a willingness to design unique rulemaking procedures to supplant section 553 rulemaking, evidenced by its efforts with the Clean Air Act[156] and the Magnuson-Moss Act.[157] The task of simply referring to a standard APA section is certainly less burdensome than drafting wholesale alternatives. This approach does not, however, reduce congressional flexibility and responsiveness; Congress is still free, when passing a statute, to designate that certain procedures be used or eliminated.

This approach was chosen in favor of attempting to set forth abstract criteria defining those cases for which section 553a hybrid rulemaking should apply. Such criteria would necessarily generate needless litigation attempting to identify those issues appropriate for hybrid rulemaking. In addition, even if a clear and understandable set of criteria could be drafted, probably revolving about a central formulation of issues in which the policy chosen is highly dependent upon the determination of material and disputed facts, such criteria would tend to discourage congressional mandates for the use of hybrid rulemaking for cases not falling squarely within the bounds of the definition.

Part 2 of the amendment sets forth the new APA section 553a "hybrid rulemaking." The main policy goals of this rulemaking proceeding are to ensure increased and informed public participation in the rulemaking process, to enable agencies to exercise their expertise and discretion in designing the particular set of proceedings to be used for each rule and the production of an adequate but focused record to be available for meaningful judicial review of agency action.

Proposed section 553a(a) provides for general notice of rulemaking proceedings to be placed in the Federal Register. This is identical to the current section 553 rulemaking, and ensures that the public is notified of prospective rules.

156. *See* note 113 *supra*.
157. *See* note 112 *supra*.

Section 553a(b) establishes a "notification list" requirement. This ensures that individual notice is given to most interested and affected persons without placing an undue burden upon the agency. The agency establishes such a list for each statute for which hybrid rulemaking procedures are applicable. Persons known to be affected by rulemaking pursuant thereto, and persons requesting their names be placed on the list (typically, one might expect, public interest groups) are sent notice of the date and title of any Federal Register notice. Although these persons are notified through the 553a(a) Federal Register publication, this subsection ensures that agencies make a concerted effort to identify and communicate with those especially interested members of the public who comprise their constituencies. Seeking out this constituency and thereby encouraging its participation in the rulemaking furthers the primary goal of this hybrid procedure, which is to fully develop all points of view concerning policy and factual questions bearing upon the proposed rule.

Section 553a(c) introduces the docket requirement, absent in the current formulation of the APA. The docket is useful as a device for consolidating agency statements, supporting data, underlying policy considerations, public comment and criticism and agency reaction to such comment and criticism. The docket also serves as an exclusive record for judicial review, with several important ramifications. First, it simplifies the process of judicial review by eliminating the lengthy use of discovery devices by petitioners in the attempt to recreate the agency decision-making process. Second, it limits the volume of materials to be examined by the court. Third, it forces agencies to adequately consider all public comment and criticism because only responses included in the docket are to be considered by the court when examining the rationality of the agency decision. Finally, it inherently screens out extraneous materials currently placed before the court when agencies are forced to justify their decisions, since all materials placed in the docket must be discussed by the agency in its notice, preliminary rule, final rule or technical supporting documents.

Section 553a(c)(1) begins by requiring the establishment, by the agency, of a rulemaking docket. The subsection then sets forth those items to be included in the docket: the initial notice, the proposed rule, all data and documents discussed in the preamble or appendix of the proposed rule, all written responses to the proposed rule, transcripts of any oral proceedings held in regard to

the proposed rule, all agency responses to such written responses or oral proceedings, all data and documents discussed in the preamble or appendix to the final rule and the final rule itself. This docket represents a complete history of agency action, public reaction and agency response, but does not include internal and interim thinking by the agency as represented in intra-agency memoranda and internal conferences. The final results of such internal considerations are represented in the docket in the form of agency responses to public reaction and agency statements of methodology, legal interpretations and policy considerations. To require intra-agency memoranda and internal conferences to be made public would arguably hamper full freedom of expression in such writings and also confuse the record with half-formed and discarded ideas.

Section 553a(c)(2) provides that the inclusion of the final rule and its support documents shall close the docket, thus insuring that either before this time or in the final rule itself the agency shall address all major issues raised during the public participation period. The subsection then explicitly states that the docket forms the exclusive record for review, for the aforementioned reasons. Leave to reopen the docket is available upon showing good cause to the court. This degree of flexibility is necessary. It is possible that upon rare occasions, though the initial agency decision-making process was insufficient to justify the final rule, new evidence after the promulgation of the rule is sufficient to warrant its continued effect. The "good cause" requirement, however, should serve to limit use of this exception to those rare occasions and prevent abuse leading to the current state of disarray caused by ad hoc justifications.

Section 553a(c)(3) ensures public accessibility of the docket and requires the agency to provide copying facilities for the public to use at its own cost. Recognizing the poverty which afflicts many public interest groups but reluctant to place the financial burden of conceivably thousands of pages of reproduction upon the agency, the statute allows the agency in its discretion to waive or reduce copying expenses. To help prevent abuse of this discretion, the agency must waive or reduce these expenses "as the public interest requires." This means that these waivers and reductions should be reasonably available and administered in a non-discriminatory manner.

Section 553a(d) spells out the notice requirement of section

553a(a). This requirement is placed here because references to "the docket" would be meaningless before section 553a(c) defined that term.

The notice requirement of section 553a(d) is far more elaborate than that employed in the current APA.[158] It is designed to facilitate meaningful public reaction by making public not only the details of the upcoming rulemaking proceedings but also the legal authority (section 553a(d)(2)), bases and purpose (section 553a(d)(3)), the text or substance of the issues (sections 553a(d)(4) and 553a(d)(5)), and the factual data, methodology and legal and policy considerations (sections 553a(d)(6)(A), 553a(d)(6)(B) and 553a(d)(6)(C)) used in formulating the rule. Public reaction can therefore be more focused, specific and informed. Sections 553a(d)(7) and 553a(d)(8) require the agency to reference those documents in the docket and to identify the location and accessibility of the docket. This allows the public to know exactly what supporting materials have been used by the agency and how to acquire them. Accessibility of supporting documents is essential to those wishing to make particularly specific and informed responses to the agency's proposed rule.

Section 553a(e) defines the extent of the procedures necessary for the promulgation of a section 553a rule, beginning with a required ninety-day public participation period. This length of time allows for acquisition of docket materials and thoughtful response without unduly delaying the proceedings. Opportunity for written submissions, with or without oral presentation, is required. This is identical to current APA[159] requirements. In addition, however, the agency is required to employ at least two of the four suggested additional procedures. The agency role here is to use its expertise to choose a combination of procedures best suited to the particular rule under consideration. Flexibility and agency independence are thus preserved under this formulation.

The four suggestions include the techniques currently employed on an *ad hoc* basis by agency choice or congressional mandate: cross-examinations, conferences, interrogatories and second-round

158. 5 U.S.C. § 553(b) (1976) states that the notice shall include "a statement of the time, place and nature of the 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."

159. "[T]he agency shall give interested persons an opportunity to participate . . . with or without opportunity for oral presentation." 5 U.S.C. § 553(c) (1976).

written comments (the so-called "paper hearing"[160]). Cross-examination of the agency head and/or agency technical staff ensures that the cross-examination will be directed to someone with a thorough understanding of the rule at hand and who is capable of making official statements on behalf of the agency. Conferences may be on- or off-the-record and are to be conducted with the agency staff primarily responsible (not necessarily the technical staff) for the substantive provisions of the rule. The distinction is made because while both procedures are aimed at elucidation of the facts, cross-examination is also aimed at solidly identifying official agency position. Off-the-record conferences, and even, to some extent, on-the-record conferences, are more cooperative in nature and aim at working out possible formulations of the rule more than freezing agency positions. Interrogatories are to be submitted within thirty days of publication of the proposed rule. The agency then has at least thirty days to respond, leaving at least thirty days for criticisms of the responses to be placed in the docket through written submissions. The second round of public comments allows essentially an on-paper cross-examination in that criticism from all parts of the public and official agency responses thereto are all subjected to re-examination by both the public and the agency.

Because any one of these procedures might become unwieldy, section 553a(e)(2) permits the agency to employ these procedures in accordance with rules designed to avoid unnecessary costs or delay. This subsection is limited, however, to rules concerning oral hearings and cross-examination, the procedures most likely to be expensive and lengthy. To allow further restrictions might invite agency abuse through the use of restrictions which dilute the effectiveness of these procedures.

For oral hearings, the agency is permitted to impose a reasonable time limit (section 553a(e)(2)(A)). Cross-examinations may be subjected to rules which are both appropriate and consistent with a full and true disclosure with respect to disputed issues of material fact (section 553a(e)(2)(B)).

Section 553a(e)(3) continues to prescribe techniques for reducing the burdens of added procedures. It allows the agency to require groups representing similar interests to consolidate efforts and designate a common representative or representatives for cross-exam-

160. *See* Stewart, *supra* note 61.

ination or conferences. This prevents undue repetition of the same procedure for each interested person when that person's point of view is already represented. This conservation of agency time and effort is designed to reduce the overall burden on the agency and to encourage its meaningful expenditure of time in participation in those proceedings it does employ. To avoid unfair exclusion of an interested party, however, section 553a(e)(3)(B) provides that if a good faith effort to consolidate has failed, each interested party may participate to the extent that a substantial and relevant issue of concern to that person is not adequately represented by whatever group representative(s) there might be.

Part 3 amends section 706(a)(E) of the APA, which describes the scope of judicial review of agency actions subject to APA requirements. Part 3 adds section 553a cases to the current provision which designates a "substantial evidence" test as the appropriate level of review for sections 556 and 557 actions. The substantial evidence test requires the court to find that the agency action is supported by a preponderance of the evidence presented in the record on the issue.[161] This test is chosen in preference to the "arbitrary and capricious" test used for section 553 actions (where the court may overturn an agency rule only if the decision appears to have been an abuse of discretion or arbitrary and capricious) for two reasons. First, the substantial evidence test is inappropriate for section 553 actions partly because there is no clear record for review required by the APA. No such difficulty exists for the record-oriented section 553a proceeding. Second, a section 553a proceeding is subject to more stringent procedures because, although it is a rulemaking proceeding, the subject matter with which it is concerned has an importance and a complex factual basis justifying its congressional mandate for extra precautions. The stricter scrutiny of a substantial evidence test is both possible and appropriate for a factual and record-oriented proceeding. In addition, to employ a looser standard would defeat the congressional intent to employ more caution manifest in its choice of section 553a proceedings.

Part 4 again amends the scope of judicial review provisions of APA section 706(2).[162] Under amended section 706(2), a court may

161. "The reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . unsupported by substantial evidence. . . . In making the foregoing determinations, the court shall review the whole record . . . ." 5 U.S.C. § 706(2) (1976).

162. 5 U.S.C. § 706(2) (1976).

set aside a section 553a rule because rules limiting cross-examination and conferences were employed in such a way as to prevent a full and true disclosure of disputed issues of material fact. This is in addition to current section 706(2) provisions, allowing a court to set aside an agency action because it is arbitrary and capricious, an abuse of discretion, unconstitutional, *ultra vires*, in violation of procedural requirements, unsupported by substantial evidence of sections 556 and 557 (and, as amended, a section 553a) action or unwarranted in light of facts developed at a trial *de novo* by the reviewing court. The addition of section 706(2)(G) ensures that whatever rules used by the agency to control cross-examination or conferences are in fact designed to reduce cost and delay and are not prejudicial to the interests of any participating party nor a hindrance in the full disclosure of all important issues of fact.

Part 5 states that this Act shall take effect six months from the date of enactment. The six-month delay period ensures agencies a sufficient period of time to develop mechanisms for implementation. In fact, however, section 553a proceedings may not be used until still later. Until Congress either passes a new statute or amends an old statute, with a proviso that it be subject to hybrid rulemaking procedures, section 553a will remain inactive. It may, of course, be voluntarily invoked by any agency in the same way that agencies are currently free to employ procedures beyond the minima prescribed by section 553.[163]

B. *The Proposal*

AN ACT to amend the Administrative Procedure Act to provide a hybrid form of rulemaking.

BE IT ENACTED by the House and Senate of the United States assembled that

(1) Title 5 of the United States Code section 553(a) is amended by the addition of subsection 553(a)(3), to read as follows:
  (3) a rule to be promulgated pursuant to a statute required by Congress to be governed by the provisions of section 553a.

(2) Title 5 of the United States Code is amended by the addition of section 553a, titled "Hybrid Rulemaking," to read as follows: § 553a *Hybrid Rulemaking*
  (a) The agency shall publish a general notice of proposed rulemaking in the Federal Register.

163. 5 U.S.C. § 553 (1976).

(b) The agency shall establish a notification list for each statute subject to the provisions of this section. The agency shall send the date and title of any Federal Register notice relating to rulemaking pursuant to that statute, not later than the date such notice appears in the Federal Register, to all persons on the notification list. The agency shall place on the list all persons it knows may be subject to regulations promulgated pursuant to the statute and all persons requesting placement on the list.

(c) (1) Not later than the date notice is published of any action to which this section applies, the agency shall establish a rulemaking docket for the action. The docket shall include:

(A) the notice of proposed rulemaking;

(B) the factual data and documents discussed in the preamble to the proposed rule, in the accompanying technical support document and in the notice of proposed rulemaking;

(C) any written comments, data, questions and interrogatories submitted in response to the proposed rule, whether by the public or other governmental bodies, and all agency responses thereto;

(D) any transcripts of hearings, cross-examinations and on-the-record conferences held concerning the proposed rule;

(E) any post-proposal factual data and documents discussed in the preamble of the final rule or the accompanying technical support documents; and

(F) the final rule, accompanied by a statement of the basis and purpose of the rule, the methodology used in obtaining and analyzing the data, the major legal interpretations and policy considerations underlying the rule and responses to all important issues raised during the public comment and participation period.

(2) The final rule, with its support document(s), shall close the docket. The docket shall be the exclusive record for judicial review, unless upon a showing of good cause the court grants leave to reopen the docket.

(3) The rulemaking docket required under section 553a(c)(1) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The agency shall provide copying facilities which may be used at the expense of the person seeking copies, and any person may request copies by mail at his own expense. The agency may

waive or reduce such expenses in such instances as the public interest requires.

(d) The notice required by section 553a(a) shall include:
  (1) a statement of the time, place and nature of the public rulemaking proceedings;
  (2) the legal authority under which the rule is proposed;
  (3) a statement of the basis and purpose of the rule;
  (4) the text of the proposed rule, if available;
  (5) the substance and issues of the proposed rule, if the text is unavailable;
  (6) a short summary of the following:
    (A) the factual data on which the proposed rule is based;
    (B) the methodology used in obtaining and analyzing the data; and
    (C) the major legal interpretations and policy considerations underlying the proposed rule;
  (7) reference to all documents present in the docket at the times it will be open to public inspection; and
  (8) the docket number, the location(s) of the docket and the times it will be open to public inspection.

(e) (1) After publishing the general notice required by this section, the agency shall provide a ninety-day comments and participation period, in which interested persons shall have an opportunity to participate in the rulemaking through submission of written data, views or arguments, with or without oral presentation, and through at least two of the following four procedures designated at the option of the agency:
    (A) cross-examination of agency head(s) and/or technical staff;
    (B) on- or off-the-record conferences with the agency staff primarily responsible for designing the substantive provisions of the rule;
    (C) submission of interrogatories, to be answered by the agency no later than thirty days prior to the close of the comments and participation period. Interrogatories may be submitted no later than thirty days after the opening of the period;
    (D) a second round of public comments responding to the docket as developed through sections 553a(c)(1)-553a(c)(4) and 553a(e)(1)-553a(e)(4).

  (2) The agency may prescribe rules concerning proceedings in order to avoid unnecessary costs or delay. Such rules shall be limited to the following:
    (A) imposition of reasonable time limits on each interested person's oral presentations; and
    (B) requiring that any cross-examination to which

a person may be entitled under subsection 553a(e)(1) be conducted in such a manner as the agency determines to be appropriate and designed to elicit a full and true disclosure of disputed issues of material fact.

(3) (A) Except as provided in subparagraph (B), if a group of persons, each of whom under subsections 553a(e)(1) and 553a(e)(2) would be entitled to conduct cross-examination or on- or off-the-record conferences and who are determined by the agency to have the same or similar interests in the proceeding, cannot agree on a single group of representatives of such interests for the purposes of cross-examination and of on- or off-the-record conferences, the agency may make rules:

(i) limiting the representation of such interests for such purposes; and

(ii) governing the manner in which such cross-examination or on- or off-the-record conferences shall be limited.

(B) When any person, who is a member of a group with respect to which the agency has made a determination under subparagraph (A), is unable to agree upon group representation with the other members of the group, then such person shall not be denied under the authority of subparagraph (A) the opportunity to conduct cross-examination or participate in on- or off-the-record conferences as to issues affecting her particular interests if:

(i) she satisfies the agency she has made a reasonable and good faith effort to reach agreement upon group representation with other members of the group; and

(ii) the agency determines that there are substantial and relevant issues which are not adequately presented by the group representative(s).

(3) Title 5 of the United States Code section 706(2)(E) is amended to read as follows:

(E) unsupported by substantial evidence in the record in a case subject to section 553a or sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(4) Title 5 of the United States Code section 706(2) is amended by the addition of subsection 706(2)(G) to read as follows:

(G) made without a full and true disclosure of disputed issues of material fact due to an agency rule or ruling under section 553a(e)(2) or 553a(e)(3), limiting the petitioner's participation in any proceedings.

(5) This Act shall take effect six (6) months from the date it is enacted by Congress.

V. CONCLUSION

With the *Vermont Yankee*[164] decision, the judicial role in creating a hybrid rulemaking procedure has been severely curtailed. Yet the problems of using a flexible, policy-oriented rulemaking procedure to determine complex issues of fact demand solution. The need for increased public participation, greater agency accountability and more meaningful judicial review has been recognized by the courts, commentators, administrative law experts and Congress.

In the absence of judicial activism, Congress must provide an integrated solution to this problem while not unduly hindering use of agency expertise in determining the procedures most appropriate to the issue at hand. One solution is an amendment of the Administrative Procedure Act, providing a new "hybrid" rulemaking which mandates more meaningful notice to interested persons, creates guidelines which compel agencies to employ additional procedures for public participation but permit the agency to use its discretion to produce the best "mix" of those procedures, provides for an organized and complete record of the rulemaking, and eases the task of judicial review while heightening the degree of judicial scrutiny.

Robin Alta Charo

164. 435 U.S. 519 (1978).