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ADMINISTRATIVE LAW: JUDICIAL SUPERVISION OF ADMINISTRATIVE DECISION-MAKING IN ACTION

Diane Geraghty*

From its inception, the concept of rule by administrative process has been subject to criticism. The attacks have ranged from constitutional challenges to complaints of bureaucratic inefficiency. In the last decade the call for regulatory reform has redoubled. To date federal courts have assumed a principal role in responding to allegations of administrative deficiencies. In so doing they have been faced with the challenge of fashioning judicial remedies which answer the concerns of critics while preserving the delicate balance of power allocated among the branches of government.

To achieve this goal, federal courts have relied heavily on principles of administrative law legitimized in earlier decades. Thus, the now recognized rights of meaningful judicial review and procedural regularity have served as the rationale for newly developed methods

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2. The nondelegation doctrine of administrative law emerged from initial arguments that the creation of administrative agencies authorized to perform a combination of legislative, judicial and executive functions violated the Constitutional scheme of separation of powers. Under the doctrine as it has evolved, courts have not imposed stringent constitutional restrictions on the scope of agency functions. See S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 37-84 (1979) [hereinafter cited as Breyer & Stewart].


4. Deficiencies attributed to the administrative process include charges that agencies are biased in favor of industry interests, that they are headed by inexperienced appointees chosen on the basis of political considerations, that they are unable to safeguard the growing concerns of significant segments of society, such as consumers and the poor, and that agency procedure is costly, time-consuming and unproductive. See generally R. Fellmeth, The Interstate Commerce Omission (1970); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1681-87 (1975) [hereinafter cited as Stewart].

5. The legislative and executive branches have not been immune from the clamor for regulatory overhaul. Deregulation of certain industries, such as the airline industry, and increased use of congressional veto power over agency action, (See Miller & Knapp, The Congressional Veto: Preserving the Constitutional Framework, 52 Ind. L.J. 367, 370 (1977)), represent other forms of governmental response to allegations of administrative failure. For a survey of additional legislative and executive efforts, see Breyer & Stewart, supra note 2, at 144-62.


for circumscribing unbridled administrative discretion.\(^9\) Traditional formulae for confining agency action, such as requiring that fact-finding be supported by substantial evidence\(^10\) and that it be consistent with prior agency practice,\(^11\) have been augmented to include 1) close scrutiny of the statutory authority on which the agency purportedly relies,\(^12\) 2) requirement that the basis for all types of agency action, including informal action, be articulated,\(^13\) and 3) increased stress on the value of procedure, both to ensure fair treatment of those subject to agency control\(^14\) and to enable the court to carry out its task of reviewing agency conduct.\(^15\)

Several opinions of the United States Court of Appeals for the Seventh Circuit during the 1979-80 term reflect the court's adoption and use of both traditional and newer techniques developed by the federal judiciary to supervise the process of administrative decision-making in the areas of rulemaking, adjudication and informal agency action.

**CONCEPTS LIMITING AGENCY JURISDICTION**

**Agency Action in Excess of Statutory Authority**

Perhaps inevitably, any legislative grant of jurisdiction to an agency customarily receives liberal interpretation by the agency.\(^16\) A tension is thereby created, with federal courts on the one hand bound to defer to the agency's reading of its own governing statute,\(^17\) and on the other hand obligated to restrain agency action which exceeds the

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13. The requirement that findings be articulated, however, is an easily met burden. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417-20 (1971) (no formal findings necessary; district court may require testimony by administrative officials, but such inquiry is to be avoided absent bad faith.); Camp v. Pitts, 411 U.S. 138, 139 (1973) (three-sentence explanation for agency denial of an application for a branch bank was deemed sufficient).
16. This is facilitated by legislation drafted to give an agency broad discretion, but lacking any meaningful standards to guide the agency in the exercise of that discretion. It is this now-standard mode of statutory delegation which led to Professor Davis' call for increased use of agencies' rulemaking authority to cabin administrative action. *See* K. Davis, Discretionary Justice: A Preliminary Inquiry (1969).
scope of its authority.18

While courts traditionally accepted an agency’s interpretation of its own jurisdiction with little or no dissent,19 they are increasingly asserting their own expertise in statutory construction to overturn agency action.20 Two cases decided by the Seventh Circuit this term illustrate the trend toward narrow statutory interpretation as a means of controlling unwarranted agency usurpation of authority.

In Atchison, Topeka & Santa Fe Railway v. ICC,21 petitioner railroads challenged an order of the Interstate Commerce Commission requiring rail carriers to publish tariffs of operating schedules between certain points. Petitioners contended that the Commission was without jurisdiction to require publication of the schedules in tariff form22 because the section of the Interstate Commerce Act relied on by the Commission in entering its order referred only to “rates, fares and charges,”23 not operating schedules.

On review, the Commission asked the Seventh Circuit to follow what it termed the “modern view” of agency jurisdiction, stating that an agency is empowered to take any action it deems necessary to effectuate the general goals of the legislation in issue unless such action is expressly prohibited by Congress.24 The court, however, refused to adopt this expansive view of administrative authority. In so doing, it distinguished an agency’s use of implied powers to carry out an express grant of jurisdiction from an agency action which would expand the scope of its substantive authority. Reading the terms “rates, fares and charges” literally, the court concluded that the phrase did not encom-

18. The Administrative Procedure Act, 5 U.S.C. § 706(2)(c) (1976), mandates that:
To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.


21. 607 F.2d 1199 (7th Cir. 1979).

22. Because tariffs bind carriers with the force of law, petitioners argued that the Commission’s order would subject them to possible civil and criminal liability if the published service schedules were not met. Id. at 1206.


24. 607 F.2d at 1202-03.
pass operating schedules, and it therefore reversed the agency order. The court held, however, that the Commission did possess the authority to require publication of service schedules in nontariff form.25

At issue in a second Interstate Commerce Commission case, Atchison, Topeka & Santa Fe Railway v. United States,26 was whether the Commission properly invoked emergency powers in permitting one rail carrier to operate over the tracks of another, bankrupt carrier. The Commission argued that it derived the authority to act from provisions in the statute empowering the Commission to "take action during [an] emergency to promote service in the interest of the public and of commerce regardless of the ownership (as between carriers) of a locomotive, car, or other vehicle. . . ."27 Rather than broadly interpreting this language so as to permit the agency to deal with the difficult problem of balancing the interests of rail users, employees and competitors in the face of a fiscal crisis, the Seventh Circuit engaged in a probing analysis of the language and history of the Commission's authority and concluded that the Commission had exceeded the scope of its jurisdiction in entering the emergency order.28 The court then forcefully reminded the Commission that "[i]t is courts and not administrative agencies who are the final authorities on issues of statutory construction."29 The court's express assertion of its own powers is part of the trend toward use of techniques of statutory construction by the courts to carefully oversee the exercise of agency action.30

Estoppel as a Limit on Agency Discretion

In several opinions this term the Seventh Circuit examined the

25. In dissent, Judge Swygert argued that the Commission did have the authority to issue the rule under other sections of the Act and pointed out the irony in the majority holding which authorizes the Commission to require publication of the schedules in nontariff form but deprives the agency of the ability to enforce such an order. Id. at 1206-07 (S wygert, J., dissenting).
26. 617 F.2d 485 (7th Cir. 1980).
28. 617 F.2d at 494-96.
29. Id. at 496.
30. The shift in the ardor with which courts are performing their role of statutory construction does not mean that the federal judiciary has abandoned the principle that an agency's reasonable interpretation of its own authority should be respected by the courts. In Chicago & N. W. Transp. Co. v. Atchison, T. & S. F. Ry., 609 F.2d 1221 (7th Cir. 1979), the Seventh Circuit adopted the Interstate Commerce Commission's interpretation of two statutory provisions, although in one case it meant rejection of the court's own prior interpretation and, in the other, refusal to follow the authority of other jurisdictions. In both instances the court reiterated its belief that it is bound to defer to the interpretation given a statute by the agency charged with administering it if such an interpretation is reasonable. Id. at 1232.

Other cases in which the Seventh Circuit upheld agency interpretation of legislative language this term include Westinghouse Electric Corp. v. Occupational Safety and Health Review Comm., 617 F.2d 497 (7th Cir. 1980) and Marshall v. N. L. Industries, Inc., 618 F.2d 1220 (7th Cir. 1980).
role that the doctrine of estoppel plays in defining the boundaries of administrative action. Estoppel arguments arise in administrative law cases in two contexts. In the first, the question is whether an agency is prohibited from relitigating issues decided in a prior judicial or administrative proceeding; this is referred to as collateral estoppel. In the second, the issue is whether an agency is estopped from taking adverse action against a party because of prior informal conduct by the agency on which the party detrimentally relied; this is generally known as equitable estoppel.

A. Collateral Estoppel

Although originally held inapplicable to the administrative process, it is now clear that the doctrine of collateral estoppel may be invoked in an administrative action, at a minimum, when the issue involves a dispute of fact already decided in a formal judicial or administrative proceeding.

The Seventh Circuit's opinion in Continental Can Co. v. Marshall illustrates the use of collateral estoppel as a means of limiting an agency's prosecutorial discretion. In Continental Can it was uncontested that Continental operates eighty metal can manufacturing plants, all using similar equipment. The Secretary of Labor issued citations charging excessive noise levels in eight of the plants. At the hearing on those violations Continental took the position that the agency could require engineering controls to correct the noise problem only if they were economically feasible, while the Secretary argued that under the statute the issue of economic feasibility was irrelevant. An administrative law judge agreed with Continental Can and his decision was eventually affirmed by the full United States Occupational Safety and Health Review Commission. The Secretary ultimately chose not to appeal that ruling.

While review before the Commission was pending, the Secretary

34. 603 F.2d 590 (7th Cir. 1979).
35. Continental already had in effect a hearing protection system involving the use of earplugs and earmuffs. It conceded that enclosing machines in order to control noise was technically feasible, but argued that it was economically impossible. Id. at 592 n.2. Despite his interpretation of the statute, the Secretary did introduce the Standard & Poor's report on Continental to show that it could afford to make the requested changes. Id. at 596.
filed citations against different Continental plants for noise violations. After the Commission's decision in the first eight cases, Continental moved for summary judgment in the remaining cases on the ground of collateral estoppel. Continental argued that the issue of technical versus economic feasibility had already been successfully litigated before the Commission. The Commission, however, refused to apply the doctrine of collateral estoppel because the Secretary of Labor, believing economic feasibility to be irrelevant, had not actively litigated the factual issues surrounding economic feasibility in the first eight cases. Continental then appealed to the district court, which held that the Secretary was estopped from relitigation of that issue. The Seventh Circuit affirmed, holding that the Secretary could not use the fact that he had chosen to offer only slight evidence on the factual issue of economic feasibility as grounds for arguing that—for collateral estoppel purposes—the issue had not already been litigated.\textsuperscript{36}

The \textit{Continental Can} opinion should serve as a warning to agency officials that the doctrine of collateral estoppel can limit prosecutorial discretion to proceed on a case-by-case basis, and additionally, can result in loss of an opportunity for judicial review of the appropriate interpretation of a regulation. In \textit{Continental Can} the Secretary of Labor chose not to seek review of the OSHA Review Commission's interpretation of the term “feasibility” in the first eight cases. This choice, through the subsequent application of the collateral estoppel rule, effectively precluded judicial review of both the factual and legal issues in dispute.

Although as a general matter collateral estoppel is applicable to administrative proceedings, differences between the functions performed by courts and agencies require that the doctrine be more flexibly applied in the administrative context. The Seventh Circuit demonstrated sensitivity to this need in a case involving a Federal Trade Commission order relating to non-prescription weight reducing drugs. In \textit{Porter & Dietsch, Inc. v. FTC},\textsuperscript{37} the issue was whether the Commission was required to give preclusive effect to fact determinations made in earlier cases involving an identical question. The court, citing the agency's mandate to protect the public's health and the speed with which new discoveries are made in the field of medical science, refused to apply the doctrine of collateral estoppel. This relaxed ap-

\textsuperscript{36} The Seventh Circuit also held that the district court was empowered to issue an injunction without Continental having exhausted its administrative remedies, because to require relitigation in each case would constitute unconstitutional harassment. \textit{Id.} at 597.

\textsuperscript{37} 605 F.2d 294 (7th Cir. 1979), \textit{cert. denied}, 445 U.S. 950 (1980).
proach to a rule of law correctly takes into account the fact that an agency, unlike a court, has continuing jurisdiction over subjects before it and needs a free hand in shaping policy to reflect the changing interests of the public as a whole.

B. Equitable Estoppel

The recurrent confusion in the state of the law regarding the use of equitable estoppel in administrative proceedings is highlighted in two opinions decided this term. In *Cheers v. HEW*, the court concluded that "appellant cannot avoid the well established principle that estoppel shall not operate against the Government in these circumstances." In *Gressley v. Califano*, however, the court stated that "this circuit is among the minority of jurisdictions that have applied the estoppel doctrine to the Government."

Traditional notions of sovereign immunity and the concern that judicially-imposed handicaps would impede the smooth functioning of government led to the position that administrative agencies are not bound by principles of equitable estoppel. This position, however, has been significantly eroded in recent years. Modern courts recognize that there are instances where justice requires that the government be held responsible for the harm it does its citizens in the same way that a private person in the same circumstances would be. The court's decisions in *Cheers* and *Gressley*, however, reflect the cautious approach taken by courts in applying principles of estoppel to administrative agencies.

*Cheers* involved a social security applicant who failed to file a written application as required by regulation after an agency employee incorrectly advised him he was ineligible for benefits. In *Gressley*, a social security applicant was denied benefits even though he was instructed that if he filed amended tax returns he would be eligible. In

38. 610 F.2d 463 (7th Cir. 1979).
39. Id. at 469.
40. 609 F.2d 1265 (7th Cir. 1979).
41. Id. at 1267.
43. L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW 300-06 (1976).
44. See Moser v. United States, 341 U.S. 41 (1951); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); United States v. Fox Lake State Bank, 366 F.2d 962 (7th Cir. 1966); Schuster v. Commissioner of Internal Revenue, 312 F.2d 311 (9th Cir. 1962).
45. See also Champaign County v. United States Law Enforcement Assistance Adm'n, 611 F.2d 1200 (7th Cir. 1979).
both cases the Seventh Circuit held that the agency was not bound by
the informal actions of its agents and thus refused to estop the govern-
ment from denying benefits.

These decisions demonstrate that, while estoppel is in principle
available as a tool for limiting agency discretion, in fact, courts con-
tinue to proceed with great care in applying it to the government.46
Specifically, when agency requirements are in writing and have the
force of law, a private party will be presumed to know of the existence
of that law and will be required to follow it rather than the oral advice
of an agency employee.47 Additionally, when a case involves a claim
on the public treasury, courts are particularly reluctant to invoke the
doctrine of estoppel to permit the receipt of benefits to which the appli-
cant would not otherwise be entitled.

**AGENCY ACQUISITION OF INFORMATION**

*Administrative Searches*

As Professor Nathanson has said, "[n]othing in the law, perhaps,
better illustrates the increased reach of government in the last fifty
years than does the broadening of the power of administrative investi-
gation."48 In order for agencies to carry out effectively the balooning
responsibilities delegated to them by Congress, they must have ready
access to raw information. The power of agencies to acquire informa-
tion, however, is not unlimited. The Supreme Court placed a signifi-
cant constraint on agency information-gathering procedures when it
ruled that searches conducted by agencies in the performance of their
regulatory responsibilities are subject to the constitutional constraints
of the fourth amendment.49 Thus, before an agency employee may in-
spect a business or private premises without consent, the agent is re-
quired to obtain an administrative search warrant after presenting a
magistrate with sufficient information to establish probable cause for
the search.50

46. *See* United States v. Gross, 451 F.2d 1355, 1358 (7th Cir. 1971); United States v. Fox
Lake State Bank, 366 F.2d 962, 965 (7th Cir. 1966); Semaan v. Mumford, 335 F.2d 704, 706 (D.C.
Cir. 1964); Vestal v. Commissioner of Internal Revenue, 152 F.2d 132, 136 (D.C. Cir. 1945).
49. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387
U.S. 541 (1967).
50. In See v. City of Seattle, the Court stated, "We hold only that the basic component of a
reasonable search under the Fourth Amendment—that it is not to be enforced without a suitable
warrant procedure—is applicable in this context, as in others, to business as well as residential
premises." 387 U.S. at 546.
The Supreme Court, however, taking into account the crucial role played by administrative agencies in protecting the public's health and safety, has defined "probable cause" differently in criminal and civil cases. While in criminal prosecutions a warrant will issue only if the judge finds reason to believe there has been a violation of the law, in agency inspection cases probable cause exists if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."  

In a 1978 case, *Marshall v. Barlow's, Inc.*, the Supreme Court affirmed the warrant requirement for administrative searches authorized under the Occupational Safety and Health Act, even though the agency argued that it could not effectively perform its policing obligations under the Act without the surprise advantage of warrantless inspections. Over the dissent of Justice Stevens, the Court again applied the relaxed probable cause standards first enunciated in *Camara* and *See*.

The Court's decision in *Barlow's* has generated substantial litigation and comment. The broad language of the opinion left it to the lower courts to decide under what circumstances OSHA has produced enough information to enable a magistrate to make a probable cause finding. Many of the issues raised but left unanswered by *Barlow's* are addressed in the Seventh Circuit's opinion in *Burkart Randall Division of Textron, Inc. v. Marshall*.

In *Barlow's*, the attempted agency search was part of a general administrative plan for industry-wide enforcement of the Act. Agency inspectors had no particular reason to suspect violations were present at that facility. In *Burkart Randall*, however, the agency inspection was touched off by complaints from two employees regarding specific alleged violations. In *Burkart Randall*, therefore, the issue was whether the district court erred in applying the relaxed probable cause standard rather than probable cause in the criminal law sense. The plaintiff employer argued that because of the particularized nature of the complaint and because of the need for protection against disgruntled

51. *See* Camara v. Municipal Court, 387 U.S. at 534-35.
52. 387 U.S. 523, 538 (1967).
55. Justice Stevens argued that a reduced standard of probable cause makes the warrant requirement a mere formality. 436 U.S. at 334 (Stevens, J., dissenting).
57. 625 F.2d 1313 (7th Cir. 1980).
employees' unfounded complaints, the criminal probable cause standard should apply.\textsuperscript{58} The court rejected this position, holding that criminal probable cause is not required for either an employee complaint or an administrative plan inspection.\textsuperscript{59}

The court also rejected plaintiff's argument that the warrant application was deficient in terms of detail, holding that the compliance officer's sworn statement that employee complaints had been received and summarizing those complaints was enough.\textsuperscript{60}

The most controversial aspect of the Burkart Randall opinion involves the court's holding that the inspection authorized by an administrative warrant need not be limited in scope to the substance of those complaints. Over Judge Wood's dissent,\textsuperscript{61} the court balanced the employer's interest in privacy against the purposes of the Act and concluded that the "interposition of a neutral Magistrate between inspectors and employers guarantees that inspectors will not exercise unbridled discretion. . . ."\textsuperscript{62}

\textbf{INFORMAL RULEMAKING}

\textit{Interpretation of the Terms "Order," "Record" and "Hearing"}

Since enactment of the Administrative Procedure Act\textsuperscript{63} in 1946, agencies have had the option of formulating regulatory policy by rulemaking or adjudication.\textsuperscript{64} Initially, however, many agencies were reluctant to utilize their informal rulemaking authority, perhaps because informal rulemaking does not involve the trial-type proceedings traditionally associated with concepts of fair procedure.\textsuperscript{65}

Agencies now recognize that informal rulemaking often is the most efficient and fairest method of setting prospective agency policy.\textsuperscript{66}

\textsuperscript{58}. \textit{Id.} at 1315.
\textsuperscript{59}. \textit{Id.} at 1318-19.
\textsuperscript{60}. The court distinguished its earlier opinions in In re Establishment Inspection of Northwest Airlines, Inc., 587 F.2d 12 (7th Cir. 1978) and Weyerhaeuser Co. v. Marshall, 592 F.2d 373 (7th Cir. 1979), where warrant applications contained mere conclusory statements that complaints had been received. \textit{Id.} at 1319-22.
\textsuperscript{61}. \textit{Id.} at 1326 (Wood, J., dissenting).
\textsuperscript{62}. \textit{Id.} at 1325. The majority's holding on the overbroad warrant issue was recently criticized in Comment, \textit{Administrative Inspections and OSHA: Abridging Fourth Amendment Safeguards? Burkart Randall Division of Textron, Inc. v. Marshall}, 15 GEo. L. REV. 233, 239 (1980).
\textsuperscript{64}. Prior to passage of the Administrative Procedure Act, official decisionmaking was thought to require adjudicatory procedures. \textit{See}, e.g., United States v. Abilene & So. Ry., 265 U.S. 274 (1924).
\textsuperscript{66}. The Supreme Court recognized this in Securities and Exchange Comm. v. Chenery
In a prophetic law review article, Professor Paul Verkuil foresaw the development of a new rulemaking model of agency decision-making and predicted that any workable model would have to find a middle ground between the desirability of flexible procedures on the one hand, and the need for procedural regularity on the other.

The 1970s were marked by active experimentation by Congress, agencies and the courts in their attempt to find this middle ground which would make informal rulemaking a viable alternative to adjudication and formal rulemaking. Courts concentrated on redefining familiar terms such as "order," "hearing" and "record" to conform to the needs of the new rulemaking model. Additionally, they focused on procedures which would assure principled decision-making. Some of these experiments worked, while others impermissibly crossed the narrow line between judicial review and judicial usurpation of legislative authority. Two recent Seventh Circuit opinions serve as a primer on the results of the search for a separate model of agency decision-making.

In *Sima Products Corp. v. McLucas*, plaintiffs, the manufacturers of x-ray-proof containers, brought a declaratory action in district court asking that an amended Federal Aviation Administration regulation be set aside. The amended regulation was enacted according to the notice and comment requirements of section 553 of the Administrative Procedure Act, with plaintiffs participating fully in those proceedings.

After promulgation of the amended regulation, plaintiffs filed a petition with the agency asking for further amendment of the new provision. After the agency failed to respond to the petition, plaintiffs...
filed their action in district court. The central issue on appeal was whether it was within the subject matter jurisdiction of the district court to review the amended regulation. Plaintiffs took the position that because the amendment was not an "order" but a "regulation," the statutory provision giving the court of appeals exclusive jurisdiction to review FAA "orders" was inapplicable.

If the Seventh Circuit had accepted plaintiffs' argument, the result would have been that FAA regulations adopted after informal rulemaking would not be subject to judicial review unless an aggrieved party called upon the equity jurisdiction or declaratory powers of a district court.

The court of appeals, however, refused to construe the term "order" literally. Instead, the court adopted a functional approach, holding that if the informal rulemaking procedure generates a sufficient record for review, then a direct appeal to the court of appeals is appropriate.

The court's adoption of the "sufficient record for appeal" standard reflects its willingness to interpret familiar administrative law terms in a way which conforms to the recognized need for an informal rulemaking process of decision-making. Traditionally, a "record" was the product of a trial-type proceeding. That gave rise to the argument that where Congress provides for appeal from an agency decision, the agency is obligated to provide an adjudicatory forum so that a "record" can be generated. The Seventh Circuit rejected this narrow reading of the term. Rather, the court defined "record" as the minimum information that is required before an appellate court can perform its reviewing function. In Sima Products, the court had no trouble finding that there was sufficient information for review, noting that the record included notice of the proposed amendment, the comments of those responding to it, and a copy of the regulation as adopted together with the agency's explanation of its adoption.

**Scope of Review of Informal Rulemaking**

If less than the formal record produced at an adjudicatory hearing is sufficient to permit review of informal rulemaking, the question be-

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76. 460 F. Supp. 128 (1978). The district court held that the court of appeals had exclusive jurisdiction to review the amended regulation. *Id.* at 134.
78. 612 F.2d 309, 313 (7th Cir. 1980).
79. *Id.* at 314.
comes what is the appropriate standard for judicial review when a traditional "record" is not before the court?

After agencies began to use extensively their informal rulemaking powers, it became apparent that the search for the appropriate measure for review of agency policymaking would not be an easy one. The traditional substantial evidence standard of review seemed inapplicable because that standard is best suited to consideration of factual determinations which are the product of testimony introduced into a formal record at an adjudicatory hearing. Informal rulemaking, however, involves prospective policymaking rather than a dispute between two litigants and, as we have seen, does not produce a formal evidentiary record.

The Administrative Procedure Act provided no express guidance in the quest for the most appropriate standard for judicial review of informal rulemaking.80 While it had been assumed that the Act's "arbitrary and capricious" standard was applicable,81 adoption of that standard posed the threat of too much judicial deference to agency decision-making. Under section 553 rulemaking procedures, an agency may take into account not only information introduced at the comment stage, but any material it deems relevant. While section 553 requires the agency to publish a "concise general statement" of the basis of any rule adopted, it does not on its face require full disclosure of the information taken into account in adopting the rule. This created problems for those seeking to challenge informal agency rulemaking in the courts, because they were effectively precluded from attacking the evidentiary basis for the rule ultimately adopted. It also meant that reviewing courts could only overturn those agency decisions where the agency acted beyond the limits of its jurisdiction or where the newly enacted rule was arbitrary on its face.

One of the responses to this situation by courts and by Congress was the development of "hybrid" rulemaking procedures. Under such procedures, agencies would be permitted to devise agency policy without having first to conduct trial-type hearings, but might be required to procedurally supplement section 553 notice and comment requirements. The judicial development of hybrid rulemaking was effectively halted by the Supreme Court's decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council.82 There, the

81. See Verkuil, supra note 65, at 206.
Supreme Court rejected the argument that section 553 establishes the procedural minimum for informal rulemaking and that courts can require extra procedures when such procedures are, in the court's opinion, necessary for principled decision-making and effective judicial review. After Vermont Yankee, it is up to Congress or to the agencies themselves to make the decision about what additional procedures, if any, should be used to supplement section 553 notice and comment proceedings.

The Court in Vermont Yankee, however, was not insensitive to the argument that meaningful judicial review of informal rulemaking is necessary to stem the criticism that administrative agencies have too much discretionary power and wield it without adequate consideration. The Court, therefore, sanctioned the practice developed by lower federal courts, particularly the District of Columbia Court of Appeals, of closely scrutinizing the sufficiency of the record for review as well as the adequacy of the agency's explanation for its action.

The job of the reviewing court in assessing informal rulemaking is now thought to require that the court take a hard look at the rationality of an agency decision, carefully examining the record to be sure that the agency considered all relevant factors in arriving at its decision. If a record is inadequate to permit the court to perform its task fully, the case may be remanded to the agency for fuller development of the facts so that review is possible. Additionally, courts can require that agencies articulate more fully the reasoning behind their policy choices.

In Belenke v. Securities and Exchange Commission, the Seventh Circuit addressed the scope of judicial review and the adequacy of the informal rulemaking record and adopted a position consistent with that evolved through the process of experimentation discussed above. In Belenke, the proposed rule was adopted after notice and comment. In approving the rule change, the SEC issued a twenty-four page, single-spaced order addressing the issues relevant to the rule change, including specific objections raised in the comment proceedings.

One of the arguments raised by the petitioners on appeal was that the "record" before the SEC did not contain "substantial evidence" to support its decision. In response, the Seventh Circuit noted that in an

83. See, e.g., Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).
86. 606 F.2d 193 (7th Cir. 1979).
informal rulemaking procedure there is no requirement of a detailed factual record. The court went on to say that, under the statute, the standard for review of such an order is whether the order was arbitrary and capricious. The court made it clear, however, that the arbitrariness standard no longer operates as a rubber stamp of agency action. Rather, the court carefully analyzed the statutory language of the Act and the reasoning of the agency in its approval order before upholding the validity of the agency rule. This approach to review of agency informal rulemaking represents a synthesis of the ideas formulated over the last decade to make rulemaking a viable alternative to more formal proceedings.

**Remedies**

*Private Remedies*

One of the criticisms of the regulatory process in recent years has been the failure of agencies to utilize effectively their enforcement powers. A judicial response to this criticism has been to find a private right of action implied in legislation designed to ensure compliance with agency requirements.

In *Cort v. Ash*, the Supreme Court articulated a four-part test for determining when a private cause of action exists. The Court found that an aggrieved person had no independent remedy when the statute 1) did not purport to create a private action; 2) did not prohibit certain conduct; 3) did not create federal rights in favor of private parties; and 4) evidenced no legislative intent to create a private remedy.

In *Bratton v. Shiffkin*, the Seventh Circuit was asked to consider the issue of whether charter air travelers have a private remedy under the Federal Aviation Act. In its initial consideration of the question, the court applied the standards set forth in *Cort v. Ash* and found that the FAA does give air travelers a right to bring suit in federal court for violation of Civil Aeronautics Board regulations. That opinion was appealed to the Supreme Court, which remanded it for reconsideration.

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89. Id. at 78. In Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), the Court stressed that the primary inquiry in determining whether a private remedy is implied is Congressional intent. Id. at 23-24.
90. 635 F.2d 1228 (7th Cir. 1980).
91. 49 U.S.C. §§ 1301-1552 (1978) [hereinafter referred to as FAA].
in light of its decision in *Touche Ross & Co. v. Redington*. In *Touche Ross*, the Court refused to find that Congress intended to create a private remedy when it merely required brokers and others to keep records as prescribed by the Securities and Exchange Commission.

On remand, the Seventh Circuit, in a 2-1 decision, distinguished *Touche Ross* and reaffirmed its earlier holding. Writing in dissent, Judge Bauer persuasively argued that Supreme Court precedent required the conclusion that air travelers have no private right of action under the FAA. Specifically, he noted that the face of the CAB regulation merely requires supplemental air carriers to post a performance bond and does not expressly provide for any private remedy, create any federal right or prohibit any conduct. Additionally, he pointed out that even the majority agreed that there was scarce legislative history on the question of Congressional intent. Finally, Judge Bauer cautioned against the majority's approach which found an implied right of action by drawing a positive implication from legislative silence on the issue.

Finding a private right of action is one way to ensure that agencies do not fail to enforce sanctions available to them under substantive legislation. On the other hand, the consequences of finding such a right are potentially serious. If the concept of an implied private cause of action is overused, the twin evils of back door judicial usurpation of administrative authority and an overload of cases on the already-burdened court system may result.

Alleged agency inefficiency in enforcing legislation also gave rise to the suit in *Stewart v. EEOC*. The 1972 Amendments to Title VII provide for the administrative processing of complaints of unfair employment practices, including the right of the agency to bring a civil action in federal court against an employer. Title VII also creates an express private remedy for employees if the EEOC fails to meet statutory deadlines setting certain times within which an agency has to act.

Appellants in *Stewart* were employees who filed unfair employment practice charges with the Commission, but the agency allegedly failed to act on those charges or make timely reasonable cause determinations. Appellants filed an action in the district court seeking declara-

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94. 635 F.2d at 1232 (Bauer, J., dissenting).
95. *Id.* at 1233.
96. *Id.* at 1233-35.
97. 611 F.2d 679 (7th Cir. 1979).
tory and injunctive relief which would compel the agency to act on appellants' charges.

The Seventh Circuit affirmed the district court's grant of summary judgment on behalf of the agency, holding that the agency's failure to act in a timely fashion violated neither the Act, the Administrative Procedure Act nor the fifth amendment. The court cited, as the primary basis for its holding, the fact that under Title VII individual complainants are given a private right of enforcement in the courts.\(^\text{100}\)

**Judicial Review of Administrative Remedies**

While agencies have broad discretionary powers in selecting an appropriate remedy for violation of an organic act,\(^\text{101}\) courts nonetheless must review agency enforcement decisions to ensure that the chosen remedy is reasonable.\(^\text{102}\) Exercising this review authority, the Seventh Circuit this term examined several agency enforcement orders.

In *Keystone Steel and Wire, Division of Keystone Consolidated Industries, Inc. v. National Labor Relations Board*,\(^\text{103}\) the Board found that an employer violated the NLRB's mandatory collective bargaining duty in connection with its decision to change the administrator of its medical benefits program. In its remedial order, the Board required the employer to cease and desist from refusing to bargain collectively and additionally ordered the employer to reinstate, upon request of the Union, the prior administrator. Calling this remedy "heavy handed, disruptive and overly broad," the court refused to enforce the provision which exceeded the scope of the collective bargaining issue and remanded the case to the agency for formulation of a more limited remedial order.\(^\text{104}\)

Several issues concerning the scope of an agency's enforcement powers were present in *Encyclopaedia Britannica, Inc. v. Federal Trade Commission*.\(^\text{105}\) Petitioners there challenged the remedial provisions of an FTC order finding the company guilty of deceptive practices in the recruitment of sales representatives and sales presentations to customers. Britannica was ordered, among other things, to cease and desist from soliciting home sales unless the salesmen immediately presented the potential customer with a printed card disclosing that the purpose

\(^{100}\) 611 F.2d 679, 683-84 (7th Cir. 1979).

\(^{101}\) Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946).

\(^{102}\) See Chrysler Corp. v. FTC, 561 F.2d 357, 364 (D.C. Cir. 1977).

\(^{103}\) 606 F.2d 171 (7th Cir. 1979).

\(^{104}\) Id. at 180.

\(^{105}\) 605 F.2d 964 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980).
of the call was to sell.\textsuperscript{106}

Petitioners asked that the order be set aside because: 1) the disclosures ordered were not the least restrictive alternative for curing deception; 2) the Commission failed to state reasons for its choice of remedy, in violation of section 557(c) of the Administrative Procedure Act;\textsuperscript{107} 3) the Commission's order infringed on Britannica's first amendment right to advertise and solicit sales; 4) the Commission abused its discretion in its method of enforcement; and 5) Britannica did not have an opportunity to rebut information it believed the Commission considered in selecting the remedy.\textsuperscript{108}

The Seventh Circuit addressed each of these arguments and rejected them in turn. The court found that the disclosure requirements were reasonably related to the deceptive practices charges, stressing the latitude which agencies should be allowed in formulating a remedy which will further the broad interests sought to be protected by Congress.\textsuperscript{109}

Secondly, the court found no violation of section 557(c) of the APA which requires that "all decisions . . . shall include a statement of . . . findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record. . . ."\textsuperscript{110} Although the Commission did not expressly state why it rejected the argument that oral disclosures would be inadequate, the court cited language in the order which permitted it to imply that the agency considered and rejected petitioner's suggestion.

Additionally, the court found no first amendment violation, despite petitioner's argument that the sanction imposed by the agency was broader than necessary to correct the evil at which it was directed. The court distinguished cases cited by petitioner\textsuperscript{111} on the grounds that those cases, for example, did more than direct truthful disclosure, by placing on the companies an affirmative duty of arguing a position which they opposed.

The court also rejected the argument that, because the Commission had imposed a less restrictive requirement in a similar case against a direct competitor of Britannica's, the Commission was prohibited

\textsuperscript{106} Id. at 967.
\textsuperscript{107} 5 U.S.C. § 557(c) (1976).
\textsuperscript{108} 605 F.2d at 970.
\textsuperscript{109} Id. at 974.
\textsuperscript{110} 5 U.S.C. § 557(c) (1976).
from entering a substantially different order against Britannica. While agreeing in principle that different remedies against competitors would be arbitrary, the court felt that because the earlier order was ten years old and against a minor competitor, the Commission's method of enforcement was not capricious.112

Judge Wood dissented, arguing that the remedial orders went beyond what was required to correct the violations and characterizing them as "more akin to bureaucratic punishment imposed upon a company found by the Commission to be errant."113

In Marshall v. N.L. Industries, Inc.,114 the Secretary of Labor filed an action in district court, alleging that an employee had been discharged in violation of the Occupational Safety and Health Act and seeking a back pay award. The district court granted the employer's motion for summary judgment on the grounds that the parties already had submitted their dispute to arbitration and that the arbitrator, while ordering the employee reinstated, denied back pay. The employee subsequently returned to work without back pay.115

On appeal, the Seventh Circuit reversed, refusing to construe the employee's return to work as a waiver of his right to statutory relief. In so doing, the court relied on the Supreme Court's opinion in Alexander v. Gardner-Denver Co.,116 which held that an arbitrator's decision under a collective bargaining agreement does not bar a subsequent Title VII claim in federal court. The court likened the Occupational Safety and Health Act to Title VII in that both were enacted with the dual purpose of rectifying an employment wrong done to an individual employee, as well as correcting a broader problem faced by workers on a nationwide level.117 Consequently, the court found that it would violate the spirit of OSHA to make an arbitrator's decision binding, thereby keeping an issue of potentially national importance out of the courts. On the waiver issue, the court refused to require that an employee ignore an arbitrator's reinstatement decision and risk loss of employment in order to exercise his right to judicial relief.118

112. 605 F.2d at 974.
113. Id. at 977 (Wood, J., dissenting).
114. 618 F.2d 1220 (7th Cir. 1980).
115. Id. at 1221.
117. 618 F.2d 1220, 1222 (7th Cir. 1980).
118. Id. at 1223.
JUDICIAL REVIEW

Preclusion of Review

Since the Supreme Court's decision in *Abbott Laboratories v. Gardner*, 119 a party aggrieved by administrative action has had a right of review which can be abrogated only "upon a showing of 'clear and convincing evidence' of a contrary legislative intent." 120 Congress manifested this intent in section 701 of the Administrative Procedure Act, which provides that agency action is not subject to judicial review if review is precluded by statute or if agency action is committed to agency discretion by law. 121

In *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, 122 the Seventh Circuit was called upon to decide if the Commodity Futures Trading Commission's determination that an emergency existed in the futures trading market was committed to agency discretion by law and thus unreviewable. The district court found the agency action reviewable, conducted an evidentiary hearing, and concluded that no emergency existed. The Seventh Circuit disagreed on the issue of reviewability. 123

In reversing, the Seventh Circuit patterned its approach on the question of reviewability after that taken recently by the Supreme Court in *Southern Railway v. Seaboard Allied Milling Corp.* 124 There, the Court involved itself in a detailed look at the face of the Act, its relationship to other statutory provisions, and the legislative history of the Act, in deciding that an Interstate Commerce Commission refusal to investigate the lawfulness of a proposed tariff was immune from judicial review. 125

In *Board of Trade*, the Seventh Circuit looked at such factors as the language of the Act ("whenever the Commission has reason to believe. . ." "in the Commission's judgment"), the absence of an express right to judicial review present in other sections of the Act and the nature of the agency authority (carefully defined emergencies) and decided that agency discretion was unreviewable as a matter of law. 126

120. Id. at 141.
122. 605 F.2d 1016 (7th Cir. 1979), cert. denied, 100 S. Ct. 1866 (1980).
123. Id. at 1022-25.
125. Id. at 448-64.
126. 605 F.2d 1025.
Review of Informal Administrative Action

A. Summary Judgment

Although until recently litigation in the administrative law area has focused on the adjudicatory and rulemaking functions performed by agencies, the bulk of the work which agencies do falls under the rubric of informal agency action.127

There was a time when it was unclear whether agency action other than rulemaking and formal adjudication was judicially reviewable.128 The Administrative Procedure Act contributed to the confusion by failing to make any express mention of the review procedures to be used when informal administrative action is involved.129

In Citizens to Preserve Overton Park, Inc. v. Volpe,130 however, the Supreme Court dispelled the notion that informal action is unreviewable and held that the "arbitrary and capricious" standard is the appropriate one for use by reviewing courts. Nonetheless, even under that narrow standard, the Court charged reviewing courts with the responsibility of scrutinizing the record on which the agency acted to ensure that the agency decision "was based on a consideration of the relevant factors. . . ."131

That language in Overton Park formed the basis for petitioner's argument in Milton v. Harris132 that the district court could not enter a summary judgment order affirming the agency's decision to terminate her disability benefits and seek a refund for overpayment.

In a Tenth Circuit case, Nickol v. United States,133 the court had concluded that the language in Overton Park exhorting thorough review of an administrative record meant that, where a record contained disputed issues of fact and where the court was required to determine if the agency decision was supported by substantial evidence, the reviewing process could not be done in a summary proceeding.134

In Milton the Seventh Circuit declined to follow the Tenth Circuit's opinion in Nickol, holding instead that the question of whether substantial evidence supports an administrative law judge's finding is a

128. BREYER & STEWART, supra note 2, at 525.
131. Id. at 416.
132. 616 F.2d 968 (7th Cir. 1980).
133. 501 F.2d 1389 (10th Cir. 1974).
134. Id. at 1391-92.
question of law, not fact, and thus summary judgment procedures may be used by the reviewing court.\textsuperscript{135}

B. Adequate Explanation Requirement

As discussed above, one of the requirements placed on an agency engaged in informal rulemaking is that of articulating the basis of its decision with enough clarity and detail to permit a court to perform its reviewing function. This same requirement of adequate explanation is present where an agency acts in other than its rulemaking or formal adjudicatory capacity, a fact underscored in the court's decision in \textit{City Federal Savings & Loan Association v. Federal Home Loan Bank Board}.\textsuperscript{136}

\textit{City Federal Savings} and a consolidated case involved challenges to a Federal Home Loan Bank Board decision approving limited branch bank facilities. The Board resolutions permitting the branch banks contained only the decision reached and conclusory language with little amplification of the reasons for the decision. The Seventh Circuit, while noting that substantial deference is due the Board's branch banking determinations because of the technical expertise involved, nonetheless refused to affirm the Board's orders, remanding the cases instead for a fuller explanation of the relationship between the record and the Board's results.\textsuperscript{137}

While hesitant to develop a checklist of questions an agency must answer before its informal decisions will be approved, the court did provide some guidelines about what the explanation should contain. Thus, although it is not \textit{a per se} abuse of discretion for an agency to fail to give express reasons for its decision, in cases where significant issues are contested, it is incumbent on the agency to explain how it resolved those issues and to provide the information on which it relied in making its decision. According to the court, that is the minimum degree of explanation required from the agency which will enable the court to decide whether the agency determination was arbitrary and capricious, the standard of review set for informal agency action by the Supreme Court in \textit{Citizens to Preserve Overton Park, Inc. v. Volpe}.\textsuperscript{138}

\textsuperscript{135} 616 F.2d at 975-76.
\textsuperscript{136} 600 F.2d 681 (7th Cir. 1979).
\textsuperscript{137} \textit{Id.} at 692-93.
\textsuperscript{138} 401 U.S. 402, 416 (1971).
MOOTNESS

One of the functions served by the mootness doctrine is to guarantee that one branch of government, the judiciary, will not unduly interfere with the policymaking responsibilities delegated to another branch.\(^{139}\) In the administrative law context, courts should be particularly sensitive to the role that mootness can play in assuring that agencies have maximum latitude in experimenting with different positions before those positions become binding precedent.

The Seventh Circuit addressed the issue of mootness in the administrative law context in two cases this term. In \textit{Central Soya Co. v. Consolidated Rail Corp.},\(^{140}\) the court examined the question of under what circumstances the "capable of repetition, yet evading review" branch of the mootness doctrine is applicable to situations regulated by Congress or its agencies. The court first noted that although the "capable of repetition, yet evading review" doctrine normally applies to government conduct, logic dictates that it be extended to cover cases between private parties as well.\(^{141}\)

With respect to the "capable of repetition" requirement, the court rejected Conrail's argument that this prong of the test is met whenever a federal court may again be called upon to decide the legal issue in dispute. Rather, the court said that "capable of repetition" means that "there must be a reasonable degree of likelihood that this issue will be the basis of a continuing controversy between these two parties."\(^{142}\) As for the "yet evading review" requirement, the court concluded that that language refers to actions which are otherwise reviewable, but which are too short in duration to be fully litigated.\(^{143}\)

Applying these definitions, the court dismissed as moot a case in which a shipper challenged the decision of a railcarrier to reduce the number of cars allocated to it under a booking agreement. The period for which the cars were needed had ended and the court refused to speculate on the possibility that these two parties might sometime in the future enter into a similar contract.\(^{144}\)

In \textit{Board of Trade of the City of Chicago v. Commodity Futures}
Trading Commission, however, the court found the case to fall squarely within the “capable of repetition, yet evading review” doctrine. The court correctly hypothesized that it was likely that the Commission, authorized by statute to use emergency powers because of the frequent fluctuations in the futures market, would again invoke these powers against the Board of Trade, the largest futures trading board in the world.

CONCLUSION

The bulk of the work performed by courts reviewing administrative decisions continues to be the stock-in-trade tasks of statutory interpretation and application of legal principles to individualized facts. This article has focused on several of the cases decided by the Seventh Circuit in its 1979-80 term which highlight efforts on the part of the federal judiciary to respond to charges of significant failures in the administrative process.

The cases discussed, however, do not represent the totality of efforts by courts and Congress to supervise administrative decision-making. Other approaches, for example, include a relaxed view of standing to challenge administrative action, an expanded due process right to be heard before adverse agency action, increased access to information in the possession of the agency and liberalization of restrictions on public participation in agency proceedings themselves. Cases involving these areas, as well as the trends discussed in this article, will serve to shape the response of the Seventh Circuit to administrative law issues in the court's upcoming terms.

145. 605 F.2d 1016 (7th Cir. 1979).
146. Id. at 1020-21.