BOOK REVIEW


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Those who know Kenneth Culp Davis find it not at all surprising that at the age of seventy he is embarking on the ambitious venture of rewriting his multi-volume treatise on administrative law. Over the years Davis has been a prodigious scholar, publishing many provocative books and articles, as well as massive supplements and revisions to his original multi-volume treatise. His seminal books on the control of discretion and discretionary justice opened areas for study that previously had been thought to be intractable.

Promotional material accompanying volume one of the revised treatise states that the complete work will consist of four or five volumes. So far only the first, dealing with six areas of administrative law, has been published. The problems of preparing and maintaining a treatise on a subject as complex and changing as administrative law are formidable: Davis has also recently published a 300-page supplement to his original treatise pending the comple-

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1 This treatise was originally published in four volumes in 1958. K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958). After several pocket part supplements, Davis published a 1970 supplement of 1154 pages, id. (Supp. 1970), and thereafter a single volume in 1976, K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES (Supp. 1976) [hereinafter cited as ADMINISTRATIVE LAW OF THE SEVENTIES]. This volume has itself been supplemented by pocket parts.

2 A sampling of the triennial volumes of the Index to Legal Periodicals going back to 1943 reveals at least one entry—and often four, five, or six entries—in each volume under Davis' name. A complete bibliography of Davis' legal writing is well beyond the scope of this review.


4 The six topics can be gleaned from the volume's six chapter titles: "The Administrative Process" (which includes some historical material, but also covers state administrative law and informal action); "Philosophical Foundations"; "Delegation and Subdelegation"; "Investigation"; "The Freedom of Information Act and Related Legislation"; and "Rulemaking Procedure."
Revising the entire treatise is an ambitious project, and Davis' decision to tackle it is admirable.

Of the six topics covered in volume one, the most important and controversial concerns rulemaking procedures. Davis' discussion of this subject—and particularly his analysis and criticism of the Supreme Court's decision last spring in *Vermont Yankee Nuclear Power Corp., Inc. v. Natural Resources Defense Council, Inc.* is particularly provocative. Because of the importance and timeliness of this discussion, the bulk of this review is devoted to rulemaking procedures. Before turning to these issues, however, it may be helpful to give an overall impression of the work.

I. GENERAL EVALUATION OF THE VOLUME

Much of the volume is new in that it has been rewritten to integrate recent developments; for example, there is extensive analysis of recent developments under the Freedom of Information Act. As one would naturally expect, some of the discussion is quite similar to Davis' latest supplement, *Administrative Law of the Seventies.* On balance though, a surprising amount of it is new.

By and large Davis has done a tremendous job of integrating the numerous and disparate strands of doctrine. His treatment of current rulemaking procedures illustrates the difficulty of this task. I wrote two law review articles on this subject in the early 1970's and prided myself on having kept up with developments in this fast-moving area since then. However, after reading Davis' treatment of the same material, I realized how many developments I had not fully explored and how many trends and interrelationships among the same cases I had failed to notice. In short, I do not see how anyone seriously following or practicing administrative law can ignore this book.

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6 435 U.S. 519 (1978). For an extensive discussion of this case, and of Davis' reaction to it, see text accompanying notes 64-84 infra.


8 *Administrative Law of the Seventies, supra* note 1.

This is not a perfect treatise, however. Primarily, it suffers from too much subjectivity, a troublesome quality in a work so widely regarded as "the" treatise on administrative law. Through- out, the volume reflects the strong personality and views of its author. Davis can be brilliant, innovative, persuasive, argumentative, stubborn, impossible, and in a few cases at least, wrong. He tends to classify the world into white hats and black hats with no room for any grays. Further, he holds views tenaciously, totally and honestly convinced of their correctness.

Strongly held views appear throughout the volume. For example, the "reverse FOIA" decisions by three courts of appeals prohibiting agencies' disclosure of information involve "an extraor- dinary twisting of meaning," and they lead to "demonstrably unsound" conclusions. In a similar vein, Davis calls the result reached by the majority of the Supreme Court in Marshall v. Bar- low's, Inc., relating to OSHA inspections, "hard to square with either the statute or the Fourth Amendment." Moreover, Davis finds that, "except for stating conclusions, [the majority opinion] said nothing that answered Mr. Justice Stevens' demonstration" in his dissent. Throughout, comments and cases with which he agrees are labelled "sound," "surely unanswerable," "reli- able," "outstanding," "solid," or "strong"; those with which he disagrees are "surprising," "unsatisfactory," "curious," "astonishing," or simply "wrong." In the promotional material accompanying the volume, Davis states that a computerized search reveals the combination of "Davis" and "Administrative Law" in 59 Supreme Court opinions, 803 federal courts of appeals opinions, and 508 opinions of federal district courts. Such citations occur "often several times in one opinion."
One of Davis' principal biases is in favor of judicial activism. For example, he declares at the outset that "judges should make new law whenever they rightly discern that new law is desirable," and that when they developed rulemaking procedures for agencies from whole cloth, the federal courts were at "their creative best." Needless to say, these particular biases are not shared by a majority of the present United States Supreme Court; so, it is not surprising that some recent Supreme Court decisions are roundly criticized. Davis even devotes the major part of a section to a systematic criticism of the procedures followed by the Supreme Court itself.

Among all courts and all agencies, the one that makes the most major policy with insufficient procedural protection is the Supreme Court of the United States. No other court and no agency makes so much major policy. Yet the Supreme Court rarely measures up to the requirements federal courts have imposed on federal rulemaking agencies with respect to the factual ingredient of policymaking.

Davis acknowledges at the outset that his thinking is "unashamedly subjective" and that the treatise represents "a good deal more" than the collection, organization, and summary of the relevant law. Of course, wearing one's biases openly on one's sleeve, as Davis does, is much better than not acknowledging them.

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28 Id. xi.
29 Id. xiii.
30 The most notable example is the twelve-page discussion, see TREATISE, supra note 11, §§ 6:35-37, in which Davis attempts to narrow or nullify the effect of Mr. Justice Rehnquist's opinion in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), discussed in text accompanying notes 64-84 infra.
For another example of Davis' subjective approach, see TREATISE, supra note 11, § 4:24, in which Davis attacks the views of those justices who favor strictly literal interpretations of the protections given by the fourth and fifth amendments.
31 See TREATISE, supra note 11, § 6:38.
32 Id. § 6:38, at 618.
Davis goes on to demonstrate his point with this example:
If Mr. Justice Blackmun goes to the Mayo Clinic's medical library in Rochester, Minnesota, to develop facts about abortion as a basis for a judicial opinion, he and his brethren are free to use the facts as a part of the Court's opinion, without giving parties adversely affected a pre-decision chance to meet the facts or to argue against them.

Id. 620.
I should perhaps add that I believe that Davis' point about the court's extra-record research on issues of broad policy and on factual matters has considerable force.
33 Id. x.
34 Id.
at all, and infinitely better than not even realizing that one has them. Still, one could have hoped for a bit more measured and impartial review of admittedly highly controversial issues in the revision of a book so widely relied upon and acclaimed. However, that is not Davis' way.

Furthermore, like Davis' original treatise, this volume consists almost entirely of litigated cases and legislative materials, although there are occasional references to rules of practice and agency proceedings scattered throughout the text. An ideal administrative law treatise should give more emphasis to the latter than Davis did, even though a systematic effort along that line would be an immense and perhaps impossible undertaking. If Davis had looked more at the actual agency experience with some of the novel rule-making procedural requirements, for example, I suspect that his enthusiasm for them might have been lessened to some extent.

Further, the volume has several minor flaws. For example, its index is wholly inadequate for most practitioners and should be improved. Single entries for "Investigation-incrimination," "Jurisprudence," or "Cross-examination" without some further subcategories are not helpful. Moreover, there is no tabular index of references to either the Federal Register or the Code of Federal Regulations. Nor are there entries in the index for the various agencies discussed in the text, such as the Federal Trade Commission or the Immigration and Naturalization Service. One would expect to find each of these types of references indexed in an administrative law treatise. Fortunately, the present index is printed separately from the book itself. Because Davis plans to revise the index as each new volume is published, he has the opportunity to expand and improve it.

One final point deserves mention. Perhaps this is a matter of personal preference more than anything else, but I am not comfortable with a multi-volume treatise that has all source references in the text, rather than in footnotes. This use of textual references not only distracts the reader, but also probably results in the elimination of some useful further elaboration that could have been placed in a footnote without interfering with the text itself.

35 See note 10 supra & accompanying text.

36 This point was made strongly by a practicing attorney in a review of the original treatise. See Westwood, The Davis Treatise: Meaning to the Practitioner, 43 MINN. L. REV. 607 (1959).

Of course, none of these faults significantly detracts from the book's basic strength. I expect that the entire treatise, when completed, will be as useful in the coming decade as the original was in the 1960's.

II. RULEMAKING PROCEDURES

The current controversy over rulemaking procedures can best be appreciated by outlining its historical development.

Until approximately 1970, rulemaking procedure was not particularly controversial. The Administrative Procedure Act \(^{38}\) ("APA") classifies rulemaking procedures into two well understood types:

(1) "Informal" or "notice-and-comment" rulemaking, made pursuant to section 553 of the Act, involves publication of a notice of proposed rulemaking in the Federal Register (including "either the terms or substance of the proposed rule or a description of the subjects and issues involved"); \(^{40}\) an opportunity for "interested persons . . . to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation"; \(^{41}\) and a final notice in the Federal Register promulgating the final rule, including "a concise general statement of [its] basis and purpose"; \(^{42}\) and

(2) "Formal" rulemaking, or "rulemaking on a record" requires the agency to follow the essentially adjudicative procedures set forth in sections 556 and 557 of the Act. \(^{43}\) These include a formal trial-type hearing before an administrative law judge, sworn testimony, cross-examination, and an ultimate decision based solely on the record created at the hearing. Although the Act permits a certain amount of flexibility, it was generally recognized that "rulemaking on a record" was slow, inefficient, and poorly suited to resolving the kind of broad issues usually addressed in rulemaking. \(^{44}\)


\(^{39}\) Technically, there is a third type: rulemaking without any external procedures at all, made pursuant to one or more of the exemptions contained in 5 U.S.C. § 553. See id. § 553(a), (b)(A), (b)(B).

\(^{40}\) Id. § 553(b)(3).

\(^{41}\) Id. § 553(c).

\(^{42}\) Id.

\(^{43}\) 5 U.S.C. §§ 556-557 (1976). The "formal" procedures enumerated in these sections become applicable whenever statutes require that rulemaking be conducted "on the record after opportunity for an agency hearing." 5 U.S.C. § 553(c).

\(^{44}\) See generally Procedural Innovation, supra note 9. See also TREATISE, supra note 11, § 6:8. The United States Supreme Court has reduced the potential scope of these formal rulemaking requirements by narrowly construing the critical
Davis concluded in his 1970 supplement that informal notice-and-comment rulemaking was "one of the greatest inventions of modern government." In 1978, Davis' new volume declares that the changes made in rulemaking procedures since 1970 "are so broad and so deep that they are properly called revolutionary," and that the "greatest invention" has been "vastly improved." The "revolutionary" improvements in informal rulemaking procedures, which are described fully in Chapter Six, were prompted by several factors. First, the late 1960's and early 1970's were a period of unprecedented governmental regulatory activity affecting broad areas of the economy. And, as a result of the Supreme Court's decision in Abbot Laboratories v. Gardner, it was clear that all such rules were subject to pre-enforcement judicial review. However, simple notice-and-comment rulemaking (conducted pursuant to the minimum requirements of the Administrative Procedure Act), although efficient from the standpoint of the agency, does not provide an adequate or satisfactory basis for meaningful pre-enforcement judicial review. Nor does it give those who may be significantly and seriously affected by the proposed rule a very satisfactory assurance that their views have received careful consideration from the agency.

In statute after statute Congress struggled


46 Treatise, supra note 11, § 6:1, at 449.
47 Id. 448.
48 Id. §§ 6:1-31.
50 See, e.g., Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972) in which the Court remanded a proceeding to the agency "to supply an implementing statement that will enlighten the court as to the basis" on which it established a secondary air quality standard, which was being contested. Id. 850. The court demanded further explanation, even while recognizing that the statement accompanying the regulations had met the requirements of 5 U.S.C. § 553. Id. The Environmental Protection Agency ("EPA") thereafter published supplemental statements for the regulations it had previously adopted. See, e.g., 37 Fed. Reg. 5,767 (1972).
51 Indeed, unless the agency responds to comments, the affected person may never know whether the comment was even read. Before 1970 agencies often dismissed objections rather curtly. For example, in promulgating significant regulations relating to stationary sources of air pollution in 1971, the EPA dismissed a large number of critical comments with these two sentences:

In the comments on the proposed standards, many questions were raised as to costs and demonstrated capability of control systems to meet the standards. These comments have been evaluated and investigated, and it is the Administrator's judgment that emission control systems capable of meeting the standards have been adequately demonstrated and that the standards promulgated herein are achievable at reasonable costs.

to strike a balance between these factors, coupling grants of rule-making authority with additional procedural requirements designed to insure greater outside participation and broader judicial review. Some of these procedures, such as those imposed on certain Federal Trade Commission rulemaking by the Magnuson-Moss amendments, are extremely elaborate.

During the same period the courts, particularly the Court of Appeals for the District of Columbia, responded to essentially the same concerns by developing what Davis describes as a "common law" of rulemaking. In several instances the courts remanded rulemaking proceedings to the agencies, ordering them to provide fuller descriptions of the reasons for their decisions; to describe the procedures they used for evaluating certain information; and to conduct additional proceedings of a largely unspecified nature or, in a few instances, with specific provision for cross-examination on "critical questions." Several of these opinions involve full and careful review of complex technical or scientific issues by judges to determine whether the decision had a reasonable basis under all the circumstances. A commentator familiar with the internal operations of the Environmental Protection Agency has praised these cases by noting that "the best hope for detailed, effective review of complex regulations is the judiciary," and that the courts' "factual probing" in these opinions was "several times more detailed than [any that] the regulations at issue had received since they were first written." One issue that divided the District of Columbia Circuit was whether judges should engage in such factual probing on complex issues, or whether they should limit their


54 TREATISE, supra note 11, at 449-50.

55 See, e.g., Industrial Union Dep’t, AFL-CIO v. Hodgson, 499 F.2d 467, 481, 488 (D.C. Cir. 1974); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972).

56 See, e.g., Hooker Chems. & Plastics Corp. v. Train, 537 F.2d 620, 636 (2d Cir. 1976).

57 International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973) (cross-examination); accord, Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1016 (D.C. Cir. 1971) (right to make oral presentation to agency officials upheld; cross-examination may be required on the "crucial issues").

58 See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976).

review to the reasonableness of the procedures followed. 60 Davis refers to the latter position as "the Bazelon Heterodoxy." 61

In summarizing these trends, Davis concludes that both Congress and the courts were gradually developing the entirely new concept of a "rulemaking record" that would contain enough information to permit effective judicial review without imposing on agencies the excessive, trial-type procedural burdens of "rulemaking on a record." 62 "Seldom in the history of the Anglo-American judiciary," Davis rather dramatically concludes, "have the courts been so creative, and perhaps never before has so much interaction occurred between new thinking of judges and new thinking of legislators." 63

Then came Mr. Justice Rehnquist's opinion last spring in Vermont Yankee. 64 The case involved a rule adopted by the Nuclear Regulatory Commission to deal generically with the problem of assessing the cost of future nuclear waste management in the licensing of nuclear reactors. In developing this rule, the agency employed procedures in addition to those required by the Administrative Procedure Act: besides soliciting written comments, the agency appointed a three-member board that conducted an oral, legislative-type hearing. The Court of Appeals for the District of Columbia Circuit, however, remanded the proceeding to the agency, which, the court held, had "uncritically relied on...extremely vague assurances by agency personnel that problems as yet unsolved [would] be solved." 65 In writing for the court, Judge Bazelon con-

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61 TREATISE, supra note 11, § 6:35, at 607.

62 Id. §§ 6:1, 6:10. As Davis has pointed out, a great deal of confusion is generated by the linguistic similarity in the two terms "rulemaking on a rulemaking record" and "rulemaking on the record." In fact, they embody entirely distinct concepts. The latter requires trial-type procedures pursuant to 5 U.S.C. §§ 556-557. See text accompanying note 43 supra. A "rulemaking record," on the other hand, accompanies section 553 proceedings. It refers to the bundle of materials that specific agencies are now required by statute to compile and submit to the court as an aid to its reviewing the promulgated rule.

63 TREATISE, supra note 11, § 6:1, at 449.


65 Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 653 (D.C. Cir. 1976), rev'd sub nom. Vermont Yankee...
cluded that the record developed by the agency was "insufficient...to sustain a rule limiting consideration of the environmental effects of nuclear waste disposal." The court, however, did not specify the precise procedures to be followed on remand; instead, it left the choice of appropriate procedures to the discretion of the agency, after observing that "[m]any procedural devices for creating a genuine dialogue on these issues [are] available." Judge Tamm, who concurred only in the result, protested the open-ended nature of the remand because he feared that such remands would result in the "over-formalization" of the rulemaking proceeding. He also broadly intimated that on the existing record the rule could not be supported under the "arbitrary and capricious" standard of judicial review.

The United States Supreme Court emphatically reversed in an opinion written by Mr. Justice Rehnquist, and concurred in by all seven participating justices. The language of the opinion is so harsh that Davis appropriately comments that "[t]he Supreme Court was not only reversing the Court of Appeals but was seemingly castigating it." The most important statements in the case concern court-imposed procedures in rulemaking:

[In two earlier cases], we held that generally speaking [section 553] of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.

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66 Id.
67 Id.
68 Id. 660 (Tamm, J., concurring in the result).
69 Id. 661 & n.11.
71 The Court said, for example, that the lower court was "wrong," id. 542, 550; that it "had seriously misread or misapplied" applicable law, id. 525; and that it had engaged in "Monday morning quarterbacking," id. 547.
72 TREATISE, supra note 11, § 6:35, at 606.
Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.\textsuperscript{73}

The Court returned to the same theme in a later part of its opinion, commenting that it “is absolutely clear [that a]bsent constitutional constraints or extremely compelling circumstances the ‘administrative agencies “should be free to fashion their own rules of procedure . . . .” ’” \textsuperscript{74} Indeed, Mr. Justice Rehnquist declared that this principle was a “very basic tenet of administrative law,” \textsuperscript{75} and that “our cases could hardly be more explicit in this regard.” \textsuperscript{76} Moreover, he stated that the legislative history of the Administrative Procedure Act “leaves little doubt that Congress intended that the discretion of the agencies and not that of the courts be exercised in determining when extra procedural devices should be employed.” \textsuperscript{77} Finally, the Court emphasized the dangers of judicial intrusion: if agencies were forced to operate under a “vague injunction to employ the ‘best’ procedures . . . [they] would undoubtedly adopt full adjudicatory procedures in every instance.” \textsuperscript{78} This, in turn, would “totally disrupt the statutory scheme” \textsuperscript{79} with the result that the advantages of informal rulemaking would be “totally lost.” \textsuperscript{80}

All of this is strong language that is fundamentally inconsistent with Davis’ basic thesis. Davis responds with a frontal attack: these statements, he argues, should not be taken literally and should be read merely as a rejection of Judge Bazelon’s “procedural emphasis.” \textsuperscript{81} After pointing out that Vermont Yankee did not involve at least a dozen procedural questions addressed by lower courts in the past,\textsuperscript{82} Davis concludes that “the broad language that


\textsuperscript{74} Id. 543 (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965) (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940))).

\textsuperscript{75} Id. 544.

\textsuperscript{76} Id.

\textsuperscript{77} Id. 546 (emphasis in original).

\textsuperscript{78} Id. 546-47.

\textsuperscript{79} Id. 547.

\textsuperscript{80} Id. (footnote omitted).

\textsuperscript{81} TREATISE, supra note 11, § 6:36, at 609. For a discussion of Judge Bazelon's position, see text accompanying notes 59-61 supra.

\textsuperscript{82} TREATISE, supra note 11, § 6:36, at 609-10.
courts may not add to the procedural requirements of § 553 probably was not intended to apply to any of the dozen questions or to other similar questions."\(^8\) The emphasis is supplied by Davis himself, who ends his discussion with this remarkable comment:

The *Vermont Yankee* opinion is largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority. The Court lacks power to change the law through sweeping generalizations that are unsupported by close analysis. When the Court is unanimous, it has enormous power to change the law by carefully considering all facets of the problem before it and by systematically answering the reasonable questions about the problem that an informed person would raise. The *Vermont Yankee* opinion is not that kind of opinion.\(^8\)

### III. Future Revisions of Rulemaking Procedures

The Court’s sweeping language and the ambiguity of its holding in *Vermont Yankee* raise many questions ultimately left unanswered in the opinion. In the balance of this review I will briefly address three of the most important issues remaining: (1) the effect of *Vermont Yankee* on the future scope of judicial review, (2) the effect of the judiciary’s diminished power to order agencies to use additional procedures, and, (3) a possible plan for legislative action in response to *Vermont Yankee*.

(1) Mr. Justice Rehnquist’s opinion clearly establishes that the Court was deciding only whether the Court could review the adequacy of the agency’s procedures, and not whether the rule itself might be considered “arbitrary and capricious” under the Administrative Procedure Act.\(^5\) In fact, the case was remanded to the court of appeals with explicit directions that it review the rule “as the

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\(^8\) *Id.* 610 (emphasis in original).

\(^8\) *Id.* § 6:37, at 616.

\(^5\) In at least two passages the Court acknowledges the narrow scope of its holding and reminds the court below that it is still free to exercise substantive review on remand. First, while discussing the issue of mootness, the Court states:

> Upon remand, the majority of the panel of the Court of Appeals is entirely free to agree or disagree with Judge Tamm’s conclusion that the rule pertaining to the back end of the fuel cycle under which petitioner *Vermont Yankee*'s license was considered is arbitrary and capricious within the meaning of . . . [§ 706] of the Administrative Procedure Act . . . even though it may not hold, as it did in its previous opinion, that the rule is invalid because of the inadequacy of the agency procedures.


The same point is reiterated in a later portion of the text. *Id.* 549.
Administrative Procedure Act provides”; 86 that is, under the “arbitrary and capricious” standard. The Court, however, ordered this review to be made solely on “the administrative record,” and to be limited to the agency’s “finding” based on that record. 87

Thus, Vermont Yankee does not explicitly narrow the scope of substantive judicial review. It may well have that effect indirectly, however, if agencies revert to the pre-1970 practice of publishing only a “concise general statement of [the rule’s] basis and purpose” that reveals little about the reasoning behind the agency’s decision. 88 This is probably unlikely for several reasons. First, most agencies by now are in the habit of rendering full explanations for their rulings; this practice may well continue on its own momentum. Second, such a development appears to be inconsistent with the 1978 Presidential Executive Order on rulemaking procedures. 89 Third, the lower courts, and even the Supreme Court, probably will continue to insist on full explanations as a requirement of judicial review under the APA rather than as an “additional procedure” not required by the APA. 90 Full explanations thus prob-

86 Id.

87 Id. (quoting Camp v. Pitts, 411 U.S. 138, 143 (1973)). The citation to Camp only adds confusion. In Camp the reviewing court sought to remedy an agency’s inadequate record by ordering a trial de novo at the district court level. In a brief per curiam opinion the Supreme Court held that the Administrative Procedure Act does not give the reviewing court itself the power to supplement or supplant the agency’s record; when an agency’s record is so inadequate that it cannot form the basis for meaningful judicial review, the proper course is to remand the case to the agency. The Court continues to assume—contrary to fact—that an administrative record actually exists in connection with all informal decisions. See Pederson, supra note 59, at 62-64.

88 See text accompanying note 41 supra. The same point is implicit in Davis’ discussion of the pre-1970 precedents involving judicial review of informal rulemaking. See Treatise, supra note 11, § 6:12, at 498.

For an example of the terse notices announcing the adoption of rules in the pre-1970 period, see note 51 supra.

89 Exec. Order No. 12,044 ("Improving Government Regulations"), 43 Fed. Reg. 12,661 (1978), requires each agency to prepare a “regulatory analysis,” which must be made public when its rule is published. Id. 12,663. The analysis must include “a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others.” Id.

90 The clearest indication of the Supreme Court’s attitude toward full explanation of agency action appears in Dunlop v. Bachowski, 421 U.S. 560 (1975), in which the Court pointed out that a statement of reasons was necessary “to enable the reviewing court intelligently to review the Secretary’s determination.” Id. 571. Without such a statement, reviewing courts would be unable to determine whether agency action “has been exercised in a manner that is neither arbitrary nor capricious.” Id. 571 (quoting DeVito v. Shultz, 300 F. Supp. 381, 383 (D.D.C. 1969)).

Mr. Justice Rehnquist, writing only for himself, stated that the Administrative Procedure Act, 5 U.S.C. § 555(c), required a statement of reasons, and that “[i]his
ably will not be considered as falling within *Vermont Yankee's* broad proscription.

The phrase "arbitrary and capricious" obviously has flexibility. Indeed, Davis concludes that there is no real difference between that standard and the "substantial evidence" standard in terms of scope of review. Judge Tamm's opinion in *Vermont Yankee* demonstrates that the "arbitrary and capricious" standard has substantive meaning: Judge Tamm suggested that, when measured against this standard, the agency's record was inadequate to support its rule. For this reason, he voted to remand the case to the agency. If this standard is generously construed in that way, then the same kind of probing review that occurred in cases prior to *Vermont Yankee* will probably continue to occur in the future. In my judgment, such review is important not only to assure the development of reasonable rules but also to improve and structure the agencies' internal decisionmaking processes.

(2) If it is true, as I have argued, that the courts are still able to make a probing review of the substance of an agency's decision under the "arbitrary and capricious" standard, then one might wonder how much has been lost as a result of *Vermont Yankee's* command that courts no longer may direct agencies to institute additional procedures on remand. My impression is that whatever powers have been lost are not nearly as important as Davis fears them to be. The only study of the actual effect of these remands—a study which Davis, surprisingly, neither cites nor refers to—concludes that the remanded proceedings did not yield any dramatic improvements. Moreover, there has never been general agreement that such remands are desirable. There is a real danger that an agency, when faced with a general remand for additional unspecified procedures, might utilize undesirable trial-type proceed-

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91 *Treatise*, supra note 11, § 6:6, at 468.


93 See generally Williams, supra note 37.
ings, as at least the Department of Agriculture apparently did. Indeed, the basic underpinnings of these cases always have been shaky; the cases have been a phenomenon only of the District of Columbia Circuit.

(3) The final question, and certainly an intriguing one, is whether, in light of the experimentation of the 1970's and in response to Vermont Yankee, Congress should revise the rulemaking statute. Davis believes that revision now is both unwise and unnecessary. In the “Summary and Perspective” section of the chapter on rulemaking, he states that “Congress could probably salvage what the Court has destroyed, but the time has not yet arrived for a codification of the new law of rulemaking procedure for it is still growing too rapidly. It should be allowed to grow further.” He concludes both the rulemaking chapter and the volume by reiterating his opposition to statutory change: “At the appropriate time, a codification of [rulemaking procedure] may be written into § 553 of the Administrative Procedure Act, but not until the rapid development of it has slowed down.”

I disagree. I believe that we now have enough experience to assess which rulemaking procedures work well and which do not. Spurred by the uncertain implications of Vermont Yankee, we should now begin the process of amending 5 U.S.C. § 553. As first steps, I envision not only a study to revise section 553, but also a systematic review of all provisions in the numerous substantive statutes that impose rulemaking procedures. I believe that most of these provisions should be repealed in favor of the revised section 553 process; there may, however, be a few exceptions, in which a special procedure seems peculiarly appropriate for a specific grant of rulemaking authority. Although the development and enactment of such a statute is a major task, it should produce a kind of order that does not now exist in the area of rulemaking procedures.

Despite Davis' professed uncertainty on this issue, and his feeling that further experimentation is needed prior to any attempts at revision, his chapter on rulemaking procedure reveals that only a few problem areas remain. They include: the extent

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95 Treatise, supra note 11, § 6:39, at 630.

96 Id. 634.
to which agencies should make findings of fact in rulemaking; the
extent to which cross-examination should be provided; whether the
agency "record" may be supplemented after the comment period
has ended; and the kind of ex parte contact rule, if any, that should
be applied. As has already been suggested,\textsuperscript{97} Davis tends to con-
centrate on reported cases and statutory provisions rather than on
actual agency experience. Quite a bit is presently known about
agency experience with these problems; a systematic study could
illuminate those problems already identified and reveal additional
ones.

Revision of section 553 would produce several significant ad-
vantages. The evolving concepts of a "rulemaking record" and
open pre-notice procedures have already led to many desirable in-
novations in recent years. Some of these appear in the Executive
Order (which will expire after two years);\textsuperscript{98} some, in recent
legislation, such as the Clean Air Act Amendments of 1977;\textsuperscript{99} some,
in a series of non-binding recommendations by the Administrative
Conference;\textsuperscript{100} and some, in the burgeoning legal literature.\textsuperscript{101} A
revised section 553 could adopt the most desirable of these innova-
tions and make them uniformly applicable to all agencies with rule-
making authority. At the same time, the revision would foster a
clearer articulation of the appropriate standard of judicial review.
In this way, Congress could insure that informal rulemaking con-
tinues to be subjected to probing judicial review, even while elimi-
nating trial-type proceedings and mandatory cross-examination\textsuperscript{102} in
those classes of cases in which they are now required.

\textsuperscript{97} See text accompanying notes 36 & 37 supra.
\textsuperscript{100} See generally the annual reports of the Administrative Conference of the
United States.
\textsuperscript{101} See generally Auerbach, Informed Rule Making: A Proposed Relationship
A partial list of the innovations from these sources includes the following: a
public agenda of rulemaking activities; a list of "significant" proceedings; a published
description of pre-rulemaking procedures; the use of advance notices of proposed
rulemaking; a public docket for each rulemaking proceeding; and the development
of the "record" in an open manner; mandatory oral, legislative-type hearings in all
"significant" proceedings; and clear guidelines specifying the amount and extent
of justification that the agency must show as a basis for its decision.

\textsuperscript{102} Davis continues to argue that cross-examination is appropriate for issues of
While I do not disagree with this general formulation, it has proved impractical as
a mandatory requirement. Davis superficially analyzes the experience of the Federal
Trade Commission in one proceeding under the Magnuson-Moss amendments and
concludes that the problems lie with the administrators rather than with the require-
ment itself. However, my discussions with agency personnel and with the con-
In my view, the principal effects of *Vermont Yankee* should be to alert Congress to the inadequacy of the present section 553; to prompt it to undertake a fresh study and review of all rulemaking procedures; and ultimately, to spur it to revise and unify those procedures. Should these events occur, *Vermont Yankee* may turn out to be in fact a blessing.

Consultant for the Administrative Conference who is studying the Magnuson-Moss Act persuade me that *mandatory* cross-examination, even on the elusive issues that can be labelled "specific," should never be required in general rulemaking proceedings. If this question were reserved for agency discretion, most of the issues described by Davis as requiring further study and development, see text accompanying note 97 supra, would disappear.
BOOKS RECEIVED


