THE ADMINISTRATIVE PROCEDURE ACT'S "GOOD CAUSE" EXEMPTION

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I. INTRODUCTION

Advances in medical technology have made it possible to prolong lives which otherwise would have ended. When the life in question is that of a severely handicapped newborn, agonizing life-or-death decisions must be made and made quickly. The moral and ethical dilemmas reached public consciousness in 1982. In Bloomington, Indiana, a child identified only as "Baby Doe" was born with Down's syndrome (mongolism) and a surgically correctable blockage of his digestive tract. His parents refused to consent to corrective surgery, and despite appeals by the county prosecutor to the state courts, no judicial intervention occurred. The infant died six days later.[1]

The "Baby Doe" case attracted national attention and prompted the federal government to take action under federal law prohibiting discrimination on the basis of handicap in administering federally assisted programs.[2] A newly appointed Secretary of Health and Human Services determined to set up and publicize a nationwide reporting system to receive and coordinate complaints of discrimination against hand-

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[1]N.Y. Times, Apr. 15, 1982, at 21, col. 5; N.Y. Times, Apr. 16, 1982, at 14, col. 6.

[2]On April 30, 1982, the President issued a directive and on May 18, 1982, the Health and Human Services Office for Civil Rights issued a "Notice to Health Care Providers." Both documents reminded recipients of federal financial assistance of the applicability of section 504 of the Rehabilitation Act of 1973. That section provides: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (Supp. V 1981).

icapped infants. Recipients of federal health care dollars were directed to post a notice encouraging reporting, to a tollfree number in the department, by anyone with knowledge that a handicapped infant was being denied food or care.[3] Upon receipt of such reports, HHS intended to "rely heavily on . . . state and local agencies, . . . which have traditionally played the key role in the investigation of complaints of child abuse and neglect."[4] Because young lives were arguably at risk, the interim final rule was issued without following the usual procedures for agency rulemaking under the "good cause" exemption[5] in the Administrative Procedure Act (APA).[6] Within days, groups representing pediatricians and hospitals filed suit challenging the rule as an arbitrary, capricious, heavy-handed intrusion into the most delicate medical judgments. In addition, the plaintiffs challenged the promulgation of the rule without allowing comment by those most immediately affected,[7] arguing that the rule was procedurally defective as well.

A better case could hardly be imagined to illustrate the tension between the values at stake in "good cause" cases. In general, when the agencies of the federal government make rules,[8] the APA provides for public participation in their formulation.[9] These procedures further

[3]*See* Interim Final Rule, 48 Fed. Reg. 9630 (1983).

[4]*Id.*

[5]5 U.S.C. § 553(b)(B)(1982)

[6]5 U.S.C. §§ 551, 553, 706 (1982)

[7]The secretary made an explicit finding that "[a]ll modifications made by the interim final rule are necessary to protect life from imminent harm. Any delay would leave lives at risk." 48 Fed. Reg. 9631(1983). Thus, invoking the "good cause" exemption, the rule was issued without prior notice and comment, although comments were solicited on the rule as published. *Id.*

[8]The APA defines a "rule" as follows:

> Rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4) (1982).

[9]Rulemaking procedures are set out in 5 U.S.C. § 553, which states:

> (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
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> (1) a military or foreign affairs function of the United States; or
>
> (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
>
> (b) General notice of proposed rule making shall be published in the Federal Register,

the important goals of accurate, well-informed decisionmaking and participant satisfaction with the way government operates.[10] But public participation can also be costly; the time necessary to solicit and evaluate public comments may foreclose government's ability to react swiftly. Furthermore, when agency rule changes are minor, technical, and uncontroversial, it would be wasteful to go through the motions of full notice and comment. As pragmatists, acutely aware that government must be permitted to function, the APA draftsmen included an exemption from the usual requirement of the notice-and-comment procedure if there is "good cause" to bypass it.[11]

As in the *Baby Doe* case, this issue has become a battleground, implicating deeply-held values. It is not surprising that those affected by often far-reaching decisions demand some opportunity to present their views, especially when they strongly oppose the agency's rule; a society which rests on participation and governmental accountability

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unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

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

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

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

Except when notice or hearing is required by statute, this section does not apply—

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

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

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, section[s] 556 and 557 of this title apply instead of this subsection.

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

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

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

[10]Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279 (1978).

[11]5 U.S.C. §§ 553(b)(B) and (d)(3) (1982).

promises no less. Nevertheless, as problems arise which call for swift action, the delays and costs associated with gathering input loom large. Agencies invoking the exemption have been challenged, and the courts have struggled to accommodate the conflicting values as they scrutinize claims of "good cause."[12] Furthermore, regulatory reform bills under consideration by Congress[13] would make some changes in the wording and the practice of the exemption. It is the aim of this study to catalogue the "good cause" decisions and suggest some changes which would better accommodate the competing values at stake. Although experience has shown that "good cause" situations are so varied as to defy attempts to categorize them in advance, history has also demonstrated the dangers of proceeding without public input. Agencies should provide for advance comment whenever possible, and should use "good cause" procedures only to frame narrow solutions to the most pressing regulatory problems. In such situations, the agency should solicit public reaction after promulgation to achieve the best rule possible.

II. PUBLIC PARTICIPATION IN RULEMAKING AND THE "GOOD CAUSE" EXEMPTION

Public participation in the rulemaking of federal agencies is important both to the agencies and to the public. The opportunity to comment on matters of direct concern encourages and stimulates those in possession of information and ideas relevant to the [illegible] come forward and help educate the agency. The prospect of binding rules which will affect and limit private behavior is a powerful incentive to speak up, thus providing government with valuable data at relatively low cost. Thus, mandating an opportunity for the interested public to offer input is often an effective and efficient way for government to gather the information necessary to make sensible decisions.

Public participation is also important to those affected by regulation. The opportunity to comment represents a crucial chance to dissuade regulators from actions which individuals or groups consider unwise or ill-founded. Furthermore, notions of fundamental fairness suggest some opportunity for affected persons to provide input into decisions which may have far-reaching effects on them. Agencies which listen and respond to public comment enhance their legitimacy and accountability, both of critical importance when decisionmaking is delegated to

[12]For an earlier compilation, *see* Annot., 45 A.L.R. FED. 12, 74–97 (1979).
[13]S. 1080, 97th Cong., 2d Sess., 128 CONG. REC. S2713 (daily ed. Mar. 24, 1982).

a nonrepresentative, politically insulated body. Thus, distinguished commentators[14] affirm the principle of soliciting public comment in the rulemaking process, as the APA does in section 553.

As provided by the APA, an agency which plans to issue a rule must publish in the Federal Register a notice which includes either the actual provisions of the proposed rule, or a summary statement of the subject or issues to which they relate.[15] If the rule is of limited applicability, so that the agency can identify and provide actual notice to all persons subject to the rule, no publication is required.[16]

After giving notice, the agency is required to accord interested persons an opportunity to comment "through submission of written data, views, or arguments with or without opportunity for oral presentation."[17] The APA requirements represent a minimum; agencies often provide more extensive public procedures to ventilate especially controversial issues,[18] and Congress has mandated a variety of procedural forms in statutes passed since the APA.[19]

The agency is required to review comments received, and to prepare for any rule issued a statement of its basis and purpose.[20] Although there is no formal requirement that the agency address the comments received, failure to consider significant issues raised by such input may call into question the rationality of the final rule and result in judicial nullification on review.[21]

Despite the advantages of soliciting input, the process itself can be costly, especially when prompt action is crucial. In some instances, the rule is merely technical and predictably uncontroversial. In others, the agency is lifting a restriction and foresees no conceivable objection. In such instances, permitting the public an opportunity to comment

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[14]*See* especially the work of Professor Arthur Bonfield, *e.g.*, Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970); Bonfield, *Military and Foreign Affairs Function Rulemaking Under the APA*, 71 MICH. L. REV. 221 (1972); *see also* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 593–94 (2d ed. 1978).

[15]5 U.S.C. § 553(b)(1982).

[16]*Id.*

[17]5 U.S.C. § 553(c)(1982).

[18]For instance, in the celebrated *Vermont Yankee* litigation, the Atomic Energy Commission afforded opportunity for oral argument before an AEC hearing panel. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

[19]*See* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovations in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1313 (1972).

[20]5 U.S.C. § 553(c)(1982).

[21]*See, e.g.*, National Tire Dealers & Retreaders Ass'n v. Brinegar, 491 F.2d 31 (D.C. Cir. 1974).

would serve no useful purpose, and would introduce unnecessary delay into the process of government.

Moreover, some situations may call for prompt action in response to fast-moving events. The delay added by soliciting public comment may hinder an effective response, and in some cases, advance notice of proposed action may actually exacerbate the problem facing the agency. Especially when governmental agencies have been assigned the task of regulating volatile sectors, such as gasoline or financial markets, advance notice of regulatory measures would produce adjustments that would nullify the effect of the measures and perhaps worsen the problem.

Hence, in some situations public participation may be too costly or too destructive of the important values of efficiency and effectiveness. The APA takes two approaches to reconciling the advantages of public participation with the need to allow government to function: section 553 provides for categorical exemptions from the requirements of notice-and-comment procedures,[22] and also includes a discretionary exemption for situations where the agency finds "good cause" to issue rules without advance public participation.[23]

The APA's "good cause" exemption is qualified and limited; the agency must find that notice and public procedure are "impracticable, unnecessary, or contrary to the public interest."[24] Both the finding and a brief statement of reasons therefor must be incorporated into the rule issued.

The grounds listed in section 553(b)(B) are stated in the alternative, so that any one of them is sufficient to invoke the exemption, although in practice the terms tend to overlap. The legislative history of the APA provides a gloss on all three terms. "Impracticable" referred to a situation in which "the due and required execution of agency functions would be unavoidably prevented by its undertaking public rulemaking proceedings."[25] Thus, impracticability seems to focus on the need for quick action. "Unnecessary" was interpreted to refer to cases involving

[22]Some exemptions are quite broad: section 553(a) exempts from all rulemaking requirements "military or foreign affairs function[s]" and "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits or contracts." Others are narrower: section 553(b)(A) exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice," from the notice-and-comment procedures.

[23]5 U.S.C. § 553(b)(B)(1982).

[24]*Id.*

[25]S. Doc. No. 248, 79th Cong., 2d Sess. at 200, 258 (1946) [hereinafter cited as S. Doc. No. 248]. This document is the official legislative history of the APA and contains working papers and committee reports.

"a minor or merely technical amendment in which the public is not particularly interested."[26] The phrase "contrary to the public interest" was identified as one which "supplements the terms 'impracticable' or 'unnecessary'; it requires that public rulemaking procedures shall not prevent an agency from operating and that on the other hand, lack of public interest in rulemaking warrants an agency to dispense with public procedure."[27] The Attorney General's Manual on the Administrative Procedure Act, issued contemporaneously by a group which had taken a leadership role in drafting the APA,[28] suggests another, independent significance for the term "contrary to the public interest:" the term refers to situations "in which the interest of the public would be defeated by any requirement of advance notice."[29] Thus, even if there is no particular need for speed in developing policy, the policy initiative depends on an element of surprise in order to have any effect.

Section 553 contains a second "good cause" exemption, which requires that a rule shall be published in the *Federal Register* at least 30 days before it takes effect.[30] The delayed effective date serves two functions: it permits the public to prepare for the new rule[31] and also provides an opportunity to correct error or oversight in the final regulations before they become effective.[32] This section includes its own "good cause" exemption,[33] allowing agencies to give immediate or even retroactive effect to regulations if there is the required "good cause" to do so.

Noteworthy in the legislative history of the APA is a recurrent admonition that any "good cause" exemption should be a narrow one. The agencies were not to have an "escape clause" from the requirements Congress prescribed. "A true and supported or supportable finding of necessity or emergency must be made and published."[34]

In summary, although Congress recognized that it might at times be appropriate to dispense with these procedural protections, it spoke

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[26]*Id.*

[27]*Id.*

[28]The Attorney General's Committee on Administrative Procedure issued an influential report after an exhaustive study of existing federal procedure. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941). Many of its recommendations were incorporated into the Administrative Procedure Act.

[29]U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31 (1947) [hereinafter cited as ATTORNEY GENERAL'S MANUAL].

[30]5 U.S.C. § 553(d)(1982).

[31]S. DOC. NO. 248 at 259.

[32]ATTORNEY GENERAL'S FINAL REPORT, *supra*, note 28 at 114.

[33]5 U.S.C. § 553(d)(3)(1982).

[34]S. DOC. NO. 248 at 200, 258.

unmistakably clearly on the narrowness of the exemptions, thus indicating the importance ascribed to the section 553 procedures.

III. JUDICIAL CONSTRUCTION OF THE GOOD CAUSE EXEMPTIONS

Decisions interpreting the good cause provisions of section 553 necessarily have an ad hoc quality. Since the statutory procedure applies to all federal agencies which issue rules, agencies which face different problems and have widely diverse responsibilities will raise the question in vastly different factual settings. Despite their diversity, Congress decreed that most federal agencies should employ public procedures unless there was "good cause" not to, and admonished the courts not to let that clause become an "escape" from those requirements. Thus, courts have little choice but to examine each claim in context, weighing all the facts and circumstances to decide whether other legitimate interests outweigh the desirability of providing an opportunity for public participation in rulemaking.[35]

A review of the cases interpreting section 553(b)(B) could serve as a roadmap through the postwar history of American government. Those agencies facing situations defined by the political agenda as crises have made generous use of the exemption, often with the blessing of the courts. As that "crisis" is replaced by another one, courts demand more process, and different agencies face demands for swift action. Today, for example, deregulation-minded agencies which seek to dismantle regulations are facing challenges to their determinations that notice and comment would take too long.

A. Where Notice and Public Procedure May Be Contrary to the Public Interest

The agencies charged with administering wage and price controls throughout the economy under the Economic Stabilization Act of 1970 relied on section 553(b)(B)'s "contrary to the public interest" provision to institute price controls without prior notice and comment.[36] The

[35]Professor Kenneth Culp Davis expressed some "wonder whether expenditure of so much judicial energy on interpreting 'good cause' is exorbitant." K. DAVIS, 1982 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE 124. Given the importance Congress attached to the rulemaking process, it may be argued that decisions to omit it deserve the most careful scrutiny, especially in light of the delicate balancing courts are called upon to do.

[36]*See* DeRieux v. Five Smiths, Inc., 499 F.2d 1321 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974); Tasty Baking Co. v. Cost of Living Council, 529 F.2d 1005 (Temp. Emer. Ct. App. 1975).

situation contemplated by the Attorney General in 1947, where "the interest of the public would be defeated by any requirement of advance notice,"[37] was present in 1970. The need for swift action was so obvious that it was the subject of judicial notice.[38] Furthermore, the price controls, if announced in advance, would predictably worsen inflation as sellers rushed to raise prices before the controls took effect.[39] Therefore, given widespread concern about controlling inflation, reviewing courts had no difficulty in ratifying executive action imposing a "freeze" without prior public comment.[40]

The same recognition of a political emergency was shown in 1973, when the government set out to regulate the petroleum industry in the wake of the Arab oil embargo. Judges experienced firsthand the long lines and short tempers caused by fuel shortages, and upheld an agency decision to promulgate without delay regulations prohibiting discrimination by retail dealers in favor of "regular" customers.[41] Also approved were administrative decisions to effectuate without delay decontrol measures, designed to increase supply.[42] Courts reasoned that the purpose of decontrol would be frustrated by delay, since suppliers would hold back oil until the price rose, thus worsening the shortage.

As the crisis receded and the far-reaching nature of these emergency programs became more apparent, however, both courts and the Congress tended to become impatient with constant claims of good cause to act without notice and comment. As agency errors based on misinformation came to light, the value of public participation became more obvious. The Temporary Emergency Court of Appeals distinguished between the initial start-up phase and later phases of both the price control[43] and energy regulation programs,[44] invalidating several later regulations for failure to provide notice and comment. Likewise, in 1974, Congress added more stringent participation requirements to

[37]ATTORNEY GENERAL'S MANUAL at 31.

[38]*See* DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974).

[39]*Id.*

[40]*Id.* at 1333.

[41]Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

[42]Nader v. Sawhill, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975); Metzenbaum v. Edwards, 510 F. Supp. 609 (D.D.C. 1981).

[43]*See, e.g.*, Tasty Baking Co. v. Cost of Living Council, 529 F.2d 1005 (Temp. Emer. Ct. App. 1975), drawing a distinction between regulations promulgated in November to avoid a regulatory vacuum, *id.* at 1014, and regulations promulgated the following February, May, June and November. *Id.* at 1015.

[44]*See, e.g.*, Mobil Oil Corp. v. Department of Energy, 610 F.2d 796 (Temp. Emer. Ct. App. 1979).

the Energy Act,[45] in recognition of the importance of making rules, regulations, and orders "which emanate from the greatest possible data base."[46] A waiver of those requirements was provided for, but only if "strict compliance is found to cause serious harm or injury to the public health, safety or welfare,"[47] obviously a more stringent criterion than the vague "contrary to the public interest" of section 553(b)(B).[48]

Another crisis occurred in 1979, when national attention was riveted on American hostages being held by Iran. The Immigration and Naturalization Service took steps to tighten controls on Iranian nationals in this country.[49] Linked as they were to the need to react to the crisis in international relations, reviewing courts found "good cause" for the agency to take such measures immediately, without pausing for notice and comment.[50] Indeed, situations where the advance notice and delay attributable to gathering public input would demonstrably worsen the problem the agency was trying to combat represent the strongest case for the good cause exemption.

The courts have also been asked to approve rules promulgated to deal with "emergency" situations which raise health and safety con-

[45]Federal Energy Administration Act, 15 U.S.C. § 766(i)(1)(B) and (C) (1976), redesignated Department of Energy Organization Act, 42 U.S.C. § 7191(e) (Supp. V 1981).

[46]120 CONG. REC. 5459 (1974) (remarks of Representative Broyhill).

[47]15 U.S.C. § 766(i)(1)(B)(1976), discussed in Shell Oil Co. v. FEA, 440 F. Supp. 876 (D. Del. 1977), *aff'd*, 574 F.2d 512 (Temp Emer. Ct. App. 1978).

[48]In light of those requirements, however, two courts have disagreed that the private sector's ability to adjust during rulemaking should override statutory public participation requirements, absent an emergency caused by shortage. The Department of Energy, anxious to clarify a provision of its pricing regulations which could result in discriminatory pricing, issued clarifying regulations. However, the practice in question was specifically permitted where a seller was bound by contractual arrangements. The agency invoked a waiver of the formal rulemaking procedures, on the grounds that sellers made aware of the ambiguity could use the public participation period to enter into long-term contracts and thereby evade the effect of the new rule. Two district courts held the waiver invalid, since any "threat" to the public was speculative at best and no "calamitous circumstances," such as disruption of supplies or imminent violence, existed. *See* Naph-Sol Refining Co. v. Murphy Oil Corp., 550 F. Supp. 297 (W.D. Mich. 1982); Mobil Oil Corp. v. Department of Energy, 547 F. Supp. 1246 (N.D.N.Y. 1982).

[49]One rule limited to 15 days the amount of time which could be granted to an Iranian national to depart voluntarily. 8 C.F.R. § 244.1 (1981).

[50]*See* Malek-Marzban v. INS, 653 F.2d 113 (4th Cir. 1981); Nademi v. INS, 679 F.2d 811 (10th Cir.), *cert. denied*, 103 S. Ct. 161 (1982). Reviewing courts also have held that these rules were exempt from § 553 under the exemption for matters involving a "foreign affairs function of the United States." 5 U.S.C. § 553(a)(1) (1982). Other courts have approved enforcement of stringent measures against Iranian nationals. *See, e.g.* Narenji v. Civiletti, 481 F. Supp. 1132 (D.D.C. 1979), and Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980). *But see* Louis v. Nelson, 544 F. Supp. 973, (S.D. Fla. 1982), *aff'd sub nom.* Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), which held that INS policy designed to staunch the flow of Haitian refugees was *not* exempt under the foreign affairs exemption.

cerns. If public participation could not be solicited without endangering health and safety, courts have upheld the need for summary action, but they have recognized that such decisions are often candidates for political debate and have tried to provide for maximum public input, especially where the danger is more remote.

Some courts have accepted at face value agency claims of "emergency." For instance, in *Allegheny Airlines v. Village of Cedarhurst*,[51] an air traffic pattern was changed without notice and comment because there was evidence that the prior pattern was unsafe and immediate change was necessary "to promote [the] safety of the flying public."[52] Regardless of the fact that the earlier "unsafe" pattern had been in effect for 18 months, the courts did not question the agency's haste to protect air travelers. Also approved on the basis of emergency was the promulgation of a rule designed to foil airline hijackers by requiring airports to provide law enforcement officers to help screen passengers.[53]

In other cases, where an agency proposed to take action which might cause health hazards, those hazards were used as a reason to insist on allowing public participation. For instance, a court held that the Secretary of Agriculture should have taken input from the public before allowing the use of mechanically deboned meat in certain food products, stating that he could not suspend the APA's rulemaking requirements while he gathered information about the process for use in formulating final standards.[54]

Notice-and-comment procedures were also at issue in three cases involving pesticides and agricultural workers. Congress had provided that the Secretary of Labor could grant a waiver of child labor laws to permit 10- and 11-year-olds to harvest short-season crops.[55] Such waivers could be granted only if "the level and type of pesticides . . . would not have an adverse effect" on the young workers, and that determination must be "based on objective data submitted by the applicant."[56]

The Secretary issued a proposed rule which would have relied on safety standards set by other federal agencies such as EPA or OSHA.[57] Unfortunately, it became clear that existing federal safety standards

[51]132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956).

[52]132 F. Supp. at 883–84. The case is discussed in Comment, *Agency Discretion to Accept Comments in Informal Rulemaking: What Constitutes "Good Cause" Under the Administrative Procedure Act?*, 1980 B.Y.U. L. REV. 93, 100–101 (1980).

[53]Airport Operators Council Int'l v. Shaffer, 354 F. Supp. 79 (D.D.C. 1973).

[54]Community Nutrition Inst. v. Butz, 420 F. Supp. 751 (D.D.C. 1976).

[55]Fair Labor Standards Amendments of 1977, 29 U.S.C. § 213(c)(4)(A) (Supp. V 1981).

[56]*Id.*

[57]43 Fed. Reg. 14,070 (1978).

had not been shown to be safe for children of ages 10 and 11. On the present state of the agency's knowledge, therefore, no safety standards could be set. Therefore, the final rule placed the burden of demonstrating safety on the employer seeking a waiver.[58]

The Secretary commissioned studies by a private consulting firm to develop criteria for evaluating waiver applications. As a result of those studies, the agency published a series of regulations, all without prior notice and comment, setting out "preharvest intervals," which were required time lags between spraying of various pesticides and entry of harvesters into the fields. On August 18, 1978, the department approved a list of 22 pesticides for use with preharvest intervals.[59] The Secretary adverted to the imminence of harvest seasons in finding notice and comment impracticable.[60] Based on later studies identifying two of the approved chemicals as suspected carcinogens, the agency modified its list, again without notice and comment, removing those chemicals from the approved list.[61]

Challenges based in part on failure to provide notice and comment came from opposing groups: organizations representing farm workers objected to promulgation of the "approved" list without prior notice and comment,[62] while growers claimed that the Secretary's action in deleting chemicals from the list required prior notice and opportunity to comment.[63]

In *National Association of Farmworkers Organizations v. Marshall*,[64] the Secretary convinced the district court that "the public interest in the expeditious issuance of safety standards for . . crops with a short harvest season" provided the necessary "good cause."[65] But the court of appeals found the possible health risk to children outweighed the need to have rules in place. The possibility that children might be exposed to health hazards "indicated the need for the utmost care in development [of the standard] and exposure to public and expert criticism."[66] Also,

[58]43 Fed. Reg. 26,562 (1978) (codified at 29 C.F.R. § 575.5 (1982)).

[59]A district court temporarily enjoined enforcement of the general statutory minimum age restrictions for the 1979 strawberry harvest in Washington, allowing some 3,900 children under the age of 11 to be employed. Washington State Farm Bureau v. Marshall, No. C78-135T (W.D. Wash. 1978), discussed in National Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604, 608–10 (D.C. Cir. 1980).

[60]*See* National Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604, 621 (D.C. Cir. 1980).

[61]44 Fed. Reg. 22,509 (1979); 44 Fed. Reg. 24,058 (1979).

[62]National Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604 (D.C. Cir. 1980).

[63]Washington State Farm Bureau v. Marshall, 625 F.2d 296 (9th Cir. 1980).

[64]628 F.2d 604 (D.C. Cir. 1980).

[65]*Id.* at 621.

[66]*Id.*

the court noted that the agency had taken seven months to issue the list and had consulted with grower groups, thus indicating that more public input would have been possible.[67]

In contrast, the summary action of deleting certain substances to protect the young harvesters was held to have been justified by "good cause" in *Washington State Farm Bureau v. Marshall.*[68] When new information became available, the 1979 strawberry season was already at hand and there was an immediate need to protect the children and inform interested growers prior to spraying.[69] Both courts found that the goal of Congress was to protect child harvesters, and therefore approved summary action designed to increase protection, but disapproved such action where the effect might be to increase risks.

In an earlier case,[70] the Fifth Circuit reversed a decision by the Department of Labor that health hazards justified issuing an emergency temporary standard restricting use of an agricultural chemical without prior public participation. In that instance, however, Congress had provided in the Occupational Safety and Health Act[71] for ample public participation in the difficult decision of weighing economic harm to industry and to consumers deprived of useful substances against the health hazards to workers. The court pointed to the enabling legislation which provided that only "grave danger" to employees from exposure to toxic substances would justify emergency procedures.[72] Where employees experienced only minor symptoms, which were fleeting and easily curable, no such emergency existed and full notice and comment should have been provided. Without the special statute, however, it seems unlikely that any court would have ordered the Secretary to force workers to experience even minor illness in order to take public comment.

In one group of cases interpreting the good cause exception, however, the courts have held that public health concerns, while entitled to respect, would not have been seriously jeopardized by allowing public comment. Those cases grew out of the Environmental Protection Administration's decision to promulgate without prior notice and comment lists of areas which did not meet federal air quality standards.[73] The rule in question was a step in the congressionally

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[67]*Id.* at 622.
[68]625 F.2d 296 (9th Cir. 1980).
[69]*Id.* at 307.
[70]Florida Peach Growers Ass'n v. Department of Labor, 489 F.2d 120 (5th Cir. 1974).
[71]29 U.S.C. §§ 651–678 (1976).
[72]29 U.S.C. § 655(c)(1) (1976).
[73]43 Fed. Reg. 8962 (1978).

mandated process of achieving national air quality standards for which a rigid timetable was specified.[74] The states were directed to submit to the EPA, by December 5, 1977, proposed designations of areas in the state which met national air quality standards (attainment), those did not meet the standards (nonattainment), or for which there were insufficient data to permit classification. By February 3, 1978, the administrator was to promulgate each such list with any modifications he deemed necessary, allowing the states to formulate implementation plans by January 1, 1979.[75] On March 3, 1978, one month after the congressional deadline, the administrator promulgated a list of nonattainment areas as a final rule, effective immediately.[76] No notice-and-comment period was provided, on the ground that the tight schedule Congress had set made public procedure "impracticable and contrary to the public interest."[77]

This action spawned at least 43 challenges in 10 judicial circuits,[78] most often by heavy industry which anticipated restrictions on its operations as a result of the classification. In one case,[79] however, review was sought by a state which objected that the administrator's action, based on faulty analysis, put certain states at a disadvantage vis-a-vis other states. This challenge became a conflict between states of the industrial northeast, widely designated "nonattainment," and states in the Sunbelt, not so designated, and therefore not required to establish programs to reduce pollution, who intervened in support of the administrator.[80]

The nonattainment classification rule seemed an unlikely vehicle for a major test of the "good cause" provision. First, the designation was concededly an intermediate step in a lengthy procedure of preparing state implementation plans, and was characterized as a "working hypothesis"[81] which would be subject to challenge before any person suffered harm or prejudice therefrom. Second, the agency provided a post-promulgation comment period, and made some changes as a result of comments received.[82] Thus, no one could show that his input

[74]The Clean Air Act Amendments of 1977, Pub. L. No. 95–95, 91 Stat. 685.
[75]42 U.S.C. § 7407(d) (Supp. V 1981).
[76]43 Fed. Reg. 8962 (1978).
[77]*Id.*
[78]*See* Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 808 n.5 (9th Cir. 1980).
[79]New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980).
[80]The states of Maine, Connecticut, Massachusetts, New York, Rhode Island, and Vermont, the District of Columbia, and the city of New York intervened in favor of New Jersey, while the states of Arkansas, Georgia, Missouri, and New Mexico intervened in favor of EPA. *Id.* at 1042.
[81]*See* Sharon Steel Corp. v. EPA, 597 F.2d 377, 381 n.9 (3d Cir. 1979).
[82]The administrator stated the agency would accept public comments received within 60 days of the promulgation of the rule. 43 Fed. Reg. 8962 (1978). The administrator

had been precluded from consideration. Third, the Agency was clearly burdened by the stringent deadlines set by Congress, which it failed to meet even without subjecting the state-proposed designations to notice-and-comment procedures. Reviewing courts agreed that use of public procedures would have delayed the designations still further, in contravention of Congress' express direction.[83] Fourth, the haste mandated by Congress was motivated by public health concerns, among the strongest justifications for summary procedure.[84] Fifth, the rule itself, while obviously involving some judgment (did or did not air quality in a given area meet some pre-designated standard?), seemed unusually susceptible to later review for arbitrary or capricious decisionmaking. If some defect in the raw data or its analysis were brought to the Agency's attention, reconsideration of the designation on the basis of the new information would seem mandatory and relatively easy to assure.

Finally, this situation seemed unlike others where courts have been reluctant to allow an agency to lightly disregard the congressional command that comments be solicited relatively early in the decision-making process. Once the agency has publicly committed itself to a course of action, "psychological and bureaucratic realities"[85] indicate that it will be less open to criticism or suggestions of alternative approaches. In these cases, however, Congress had directed EPA to review a state's decision on a yes or no question: does this air comply with the standard? The task was relatively straightforward and simple, and it seems difficult to imagine great bureaucratic attachment to a list compiled by someone else. If the list were shown to be based on incomplete or incorrect information, correction would be expected no matter when the new information came to light. Indeed, the entire process was designed to measure an ever-changing reality, and adjustments would be expected as conditions changed.

Despite these considerations, the courts in five circuits[86] sustained challenges to EPA's decision to promulgate the list without notice and

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did make some changes in response to comments received. United States Steel Corp. v. EPA, 605 F.2d 283, 291 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); Republic Steel Corp. v. Costle, 621 F.2d 797, 803 (6th Cir. 1980).

[83]*See, e.g.*, Sharon Steel Corp. v. EPA, 597 F.2d 377, 380 (3d Cir. 1979).

[84]*See* cases discussed *supra* notes 54–72.

[85]New Jersey v. EPA, 626 F.2d at 1050.

[86]Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979); New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980); United States Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979); Western Oil & Gas Ass'n v. EPA, 633 F.2d 803 (9th Cir. 1980); United States Steel Corp. v. EPA, 649 F.2d 572 (8th Cir. 1981). *Contra*, holding the Administrator did have good cause, were Republic Steel Corp. v. Costle, 621 F.2d 797 (6th Cir. 1980), United States Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980). The

comment, largely on the grounds that the agency *could have* published the state's list as a proposed rule with little extra delay.[87] The courts chose to reaffirm the importance of the notice-and-comment procedure without once pointing to any input the challenger would have provided had he been given his opportunity. Furthermore, they were unpersuaded that this procedural lapse should be considered harmless error, thus reaffirming the value of an opportunity to persuade without requiring the challenger to show that the outcome would have been different had comments been accepted. In the majority view, the process should and could have included public comment without serious harm to the public health, since this action by EPA was merely a step in the process of formulating state implementation plans, and soliciting comment would have added little delay.

Courts have seen the need to protect human health and safety as one of the paramount concerns of government. Any action which might increase risks to health and safety should receive the most careful consideration by the agency while those which directly reduce known risks may be taken as promptly as possible. Of course, if Congress has specified a different balance between health concerns and the value of public participation, agencies and courts are bound to respect that judgment.[88] Courts also struggle to find ways to accommodate both values, but absent specific legislative guidance, in matters of health and safety they generally rank the need to extend protection higher than the need to allow debate about it when one or the other must give way.

Not every claim of "emergency" or "risk to life" will [illegible] however. Perhaps the sharpest clash between values of debate and concern for health and safety occurred in the *Baby Doe* case.[89] The district court reviewing the decision to institute a "hotline" was highly critical of the quality of decisionmaking on this issue, and agreed with petitioners that the Secretary of Health and Human Services had acted without considering "many highly relevant factors central to any application of [federal antidiscrimination law] to medical care of newborn infants."[90]

Judge Gesell, himself the son of a well-known pediatrician,[91] re-

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reasoning of the courts which upheld the Administrator was strongly criticized in Note, *The "Good Cause" Exceptions: Danger to Notice and Comment Requirements Under the Administrative Procedure Act*, 68 GEO. L. J. 765 (1980).

[87]United States Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979).

[88]*See supra* text accompanying notes 70–72.

[89]American Academy of Pediatrics v. Heckler, 561 F. Supp. 395 (D.D.C. 1983). The facts are related *supra* text accompanying notes 1–7.

[90]561 F. Supp. at 399.

[91]*See* N.Y. Times, Apr. 15, 1983, at 1, col. 4.

ferred to the affidavit of a doctor at Children's Hospital National Medical Center stating that severe disruptions of hospital routine would result if any anonymous tipster could trigger the sudden descent of a *Baby Doe* squad onto the scene. Such intrusions, when medical decisions must be made on short notice, can hardly be presumed to produce higher quality care for the infant.[92]

Also criticized by the court was the failure to weigh the costs to the integrity of families if parental wishes were no longer to be recognized as legitimate. Furthermore, failure to address difficult questions of funding or allocation of scarce resources between defective newborns and other patients helped to convince the court that "haste and inexperience have resulted in agency action based on inadequate consideration."[93]

The problems with the rule could obviously have been pointed out during a notice-and-comment period had the agency provided for one. The court brushed aside claims of "lives at risk," noting that there was no emergency, since the problem had been long-standing, and that there was no evidence of any dramatic change in circumstance that would suddenly increase the risk.[94]

In summary, the court invalidated the rule, concluding that it was so ill-considered and ill-advised as to be "arbitrary and capricious," as well as procedurally improper.[95] In her haste to protect future Baby Does, the Secretary had not considered other legitimate concerns and may have jeopardized the safety of other newborns. It is just such "tunnel vision" which notice-and-comment procedures are designed to correct, and the case illustrates their importance, even in "life-or-death" situations.

B. Where Notice and Public Procedure May Be Unnecessary

Courts on several occasions have considered when public procedures are "unnecessary" within the meaning of section 553(b)(B). The legislative history indicates that the draftsmen had in mind cases involving "minor or merely technical amendment in which the public is not particularly interested."[96] Although other interpretations have been advanced, courts have been reluctant to hold public comment

[92]561 F. Supp. at 399 n.5.
[93]*Id.* at 400.
[94]*Id.* at 401.
[95]*Id.* at 403.
[96]S. Doc. No. 248 at 200, 258.

"unnecessary" when substantial government action is under consideration.

In *National Helium Corp. v. Federal Energy Administration*,[97] notice and comment were held to be "unnecessary." The Federal Energy Administration had issued amendments to its regulations in anticipation of the expiration of the Economic Stabilization Act.[98] The amendments were considered technical in nature, designed to smooth the transition from regulations promulgated by the Cost of Living Council under the Stabilization Act to regulations based on the Emergency Petroleum Allocation Act.[99] The court agreed that since the amendments in question were largely technical and did not substantively alter the existing framework or produce any detrimental impact on the rights of the parties regulated, prior notice and opportunity to comment were "unnecessary."[100] The court noted the similarity between these amendments and an interpretive rule,[101] which Congress exempted from notice-and-comment requirements, but since the agency did not urge that the "interpretive rule" exception should apply, the court affirmed the agency judgment that notice and comment were "unnecessary."

Not all agency reliance on the "unnecessary" clause has been upheld, however. The courts have taken seriously Congress's admonition that the exemption was intended to be a narrow one. For example, the Third Circuit disagreed that public participation was "unnecessary" when the Federal Power Commission announced a rule which would impose an obligation to pay compound interest on refunds of overcharges resulting from new rates subsequently found to be unjustified.[102] Given the substantial sums of money involved and the large number of companies affected, the rule could not be classified as "minor or emergency in character."[103] The agency also argued that public participation was "unnecessary" because the agency could have imposed this obligation by adjudicatory order.[104] That contention was

[97]569 F.2d 1137 (Temp. Emer. Ct. App. 1977).

[98]39 Fed. Reg. 11,768 (1974); 39 Fed. Reg. 12,353 (1974).

[99]The Economic Stabilization Act of 1970 expired on April 30, 1974. *See* National Helium Corp. v. FEA, 569 F.2d 1137, 1141 (1977). The Federal Energy Office, established by the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93–159, 15 U.S.C. §§ 751–760 (1982), adopted and recodified the regulations in effect under the Stabilization Act. 569 F.2d at 1141.

[100]569 F.2d at 1146.

[101]*Id.* at 1145. Congress exempted "interpretative rules" from the notice-and-comment requirements in 5 U.S.C. § 553(b)(A)(1982). For an evaluation of that exemption, see Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the A.P.A.*, 23 AD. L. REV. 101 (1971).

[102]Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969).

[103]*Id.* at 743.

[104]*Id.* at 744.

expressly rejected. If the agency chose to proceed by issuing a general rule, the APA specified the procedures to be used.

The FPC's contention that no procedures were required if it chose to use a rule to address a recurring problem, rather than individual orders, seems curious indeed. The agency's argument might be germane to the substantive issue of whether it had the power to impose the obligation at all, but for the agency to argue that no rulemaking procedure was necessary because it could have taken the equivalent action by means of very elaborate adjudicative procedures seems a non sequitur. If adjudicatory procedures are used, those affected have much *more* opportunity than is provided by notice and comment to be informed about and participate in governmental decisionmaking.[105] The usual argument in cases challenging attempts to avoid repetitive case-by-case determinations by issuing general rules is that notice and comment is not enough; challengers urge that the protections of a formal adjudication are statutorily or constitutionally required.[106]

Also rejected was a claim by the commissioner of the Food and Drug Administration that a change in regulations to conform them to new legislation could be accomplished without notice and comment.[107] The court reached this conclusion "with regret,"[108] given that over 15 years had already elapsed since the FDA had begun its efforts to regulate vitamin and mineral preparation.[109] Eleven years after its first notice of proposed rulemaking, the FDA had issued regulations on August 2, 1973, after holding lengthy hearings.[110] On review, the court stayed the regulations and remanded the case to the FDA for additional procedures.[111] After another hearing was held, heavy lobbying by the health food industry caused Congress to withdraw from the FDA the power to issue certain parts of the regulations.[112]

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[105]"On the record" adjudication is subject to trial-type procedures set out in 5 U.S.C. §§ 554, 556, and 557. These sections require separation of decision-makers from investigatory or adjudicatory functions, and set forth other procedural rights.

[106]The Supreme Court rejected the contention that more than notice and comment was required in United States v. Florida E. Coast Ry., 410 U.S. 224 (1973). That of course does not mean that *no* procedure is required when government acts.

[107]National Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377 (2d Cir. 1978).

[108]*Id.* at 383.

[109]The early stages of the proceeding were conducted under a provision of the Federal Food, Drug, & Cosmetic Act, § 701, 21 U.S.C. § 371(e)(3)(1976), which requires an evidentiary hearing for rulemaking. The first hearing required over 22 months. On review of the rules issued, the Second Circuit remanded to the FDA for further hearings. The reopened hearings lasted six days and added 1,119 pages of transcript to the 32,405 developed at the original hearings. 572 F.2d 377 at 379–80.

[110]38 Fed. Reg. 20,708–18, 20,730–40 (1973).

[111]National Nutritional Foods Ass'n v. FDA, 504 F.2d 761 (2d Cir. 1974), *cert. denied*, 420 U.S. 946 (1975).

[112]Pub. L. No. 94–278, 90 Stat. 401 (1976), especially § 501(a). The legislation also

Had the agency's action in response been limited to excising those portions of the proposed regulations placed beyond its authority, public comment would indeed have been superfluous, since the decisionmaking had taken place in the open political arena of the Congress, and the agency had no discretion to exercise. In this instance, however, the legislation also imposed new duties on the agency with respect to labeling,[113] and the rules in question addressed these new responsibilities. Given the long and bitter battle between the FDA, which was determined to save consumers from wasting money on vitamin and mineral products they do not need, and groups which believe that such products *are* needed for good health, the Second Circuit saw "no basis for the commissioner's believing that the public would not be 'particularly interested' in his next move."[114] In light of the intense interest on the part of some members of the public in these regulations, which did represent an exercise of discretion, public participation could not be deemed "unnecessary," and it was hardly impracticable, since so many years had already passed.

Courts have also been asked to approve agency rules issued without prior notice and comment because some other methods of gathering input made the procedures "unnecessary." Some courts have accepted this argument,[115] especially when the agency labored under time pressures not of its own making; most courts have not.

In the two cases where the argument was accepted, both involving the Environmental Protection Agency,[116] the courts agreed that notice and comment were not required before the Agency adopted a state-submitted implementation plan. Instead of focusing on lack of public interest in the rule, however, both courts stressed that there had been ample opportunity to comment at state hearings as the states developed their plan, and pointed to the alacrity demanded by Congress.[117] To allow parties another opportunity merely to restate their contentions would normally be a useless, wasteful, time-consuming, and duplicative exercise.[118] Thus, given the time con-

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directed the Secretary of Health, Education, and Welfare to use the notice-and-comment procedure to conform his regulations to the new legislation rather than to the trial-type procedures prescribed by § 701(e) of the Food, Drug & Cosmetic Act. *Id.* at § 501(b).

[113] *Id.* at § 501(a).

[114] 572 F.2d at 385.

[115] *See, e.g.*, Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973); Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1973), *vacated and remanded*, 427 U.S. 902 (1976).

[116] *Id.*

[117] 477 F.2d at 502; 481 F.2d at 10.

[118] 477 F.2d at 502; 481 F.2d at 8.

straints imposed by Congress, allowing notice and comment was both "impracticable and unnecessary."[119]

Absent the time pressure specified by Congress, however, "good cause" would likely not be present.[120] An opportunity to participate in state proceedings is not a perfect substitute for opportunity to persuade the federal agency. Even if the contentions are likely to be duplicated, a change in the listener may make some difference. The perspectives of the two agencies differ, and they may respond in differing arguments. Furthermore, procedures for giving notice would differ, and some interested persons who check the *Federal Register* might not be aware of the state proceedings.[121] Therefore, in the intensely political process of deciding how clean our air should be, another round of public input might not have been a clear waste of time. However, when balanced against the urgency mandated by Congress, the courts held that notice and comment at that stage would be both impracticable and unnecessary.

Some courts have held that even if prior notice and comment were not provided, an agency which accepts comments after the rules are promulgated has "cured" whatever errors it may have made. Although this argument often does not rest explicitly on the "unnecessary" clause, and also "mixes notions of mootness, harmless error, and minimal injury,"[122] it is based in part on the idea that as long as some effort is made to gather public reaction, strict compliance with section 553 is "unnecessary."

Although some courts have validated agency substitution of a post-promulgation comment period for the section 553 sequence,[123] most have not.[124] Courts have noted that the timing of comments is not an inconsequential matter. The procedures mandated by Congress "ensure that affected parties have an opportunity to participate in and influence agency decisionmaking at an early stage, when the agency is more likely to give real consideration to alternative ideas."[125]

Once regulations are promulgated, both the agency and the public

[119]477 F.2d at 503; 481 F.2d at 8.

[120]In both cases, the courts based their holdings on the time pressure *combined with* the state hearings.

[121]Comment, *supra* note 52, at 103.

[122]United States Steel Corp. v. EPA, 595 F.2d 207, 214 (5th Cir. 1979).

[123]*See, e.g.*, Levesque v. Block, 723 F.2d 175 (1st Cir. 1983); *see also* United States Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

[124]*See, e.g.*, City of New York v. Diamond, 379 F. Supp. 503 (S.D.N.Y. 1974); Kelly v. Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972).

[125]United States Corp. v. EPA, 595 F.2d 207, 214 (5th Cir. 1979).

are likely to consider the matter closed, even if the agency solicits comments and promises to keep an open mind.[126] The very act of labeling the regulations "Final" indicates a degree of attachment to the decision. "Psychological and bureaucratic realities"[127] suggest that once the agency has gone on public record with its final decision, it will be less willing to reconsider its assumptions or reevaluate roads not taken. Likewise, members of the public may consider offering comments a waste of time, and many choose instead to include any comments or criticism in a petition for judicial review.[128]

A new interpretation of the "unnecessary" exemption has been urged on two courts,[129] thus far without success. The Federal Energy Regulatory Commission revoked a rule following a congressional veto;[130] the Environmental Protection Agency postponed an effective date indefinitely;[131] neither agency afforded notice or opportunity to comment. When challenged, the FERC defended its actions in part by claiming that public procedures were "unnecessary."[132] The agency contended that one option which had always been present since the regulations were first proposed was that the agency issue no rule at all. Thus, the agency urged that since the public had the opportunity to address that possibility, any further notice and comment when the agency decided to return to the "no rule" state was "unnecessary."[133]

The District of Columbia Court of Appeals gave short shrift to that argument.[134] As a matter of statutory construction, the contention seems hard to reconcile with the APA's inclusion of "repealing a rule" within the definition of rulemaking for which notice-and-comment

[126]Kelly v. Department of Interior, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972).

[127]New Jersey v. EPA, 626 F.2d 1038, 1050 (D.C. Cir. 1980).

[128]See testimony that plaintiff organization did not comment during the post-promulgation comment period because "the agency had already made up its mind." Philadelphia Citizens in Action v. Schweiker, 527 F. Supp. 182, 192 (E.D. Pa. 1981), *rev'd*, 669 F.2d 877 (3d Cir. 1982).

[129]Community Energy Council of America v. Federal Energy Regulatory Comm'n, 673 F.2d 425 (D.C. Cir. 1982); Natural Resources Defense Council, Inc. v. EPA, 683 F.2d 752 (3d Cir. 1982).

[130]The Federal Energy Regulatory Commission revoked its "incremental pricing" program after its rule was disapproved by the House of Representatives. The Natural Gas Policy Act provided that the rule would take effect only if neither house disapproved it within 30 days. 15 U.S.C. § 3342(c) (1982).

[131]EPA indefinitely postponed the effective date of final amendments dealing with the discharge of toxic pollutants into publicly owned treatment works. 46 Fed. Reg. 19,936 (1981). The Clean Water Act required EPA to promulgate regulations requiring industry to pretreat wastes by removing pollutants. *See* 33 U.S.C. § 1317(b)(1) (Supp. V 1981).

[132]*See* 673 F.2d at 445–46.

[133]*Id.*

[134]*Id.*

procedures are required.[135] If the procedure which preceded adoption served to cover the question of repeal as well, the draftsmen should not have included repeal as a type of rulemaking. The court went on to note that a decision to repeal a rule should be subjected to notice and comment, if possible, "to ensure that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal."[136]

The Third Circuit agreed,[137] and also found unpersuasive the other reasons given for EPA's summary decision to delay the effective date of final rules. Neither the imminence of the scheduled effective date nor the agency's desire to prepare a regulatory impact statement, as required by Executive Order No. 12,291,[138] justified the agency's omission of notice and comment. The court held that EPA could have complied with both the APA and the Executive Order.[139] Given the importance of soliciting public input before an agency decides to make a sharp change of course, particularly when the rules in question had been developed after years of notice-and-comment procedures, the court held the agency's action was not justified by "good cause."[140]

This reasoning seems unassailable as a matter of statutory construction and also appears to be wise policy. The adoption of a rule alters the legal landscape, creating new expectations and reliance. Thus, the agency cannot claim that it is simply returning to the status quo ante. As efforts to deregulate have made very clear, those affected by regulation often have a strong interest in the rules already in place. Thus, as a matter of sound political judgment, open debate on deregulatory moves should be provided.

C. Where Notice and Public Procedure May Be Impracticable

Most claims of "good cause" rely at least in part on the "impracticable" clause. The agency weighs the extra delay which full notice-and-comment procedures entail against the need to get rules in place as

[135]Section 551(5) includes "agency process for formulating, amending, or *repealing* a rule" within the definition of "rulemaking." 5 U.S.C. § 551(5) (1982) (emphasis added).

[136]673 F.2d at 446.

[137]Natural Resources Defense Council, Inc. v. EPA, 683 F.2d 752 (3d Cir. 1982).

[138]Executive Order No. 12,291, 46 Fed. Reg. 13,193 (1981), requires a Regulatory Impact Analysis to accompany all major rules, defined as a regulation likely to affect the economy by $100 million or more a year, or to have other specified effects. Exec. Order No. 12,291 § 3(b).

[139]683 F.2d at 765.

[140]*Id.* at 767.

quickly as possible. Sometimes the haste is required because of the nature of the events being regulated;[141] in recent times, agencies have also faced deadlines imposed by courts or the Congress.[142] The courts have generally been alert to the danger that if an approaching deadline were automatic "good cause," agencies might wait until the eleventh hour to issue rules, rather than organize their procedures to allow notice and comment within the time allotted.[143]

In contrast, courts have generally ratified agency decisions to issue rules to meet unexpected emergencies caused by events over which the agency had little control. In such instances they have tried to accommodate the value of public participation by insisting that such rules be no broader and last no longer than necessary to meet the emergency.

The clearest example is provided by *American Federation of Government Employees v. Block*.[144] In that case, as a result of a lawsuit in Arkansas alleging discrimination in the enforcement of inspection rates in poultry processing plants, the Secretary of Agriculture was under court order "to use uniform inspection rate standards and to apply and enforce [them] uniformly."[145] The court further ordered the Secretary to report in detail within two weeks the manner and form of compliance with the court's injunction.[146]

Three days before the court's deadline, the Department of Agriculture published two final and immediately effective regulations.[147] The regulations had already been prepared as proposed rules based on recommendations made by a study group of inspection officials.[148] The Arkansas court had refused the Department's request to dismiss or stay the proceedings until notice and comment on the proposed rules could be completed, and had issued a preliminary injunction declaring existing informal guidelines "null and void."[149] Citing the need to comply

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[141]*See, e.g.*, the problem caused when allocation of landing "slots" unexpectedly could not be accomplished by agreement. Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309 (8th Cir. 1981), discussed *infra* text accompanying notes 171–178.

[142]The "nonattainment" rule, discussed *supra* text accompanying notes 73–87, is one example of a congressional deadline. Such "agency forcing" legislation is discussed in B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR (1981). For an example of an agency facing a judicially imposed deadline, *see* American Fed'n of Gov't Employees v. Block, 655 F.2d 1153 (D.C. Cir. 1981).

[143]*See, e.g.*, Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981).

[144]655 F.2d 1153 (D.C. Cir. 1981).

[145]Arkansas Poultry Fed'n v. Bergland, No. LR–C–78–395 (E.D. Ark. Apr. 3, 1979), cited at 655 F.2d 1154–55.

[146]*Id.*

[147]44 Fed. Reg. 22,047, 44 Fed. Reg. 22,049 (1979).

[148]655 F.2d at 1155.

[149]*Id.* at 1157.

with the court order as well as the need "to assure that the consumer is adequately protected," the regulations were issued without prior notice and comment and made immediately effective. Thus, both "good cause" provisions were at issue.[150]

In reviewing the Secretary's response to the judicial order, the D.C. Circuit found the requisite "good cause" to get regulations in place immediately.[151] The nullification of existing guidelines created a need for guidance to avoid confusion, economic harm to processors, and possible harm to consumers in the form of poultry shortages or increased prices.[152] The court broke new ground, however, by refusing to approve "*permanent* regulations of this breadth,"[153] stressing that any action taken in a rare "emergency" situation need only be temporary, pending public notice-and-comment procedures.[154] Noting that in this case the detailed regulations responded to much more than the exigencies of the moment, the court stressed the need for public procedures "before they are chiseled into bureaucratic stone."[155] Therefore, the regulations were upheld, but only as interim rules, since the court saw no "good cause" for eliminating public participation in formulating final rules.[156]

The D.C. Circuit recently upheld as within the "good cause" exemption agency action taken without notice and comment to defer for a short time the effective date of a regulation mandating additional mine safety equipment.[157] In 1978, the Mine Safety and Health Administration of the Department of Labor had promulgated a final regulation requiring mine operators to equip all underground miners with "self-contained self-rescuers" designed to provide oxygen for miners trapped in mine accidents.[158] The regulation as originally issued carried an effective date of December 21, 1980, thus providing a two-year period for compliance.[159]

The long lead time for this regulation was to provide time for MSHA to field test and approve specific equipment.[160] Such testing had been

[150]The court noted that the purpose of § 553(d) was informing affected parties and affording them a reasonable opportunity to adjust. The court found that § 553(b) is designed to allow interested parties to participate in the formulation of the rules, an even more significant purpose. 655 F.2d at 1156.

[151]*Id.* at 1157.

[152]*Id.*

[153]*Id.* (emphasis in original).

[154]*Id.* at 1157–58.

[155]*Id.* at 1157.

[156]*Id.* at 1158.

[157]Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573 (D.C. Cir. 1981).

[158]43 Fed. Reg. 54,241 (1978).

[159]*Id.* at 54,246.

[160]*Id.* at 54,244.

delayed because of safety concerns about the units. Until such fears were allayed, the testing program could not even start. The last approval for testing was not obtained until November 19, 1980.[161] On December 5, 1980, with only a small number of devices available and the compliance date about two weeks away, MSHA determined that the implementation date should be pushed back to June 21, 1981.[162] MSHA made the change without notice and comment, "in view of the imminence of the deadline," claiming it would be impracticable and contrary to the public interest to do otherwise.[163] Organizations representing the miners petitioned for review of the December 5 order.

The D.C. Circuit found this case an extremely close one.[164] The court noted that special scrutiny must be given when agencies plead lack of time, lest the agencies "simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures."[165] In this case, however, the court saw no such deliberate agency abuse.

The actions of the agency showed instead that the agency was determined to implement the regulations on schedule if at all possible, and was ultimately forced to postpone the date by circumstances beyond its control when it was truly too late to follow APA procedures.[166] The court was impressed that the date was delayed only a relatively short time, and that the agency had used the period between the December 5 rule and an expedited court hearing to complete necessary field testing. All of the circumstances indicated to the court that the agency was acting in good faith to implement the regulations as soon as possible.[167]

The court stressed that even in this instance, the question of whether public participation was impracticable was an extremely close one.[168] It reiterated that "exceptions to the APA provisions will be only reluctantly countenanced."[169] In this instance, because of snags and delays in testing the equipment which were not attributable to the agency, the original implementation date became unenforceable, and no amount of comment would have changed that fact. The court approved the

[161]653 F.2d at 577.
[162]45 Fed. Reg. 80,501 (1980).
[163]*Id.* at 80,502.
[164]653 F.2d at 575.
[165]*Id.* at 581.
[166]*Id.* at 581–82.
[167]*Id.* at 582.
[168]The court noted a combination of circumstances that "render this a special, possibly unique, case." *Id.* at 581.
[169]*Id.* at 582, quoting New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

agency's decision to devote energy to completion of field testing rather than a round of public comment.[170]

Another recent case upheld the Federal Aviation Administration's limited response to an emergency situation.[171] The FAA regulates and limits the number of takeoffs and landings at airports. Generally, available slots are allocated among airlines by voluntary agreement. In the fall of 1980, for the first time, the airlines were unable to reach agreement on allocation of slots at National Airport in Washington, D.C. On October 14, the FAA was notified that no agreement could be reached for the busy holiday travel period beginning December 1.[172]

At that point, the allocation could not be long delayed. The airlines needed firm information to make any necessary schedule adjustments and rearrange existing reservations. The traveling public also needed the information to make holiday travel plans. In fact, the agency faced a November 6 deadline for submission of pages for the Official Airline Guide, which would show the new schedules.[173]

Within two days, on October 16, the agency solicited comments on how to allocate the slots for the period from December 1, 1980, to April 26, 1981.[174] The agency did not propose any specific allotment mechanism and limited the comment period to seven days ending October 23.[175] Then, on October 29, the agency issued a Special Federal Aviation Regulation, effective immediately, making the allocation for the December 1–April 26 period.[176]

The court agreed with the Secretary of Transportation that the urgent necessity for rapid administrative action to solve an unprecedented problem constituted "good cause" under both sections 553(b)(B) and 553(d).[177] The limited duration of the rule, as well as the Secretary's prompt action in instituting rulemaking proceedings proposing several procedures for allocating slots on a long-term basis, convinced the court that the secretary had acted responsibly both to

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[170]Government counsel's assurance at oral argument that field testing had been completed and implementation on June 21 was fully anticipated bolstered the court's impression that MSHA was acting in good faith to implement the regulations as soon as possible. 653 F.2d at 582. Implementation did not in fact begin until October, 1982. Wall St. J. Oct. 5, 1982, at 1, col. 5.

[171]Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309 (8th Cir. 1981).

[172]645 F.2d at 1312–13.

[173]*Id.* at 1321.

[174]45 Fed. Reg. 69,403 (published on October 20, 1980).

[175]Thirty-seven comments were submitted, despite the very abbreviated comment period. 645 F.2d at 1313.

[176]*Id.*

[177]*Id.* at 1321.

solve the immediate problem, and to take full public input in devising rules to prevent the problem from arising in the future.[178] The Eighth Circuit agreed that under the circumstances, the "good cause" requirement was met.

Another example of "good cause" stemming from unexpected events is provided by *National Federation of Federal Employees v. Devine*.[179] At issue was a decision by the Director of the Office of Personnel Management to issue a rule on Friday, November 6, postponing the period during which employees or retired annuitants could transfer enrollment from one participating health plan to another. That period was scheduled to begin the following Monday, November 9.[180]

Because of federal budget cuts, OPM had ordered participating health plan carriers to reduce proposed benefits under the 1982 contracts.[181] Negotiations with the carriers were still underway, and several lawsuits challenging the reductions were pending in the federal courts.[182] The carriers argued that until they had better information on the actuarial risks the new benefit provisions would entail, they risked massive losses if the scheduled "open season" was held and employees were permitted to transfer freely among plans.[183] No accurate information about terms of the 1982 contract was available, so informed choice by employees would be impossible.[184] Under the circumstances, the D.C. Circuit agreed that the OPM had little choice but to postpone the "open season."[185]

The court noted that "emergency" situations generally call for temporary solutions,[186] and commended OPM for its decision to solicit public input on the question of how to provide future "open seasons" without endangering the financial stability of the health care programs.[187] Again, the court stressed the agency's good faith in reacting summarily to the immediate problem while conducting full notice and comment on long-range policy.[188]

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[178]On October 21, 1980, the Secretary issued a Notice of Proposed Rulemaking, proposing several procedures for allocating slots at National Airport on a long-term basis. 45 Fed. Reg. 71,236.

[179]671 F.2d 607 (D.C. Cir. 1982).

[180]*Id.* at 608–09.

[181]*Id.* at 609 n.1.

[182]*Id.* at 609.

[183]*Id.* at 611.

[184]*Id.*

[185]*Id.* at 610.

[186]*Id.* at 613.

[187]On November 18, 1981, OPM had instituted notice-and-comment procedures regarding future rescheduling of open seasons. 46 Fed. Reg. 55,679.

[188]671 F.2d at 613.

Courts have not been so understanding when the short time available is in part because the agency failed to plan adequately and began too late.[189] For example, the Temporary Emergency Court of Appeals invalidated regulations promulgated without notice and comment by the Federal Energy Administraton in a case where the agency had been aware for 16 months that regulations would be required.[190] Likewise, the First Circuit struck down interim regulations implementing amendments to the Social Security Act which were published 22 days after the amendments took effect.[191] The court pointed to the 14-month period between the passage of the amendments and their effective date in rejecting the agency's claim of "good cause."[192]

In cases such as these, the courts can point to language in the legislative history admonishing the agencies "to proceed with the convenience or necessity of the people affected as the primary consideration, so that an agency may not itself be dilatory and then issue a rule requiring compliance forthwith."[193]

D. "Good Cause" to Waive Delayed Effective Date

Section 553(d) requires that a rule must ordinarily be published in the *Federal Register* at least 30 days before its effective date. That section contains its own "good cause" exception.[194]

Some courts have considered the 30-day delayed effective date as an integral part of the scheme to allow a dialogue between regulators and the regulated.[195] In fact, although section 553(b) specifies no minimum period for taking comments, some courts have concluded that the 30 days called for by section 553(d) are the bare minimum for allowing public input before the rules take effect.[196] They speak of the 30-day rule as being aimed at affording "interested persons an opportunity

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[189]*See, e.g.*, Kollett v. Harris, 619 F.2d 134, 145 (1st Cir. 1980); Sharon Steel Corp. v. EPA, 597 F.2d 377, 379–80 (3d Cir. 1979).

[190]Consumers Union of United States, Inc. v. Sawhill, 393 F. Supp. 639 (D.D.C.), *aff'd mem. per curiam*, 523 F.2d 1404 (Temp Emer. Ct. App. 1975). *Compare* Shimek v. DOE, 685 F.2d 1372 (Temp. Emer. Ct. App. 1981), where the court contrasted that situation with one where the regulatory problems evolved over time, and their severity became apparent only by empirical observation. Indeed, the purpose of the rulemaking was to gather information which revealed how pressing the need for the emergency rulemaking was. *Id.* at 1376–77. The court upheld the agency's decision to make the amendments effective on July 15, 1979, four days before their publication date. 44 Fed. Reg. 42,541 (1979).

[191]Kollett v. Harris, 619 F.2d 134 (1st Cir. 1980).

[192]*Id.* at 145.

[193]92 CONG. REC. 5650–51 (1946) (remarks of Rep. Walter).

[194]5 U.S.C. § 553(d)(3)(1982), set out *supra* note 9.

[195]Kelly v. Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972).

[196]*Id.* at 1101–02.

for airing their views *before* the regulation is officially adopted."[197] However, the opportunity to persuade is more often provided by the prepromulgation comment period mandated by sections 553(b) and (c).[198] As set out in the legislative history, the main purpose of the delayed effective date is to give the public an opportunity to adjust its conduct to the new rule before it carries penalties.[199]

Nonetheless, the period of delay also does provide an opportunity to offer additional input by way of a petition for reconsideration, which may convince the agency even at that stage.[200] Especially when the rule as finally adopted differs from the rule originally proposed, or when no prior comment period was afforded, the 30-day period may be a very important opportunity for the affected public to educate the agency about the likely effects of its decision.[201]

Thus, although decisions like *Kelly v. Department of Interior*[202] have been criticized as "confus[ing] the functions of sections 553(b) and (c) with that of sections 553(d) and (e),"[203] it is true that the agency may make use of the 30-day period to educate itself, particularly when no opportunity for prepromulgation comment has been provided. Citizens are also entitled to an opportunity to adjust to and comment on a new law, unless there is some reason for haste. Thus, there is good reason for the statutory requirement that agencies demonstrate why their rules must take effect immediately.

The APA scheme, which normally includes prepublication notice and comment and a delayed effective date, can be contrasted with a similar 30-day delayed effective date provision, patterned after section 553(d),[204] added to the Selective Service Act in 1971. That section[205]

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[197]*Id.* at 1101 (emphasis in original).

[198]*See* United States v. Gavrilovic, 551 F.2d 1099 (8th Cir. 1977), which criticizes cases like Hotch v. United States, 212 F.2d 280 (9th Cir. 1954) and Kelly v. Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972), for confusing the functions of § 553(b) and (c) with § 553(d) and (e). 551 F.2d at 1104 n.9.

[199]S. Doc. No. 248 at 201, 259. The House Report continued: "Many rules *** may be made operative in less than 30 days because of inescapable or unavoidable limitations of time, because of the demonstrable urgency of the conditions they are designed to correct, and because the parties subject to them may during the usually protracted hearing and decision procedures anticipate the regulation." H.R. REP. No. 1980, 79th Cong., 2d Sess. (1946), reprinted in S. Doc. No. 248 at 260.

[200]5 U.S.C. § 553(e)(1982), set out *supra* note 9.

[201]The Attorney General's Report recommended a deferred effective date to provide "a period . . . in which all persons interested may bring matters to the attention of agency [sic] and which will give an opportunity for changes to be made if they are warranted." ATTORNEY GENERAL'S FINAL REPORT, *supra* note 28, at 114.

[202]339 F. Supp. 1095 (E.D. Cal. 1972).

[203]United States v. Gavrilovic, 551 F.2d 1099, 1104 n.9 (8th Cir. 1977).

[204]*See supra* note 9.

[205][N]o regulation issued under this Act shall become effective until the expiration of thirty days following the date on which such regulation has been published in the FED-

explicitly provides for use of the 30 days following publication in the *Federal Register* as an opportunity for any person to submit his views to the Director. This represents the only mandated opportunity for public comment, since no prepublication notice-and-comment period is required.[206] The legislative history confirms that this 30-day period was to serve two functions: the delayed effective date was to provide time for those affected to become aware of new law, and it would also provide the Selective Service System and the public the benefits of a comment period.[207] Supporters of the amendment pointed out that the short delay would be more than justified if the new procedure served to bring legal questions of authority or ambiguity to light early, when they could be easily corrected, rather than through lengthy litigation. Instead of a "good cause" exemption, the section includes a special waiver provision if the President finds and gives notice that compliance would materially impair the national defense.[208]

At least one court[209] has held this provision must be enforced, even at the cost of invalidating the on-going system of draft registration instituted by President Carter in July 1980 by presidential proclamation.[210] The President declared that his order was effective immediately, and that the initial registration period would begin three weeks later. Although the President mentioned that he was "deeply concerned about the unwarranted and vicious invasion of Afghanistan by the Soviet Union,"[211] there was no explicit waiver of the 30-day requirement. The district court in *Untied States v. Wayte* held that the indictment of Wayte for failure to register must be dismissed because the basis for the registration requirement had not been promulgated in accordance with section 463(b).

This holding was an alternative ground; the court devoted most attention to Wayte's claim that he was entitled to dismissal of his indictment because of the government's selective prosecution of only

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ERAL REGISTER. After the publication of any regulation and prior to the date on which such regulation becomes effective, any person shall be given an opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation. The requirements of the subsection may be waived by the President in the case of any regulation if he (1) determines that compliance with such requirements would materially impair the national defense, and (2) gives public notice to that effect at the time such regulation is issued. 50 U.S.C. App. § 463(b) (1976).

[206]Congress specifically exempted the Selective Service System from the Administrative Procedure Act, except its public information requirements. *Id.*

[207]*See* remarks of Senators Kennedy and McIntyre, 117 CONG. REC. S20,485–88 (daily ed. June 17, 1971).

[208]*See supra* note 205.

[209]United States v. Wayte, 549 F. Supp. 1376 (C.D. Cal. 1982).

[210]Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980).

[211]16 WEEKLY COMP. PRES. DOC. 1274 (1980).

vocal draft resisters.[212] In fact however, the court's decision on the effect of the procedural infirmity would present more serious obstacles to maintaining the draft registration system than its holding on selective prosecution. If the system itself is valid, the executive could institute a more random selection of nonregistrants for prosecution[213] and thus remove that objection to the system in practice. If the court is upheld on appeal on the invalidating effect of the procedural misstep, however, the registration requirement would presumably have to be proclaimed anew, this time with the required 30-day delay. Under the court's reasoning, any person who failed to register under the invalidly created requirement would be immune from prosecution even though the requirement was given maximum publicity and probably resulted in virtually universal actual notice to those affected. The fatal procedural flaw was not lack of notice; rather, it was cutting off a statutory right to comment.

Wayte himself could hardly complain that he had not received notice before being prosecuted, since he had obviously been aware of the draft registration requirement and had in fact taken pains to write to express his opposition.[214] Nonetheless, the effect of the abridgement of the statutory comment period deprived him of a chance to make his protest known without risking criminal penalties, and thus bears on the government's equities when it seeks to prosecute him and other vocal resisters.

In cases involving section 553(d), in contrast, courts have faced a quite different situation.[215] In some cases, the agency invokes *both* good cause exemptions, generally arguing that the circumstances justify both dispensing with notice and comment *and* an immediate or even retroactive effective date.[216] In other cases, only the effective date is at issue, since the rule in question received adequate prior notice and comment.

In cases dealing with unexpected "emergencies" or where advance

[212]Seven pages of the opinion deal with the selective prosecution question, while the procedural infirmity was handled in three.

[213]The Selective Service System has access to all Social Security records and could implement an "active" enforcement policy, identifying non-registrants and referring them to the Justice Department for a "random" selection of those to be prosecuted. *See* United States v. Wayte, 549 F. Supp. 1376, 1381 (C.D. Cal. 1982).

[214]Wayte had written two letters to the President expressing his opposition to draft registration and his intention not to register. *Id.* at 1378.

[215]In several cases involving the Department of Health and Human Services, interim regulations were applied retroactively. *See, e.g.*, Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982), and Kollett v. Harris, 619 F.2d 134 (1st Cir. 1980).

[216]The court in American Fed'n of Gov't Employees v. Block, 655 F.2d 1153 (D.C. Cir. 1981), explicitly recognized that both § 553(b) and § 553 (d) were at issue.

notice would defeat the effect of the regulation, agencies often invoke *both* "good cause" exemptions.[217] In those instances, the general public first learns about agency policy on the same day it takes effect. In such circumstances, where the need for prompt action is clear, courts have found good cause to justify immediate effectiveness.[218] Where both exemptions are raised, if courts find that agencies lack "good cause" for eliminating notice and comment, they normally look no further. The rulemaking proceeding is then tainted and detailing further irregularities would be superfluous.[219]

In case where ample opportunity for notice and comment has been provided, however, even when courts agree that the 30-day waiting period was improperly abbreviated by the agency, the question of an appropriate remedy seems troubling. When the only procedural error was in shortening the effective date, if the rule is otherwise substantively and procedurally proper, voiding the entire regulation seems disproportionate to any injury suffered.[220] If petitioners have lost at most only the 30 days' grace period, several courts have decided to redress that injury by enforcing the 30-day wait but holding the regulation valid thereafter.[221]

The effect of such a holding varies depending on the procedural posture of the case. If the challenge to the action is brought immediately, the court can redress the injury directly by staying the regulation until the statutory period has passed.[222] In such a case, courts should not lightly disregard the congressional decision that 30 days should normally be provided. If the case arises in an appeal from an enforcement action taken during the statutory waiting period, a finding of delayed validity would nullify the enforcement actions taken before that date.[223] In contrast, if the enforcement action was not commenced until long after the 30 days, declaring that the regulation should have

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[217]*See, e.g.*, Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975); Nader v. Sawhill, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975).

[218]*Id.* In both cases, the courts were able to take judicial notice of the emergency.

[219]*See, e.g.*, Tasty Baking Co. v. Cost of Living Council, 529 F.2d 1005 (Temp. Emer. Ct. App. 1975), where the court voided agency action for failure to comply with APA requirements. *But see* Kollett v. Harris, 619 F.2d 134, 145 n.15 (1st Cir. 1980), where the court took pains to note that the agency has "good cause" to make the regulations effective immediately, but not to bypass notice and comment.

[220]Rowell v. Andrus, 631 F.2d 699 (10th Cir. 1980). Some courts have voided the entire regulation, *see, e.g.*, Kelly v. Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972).

[221]Even the court in Kelly v. Department of Interior recognized that the agency could quickly moot the issue by repromulgating the concededly valid rule and delaying its new effective date for 30 days. 339 F. Supp. at 1102.

[222]Such action was taken in Ngou v. Schweiker, 535 F. Supp. 1214 (D.D.C. 1982).

[223]*See* United States v. Gavrilovic, 551 F.2d 1099 (8th Cir. 1977).

taken effect 30 days later than it did makes no difference, and the procedural misstep becomes harmless error.[224]

An OSHA case, *Daniel International Corp. v. Occupational Safety and Health Review Commission*[225] demonstrates a procedural error which was patently "harmless." The controversy centered around the effect of an accelerated effective date for regulations the corporation was found to have violated some six years after their promulgation. In 1971, the Secretary of Labor issued construction safety standards after notice and opportunity to comment,[226] but in order to take advantage of a provision allowing the newly created Occupational Safety and Health Administration to adopt federal safety standards in force on the agency's effective date without regard to the requirements of the APA,[227] the rules carried an effective date only 10 days away, one day before OSHA became effective.[228]

Daniel was inspected in the fall of 1977, and found in violation of those standards. The Fourth Circuit was not sympathetic to petitioner's procedural argument, noting that Daniel could hardly claim, six years later, that another 20 days' delay in the effective date of the regulation would have made any difference in allowing it to prepare to comply.[229] Hence, the court held the challenge to be without merit, and declined to consider whether the original acceleration was justified.[230]

One enforcement case where prejudice was clear was *United States v. Gavrilovic*.[231] On May 29, 1975, the administrator of the Drug Enforcement Administration had published for comments a proposal to add

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[224]One court decided that such procedural errors of promulgation should not even be considered during enforcement proceedings, when procedures are provided for pre-enforcement review of standards. *See* 29 U.S.C. § 655(f) (1976), which provides that adversely affected parties may challenge the validity of an OSHA standard within 60 days of its effective date. The court went on to note that if the challenge had been timely raised, it would have had great difficulty in finding the requisite "good cause" for shortening the period of delay, since the desire to get the regulations on the books in time to allow summary adoption by OSHA would not qualify as "good cause." National Indus. Constructors v. OSHRC, 583 F.2d 1048, 1054 n.9 (8th Cir. 1978).

[225]656 F.2d 925 (4th Cir. 1981).

[226]The procedural history is reviewed in 656 F.2d at 928.

[227]*See* 29 U.S.C. § 655(a)(1976).

[228]*See* 36 Fed. Reg. 7430 (1971).

[229]The Fourth Circuit agreed to review the procedural challenge, holding that Congress did not intend to limit procedural challenges to the pre-enforcement review procedures. 656 F.2d at 929–30, citing Marshall v. Union Oil Co., 616 F.2d 1113 (9th Cir. 1980), and Deering Milliken, Inc. v. OSHRC, 630 F.2d 1094 (5th Cir. 1980). *Contra* National Indus. Constructors v. OSHRC, 583 F.2d 1048 (8th Cir. 1978). Nonetheless, the court did think it appropriate to require some showing of prejudice from the procedural error. 656 F.2d at 931.

[230]656 F.2d at 931.

[231]551 F.2d 1099 (8th Cir. 1977).

the substance mecloqualone to the list of controlled substances.[232] After receiving reports that the defendants were preparing to begin clandestine manufacture of large amounts of mecloqualone, the administrator published a final regulation adding the substance to the list of July 8, with an effective date of July 10.[233] On July 31, the defendants were arrested and charged with manufacturing a controlled substance.[234]

In this case, activity which was previously lawful was suddenly declared unlawful. Severe criminal sanctions followed.[235] The administrator had justified the early effective date by claiming immediate control was necessary to protect public health and safety.[236] This position was weakened by the administrator's action in specifying an early effective date for only one of two drugs posing about the same threat to the public health.[237] The inference was inescapable that it was the threat posed by defendants' operation which triggered the change in the law. That justification was not "good cause" since the administrator could have enjoined defendants' operation immediately because they were not registered as a drug manufacturer.[238] To subject defendants instead to a felony conviction offended notions of fair play and due process,[239] and the court agreed that under these circumstances, there was no public necessity for waiving the statutory waiting period. Thus, defendants' activities were not in violation of law, and their convictions were vacated.[240]

In *British American Commodity Options Corp. v. Bagley*,[241] by contrast, a group of commodity options dealers and their national association raised the procedural issue before the challenged regulations went into effect. The Commodity Futures Trading Commission, granted authority to regulate that industry in 1974,[242] announced in the *Federal Register* in October 1975 that it was considering rules to regulate or prohibit all options trading, and solicited comments on several alternative approaches, as well as suggestions of temporary rules.[243]

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[232]Proposed Placement of Mecloqualone and the Thiophene Analog of Phencyclidine in Schedule I, 40 Fed. Reg. 23,306 (1975).

[233]40 Fed. Reg. 28,611 (1975).

[234]551 F.2d at 1103.

[235]Violation of 21 U.S.C. § 841(a)(1) (1976) carries a prison term or fine.

[236]40 Fed. Reg. 28,611–12(1975).

[237]551 F.2d at 1102.

[238]*Id.* at 1106. The court also noted that the government did not attempt to shut down the operation until 21 days after the effective date. *Id.*

[239]The court noted the harshness of subjecting defendants to a felony conviction when other means existed. *Id.*

[240]*Id.*

[241]552 F.2d 482 (2d Cir.), *cert. denied*, 434 U.S. 938 (1977).

[242]Commodity Exchange Act, 7 U.S.C. §§ 1–22 (1976).

[243]40 Fed. Reg. 49,360–62 (1975).

On February 20, 1976, the commission published its proposed temporary rules.[244] A requirement for the dealer to "segregate," or set aside a portion of the customer's cash payment until the option is sold or exercised, was not part of this proposal, but the commission solicited comments on the wisdom of such a requirement.[245] An oral hearing was held in March 1976, and some written comments supporting a segregation requirement were received.[246] The report of an advisory committee appointed to make its recommendations also advocated the requirement.[247]

On October 8, 1976, proposed interim regulations, including a "segregation" requirement, were published, intended to become effective on November 22.[248] Comments were solicited until November 8.[249] On November 24, the Commission published the final rules as adopted, delaying effectiveness for 15 days for most of the rules, but allowing 30 days before the segregation requirement became effective.[250]

Because the rules affected a small, cohesive group which followed the proceedings very closely, plaintiffs in this case had ample warning and opportunity to participate, as well as adequate opportunity to be in full compliance by the effective date.[251] To the court, the public interest in achieving comprehensive regulation of an area historically "fraught with abuses" argued for adopting the rules without further delay.[252] The court noted that the segregation requirement, the main target of complaint, was delayed the full 30 days.[253]

The court seemed convinced that these plaintiffs' long and active involvement in the rulemaking process demonstrated that they did not need any more time to debate the wisdom of the rules. Given that the fact of regulation and its imminence had been apparent since Congress first created the commission, the complaint by these parties that they needed more time to get ready to comply was not very persuasive.[254] However, the court accepted with almost no scrutiny the agency's claim that after over a year of consideration and study, the regulations were so urgent that another two weeks' advance notice simply could not be

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[244]41 Fed. Reg. 7774 (1976).
[245]41 Fed. Reg. 7776 (1976).
[246]552 F.2d at 487.
[247]*Id.*
[248]*Id.*
[249]*Id.*
[250]41 Fed. Reg. 51,808 (1976).
[251]The House Report suggested that such a situation might be a reason to dispense with the 30-day wait. See *supra* note 199.
[252]552 F.2d at 489.
[253]*Id.*
[254]*See supra* note 251.

provided. The burden was placed on the challengers to demonstrate prejudice, often difficult to do, and the court upheld the agency without much discussion.[255]

One preenforcement case where the court did devote scrutiny to the agency's justification for an early effective date was *Nance v. Environmental Protection Agency*.[256] At issue was agency action giving final approval to a request by an Indian tribe to upgrade its reservation from Class II to Class I air quality.[257] The effect of this action would greatly restrict the possibility of development of the land.

The proceedings had dragged on since May 1976, and had included public hearings and compilation of a report by the tribe, which submitted its formal request on March 7, 1977.[258] EPA was under an obligation to act on the request within 90 days.[259] It published notice of its intent to approve the request on April 29, and accepted comments through June 30, although the 90-day period expired on June 7.

In the interim, Congress passed the Clean Air Amendments.[260] If the redesignation were not approved and made effective before the effective date of the amendments, the tribe would have to begin the whole lengthy redesignation procedure again. Under the circumstances, EPA approved the request on August 5, effective immediately, two days before the amendments took effect.[261]

In reviewing this decision, the court did balance the agency's justification, which centered on the unfairness to the tribe if the effective date had been delayed, against the lack of prejudice to other affected interests, who had had ample warning that the change would likely take place, effective upon approval.[262] This balancing seems more in keeping with Congress' admonition that agencies follow the procedures set out unless there is "good cause" not to,[263] rather than placing the burden on the public to demonstrate "good cause" to wait 30 days.[264] Of course, if no person can demonstrate prejudice, the agency

[255]552 F.2d at 489. The case was especially weak since challengers did receive the full 30 days to comply with the "segregation" requirement.

[256]645 F.2d 701 (9th Cir. 1981).

[257]Procedures for redesignation by an Indian Tribe governing body were set out in 40 C.F.R. § 52.21(c) (1975).

[258]645 F.2d at 704–05.

[259]EPA regulations required action on such a proposal within 90 days. 40 C.F.R. § 52.21(c)(3)(vi) (1975).

[260]The history of the 1977 Clean Air Act Amendments is set out in 645 F.2d at 706–07.

[261]*Id.* at 707.

[262]*Id.* at 709.

[263]*See* S. Doc. No. 248 at 200, 258.

[264]The three judge court in Kelly v. Department of Interior expressly rejected any such suggestion that it is up to the public to show that an effective date should be delayed. *See* 339 F. Supp. 1095 at 1101 (E.D. Cal. 1972).

may argue that any further delay would be "unnecessary,"[265] but by specifying a waiting period to be observed unless there was "good cause," Congress seemed to have had in mind requiring more than this from government authorities.[266] This was not a situation where the agency was granting an exemption or relieving a restriction, actions which Congress had decided need not be delayed.[267] No finding of "good cause" is required in those situations because those directly affected need no time to adjust to less onerous regulations and are sure to welcome the new state of affairs as soon as possible.[268] In other instances, Congress decreed the advance notice, and courts should demand to know why it cannot be given.[269]

The most difficult decision was posed by the preenforcement challenge in *Ngou v. Schweiker*.[270] There a stay could have delayed the effective date, but at large cost to legitimate governmental interests.[271] The Secretary of Health and Human Services was faced with uncertainty about whether Congress would fully fund the Refugee Resettlement Program,[272] under which the federal government reimburses states for the costs of cash and medical assistance provided to needy refugees. The program was funded under a continuing resolution which expired on March 31, 1982. Since it was uncertain whether any other money would be available thereafter, the secretary faced a shortfall of $14.8 million per month from April to October 1982 unless benefit levels were changed.[273]

The secretary attempted to plan for an orderly phasing out of the program rather than allow it to simply run out of money. On December 11, 1981, he proposed for public comment amendments to the Refugee Resettlement Program regulations, which would cut from 36 to 18 months the period during which the federal government would reimburse cash and medical benefits for refugees.[274] The secretary reasoned that need would be greatest for those who had most recently

[265]*See* legislative history cited *supra* note 199. The qualifying language of § 553(b) is absent from § 553(d)(3).

[266]The agency must make and publish a finding of "good cause" with the rule. 5 U.S.C. § 553(d)(3)(1982).

[267]*Id.* § 553(d)(2).

[268]*See* ATTORNEY GENERAL'S MANUAL at 37.

[269]In discussing the bill, Congressman Walter remarked that "[t]his section places the burden upon administrative agencies to justify in law and fact the issuance of any rule effective in less than 30 days." (remarks reprinted in S. Doc. No. 248 at 359).

[270]535 F. Supp. 1214 (D.D.C. 1982).

[271]The stay cost $2 million in funds scheduled to be cut off. *Id.* at 1217.

[272]*See* Refugee Act of 1980, 8 U.S.C. §§ 1521–1525 (1982).

[273]Ngou v. Schweiker, No. 82–0865, slip op. at 2 (D.D.C. Apr. 30, 1982).

[274]*Id.*

arrived, while an 18-month period would allow for adjustment and establishment of a means of self-support thereafter. For the second 18 months of a refugee's residence in the United States, the federal government would fund only that support given pursuant to state programs to provide general assistance benefits in each state.[275]

After accepting comments, the secretary approved the regulation on February 8, 1982.[276] Because of the delays required to obtain clearance from the Office of Management and Budget, however, the regulation did not appear in the *Federal Register* until March 12. 1982.[277] The program operates on a monthly basis, and planning is done quarterly; both a new month and a new quarter began April 1. Thus, if the secretary had allowed 30 days before the changes became effective, he would in effect have delayed the changes not to April 12 but May 1, and possibly to July 1.[278] Therefore, under the circumstances, the secretary announced that the regulations would take effect on April 1.

These changes would have had an especially devastating impact on about 10,000 refugees located in the state of Washington, where many Asian refugees had settled. Washington had no general assistance program, which meant the refugees who had been in the United States more than 18 but less than 36 months would simply be cut off. Chances of finding work were slim given the state's high unemployment and the lack of transferable skills the often illiterate refugees brought to this country.[279]

Attorneys representing these refugees brought suit seeking to enjoin inplementation of the regulation. The only procedural misstep was the shortened delayed effective date, which the secretary urged was justified by "good cause."[280] He pointed to the fact that each month's delay would cost approximately $15 million, which would decrease the amount available for other refugee assistance purposes.[281]

The complaint was filed on March 29, 1982. Because of the urgency of the matter, the court held a hearing on a motion for preliminary injunction on March 30, and on March 31, issued an order enjoining enforcement for 30 days only as it related to refugees living in the state of Washington.[282] Since the new program could go into effect else-

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[275]47 Fed. Reg. 10,845 (1982).

[276]535 F. Supp. at 1216.

[277]Interview with Beverly Dennis III, Office of General Counsel of HHS, (June 16, 1982).

[278]*Id.*

[279]Ngou v. Schweiker, No. 82–0865, slip op. at 2 (D.D.C. Apr. 30, 1982).

[280]535 F. Supp. at 1216.

[281]*Id.*

[282]*Id.* at 1217.

where, the additonal amount the government was required to expend was reduced to $2 million.[283] The court recognized that this might reduce the benefits available to other refugees, but nonetheless held that since the secretary had approved the regulation on Feburary 8, 1982, he had "had ample time to provide these desperate refugees with the 30-day lead time provided in the statute which would enable them better to adjust to their changed circumstances."[284] Judge Gesell did not elaborate as to how another 10 days would have made any difference, or as to why refugees in other states could manage with only 20 days' warning. He merely enforced a 30-day waiting period from the date of his order, thus sustaining benefits for another month.[285]

In this case, the court weighed the special needs of the 10,000 refugees who would be left without any means of subsistence against the justification advanced by the agency, which could have acted sooner. Of course, the refugees had been on notice that the program on which they depended would be funded only until March 31,[286] and had notice as early as December 11, 1981, that their benefits might well be terminated.[287] Nevertheless, in balancing the impact on them against the government's reasons for an early effective date, the court held they were entitled to a full month's notice, despite budgetary constraints.

IV. THE SPECIAL CASE OF WELFARE BENEFITS

As the preceding discussion illustrates, some of the most difficult "good cause" cases have involved rules which govern mass welfare programs. In an age of economic belt tightening, both Congress[288] and administrative agencies have taken steps to reduce benefits,[289] often

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[283]*Id.*

[284]*Id.* at 1216.

[285]*Id.* at 1217. On April 30, the court held that the Secretary's decision was substantively valid but noted that he was considering an application from Washington State for special relief. Ngou v. Schweiker, No. 82–0865 (D.D.C. Apr. 30, 1982).

[286]The program was funded under a continuing resolution which expired March 31, 1982. 535 F. Supp. at 1216 n.2.

[287]*Id.* at 1215.

[288]The Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97–35, 95 Stat. 357, mandated deep cuts in benefits programs.

[289]The agencies have in general reacted to congressional directions, adjusting regulations for administrative convenience and equity. For example, HHS issued regulations to treat Supplemental Security Income beneficiaries living in their own households but receiving support from friends and relatives in the form of reduced rent more on a par with those receiving such support in a relative's home. That adjustment in regulations has been considered by several courts, and upheld as substantively correct. *See, e.g.*, Antonioli v. Harris, 624 F.2d 78 (9th Cir. 1980); Kimmes v. Harris, 647 F.2d 1028 (10th

without pausing for procedural niceties. In two recent cases,[290] courts have considered whether pressing financial strictures justified taking measures without observing the pattern of prior notice, opportunity to comment, and delayed effective date.

In this context, however, the basis for legal challenge to the abbreviated rulemaking procedures is not the APA. In 1946, Congress exempted from section 553 any "matter relating to . . . benefits."[291] As government benefits evolved from largesse to entitlement, and affected large numbers of Americans, the congressional decision to afford no public participation in often far-reaching decisions was severely criticized.[292] The Administrative Conference recommended that these statutory exemptions be removed,[293] and urged agencies to voluntarily utilize notice and comment in their rulemaking. In response, the Department of Health, Education, and Welfare, predecessor to the current Department of Health and Human Services, determined as a matter of policy to employ notice-and-comment procedures with a "good cause" exemption when making rules.[294] Hence, challengers complained that the agency had failed to follow its own procedures, not requirements mandated by Congress.

Aside from the voluntary nature of the rulemaking requirements, these cases illustrate the very special character of the rules governing mass benefit programs. First, in a mass welfare system administered by a far-flung and decentralized bureaucracy, rules are essential to ensure that the thousands of decisions in individual cases are made consistently and in accordance with law.[295] Invalidation of rules invites administrative chaos. Second, some programs are federally funded but state administered,[296] making the federal regulations crucial to the states,

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Cir. 1981); *contra* Jackson v. Schweiker, No. 81–1391 (7th Cir. July 20, 1982). Interim regulations were held to have been procedurally defective in Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982).

[290]Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877 (3d Cir. 1982); Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982).

[291]5 U.S.C. § 553(a)(2)(1982).

[292]*See* Bonfield, *Public Participation*, *supra* note 14; Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886 (1975).

[293]1 C.F.R. § 305.69–8 (1983).

[294]36 Fed. Reg. 2532 (1971). On June 22, 1982, the Secretary issued for comment a proposed rule which would reaffirm the Department's policy ordinarily to use notice-and-comment procedures, but to make clear that omission of these procedures is a matter for the Department's judgment, not the "good cause" standard, and that the policy is not intended to create any judicially enforceable rights. *See* 47 Fed. Reg. 26,860 (1982).

[295]*See* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

[296]One familiar example is Aid to Families with Dependent Children, codified at 42 U.S.C. §§ 601–676 (1976 & Supp. V 1981).

which need assurance that their programs comply with federal law and will therefore receive federal funds. Third, these rules have an immediate and direct impact on the monthly checks received by millions of Americans. Because of the number of people involved, changes in benefit levels represent large amounts of money in the aggregate. Thus, if benefits must be recomputed because of procedural error, the result can be extremely costly to the government.[297]

Two recent cases illustrate the special problems inherent in rulemaking for benefit programs. *Buschmann v. Schweiker*[298] was a challenge to an "interim" rule promulgated on October 20, 1975,[299] and made retroactive to December 1974. The rule in question imputed as income to individuals any support they received from friends or relatives in the form of free or reduced rent for living accommodations.[300] Buschmann paid $80 rent to live in a house owned by his son, but the fair market rental value of the house was determined to be $145 per month. Under the new regulation, the secretary determined this arrangement generated $65 per month of unearned income to Buschmann, thus making him ineligible for Supplemental Security Income.

The "interim" regulation was promulgated without notice or comment, and given retroactive effect. After full notice and comment, the identical regulation was promulgated as a final rule on July 7, 1978.[301] Buschmann's challenge was aimed at the substance of the regulation as well as the procedure by which it was promulgated.

The secretary's reason for promulgating the "interim" regulation in summary fashion was that it implemented legislation which took effect on January 1, 1974. Hence, the secretary argued that the need to administer an on-going program made it necessary to get "interim" rules in place with dispatch.

The Ninth Circuit noted that after almost two years had elapsed, there was no "emergency" that justified dispensing with the notice-and-comment procedures in this case.[302] Thus, although the final rule was determined to be valid,[303] the interim rule was invalidated for procedural error, and benefits ordered recomputed for the time it had been applied.

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[297]For instance, the extra month's extension at issue in Ngou v. Schweiker involved close to $15 million. *See supra* text accompanying notes 270–287.

[298]676 F.2d 352 (9th Cir. 1982).

[299]40 Fed. Reg. 48,937 (1975).

[300]The rule was codified as 20 C.F.R. § 416.1125(d) (1982).

[301]43 Fed. Reg. 29,277 (1978).

[302]676 F.2d at 357.

[303]The validity of the regulation was upheld in Antonioli v. Harris, 624 F.2d 78 (9th Cir. 1980).

A closer case was presented in *Philadelphia Citizens in Action v. Schweiker*.[304] There, Congress had enacted major legislation, the Omnibus Budget Reconciliation Act of 1981 (OBRA),[305] which was given highest political priority and designed to cut back on federal spending. One program targeted for cuts was Aid to Families with Dependent Children.[306] This program is administered by the states, which receive federal reimbursement for payments made in conformance with federal law.[307] This double layer of bureaucracy put pressure on HHS to provide reliable guidelines for the states to use in altering their own regulations to conform to the new law.

A protracted political battle in the legislature delayed final passage of OBRA until August 13, 1981. In an effort to realize the cost savings as soon as possible, the legislation carried an effective date of October 1, 1981, only 49 days later.

HHS had determined in May 1981 that it would face time pressures to issue implementing regulations, and decided to use informal means of gathering public input without holding a formal notice-and-comment period.[308] The regulations promulgated on September 21, 1981, were accompanied by the secretary's finding that congressional concern with reducing government spending immediately and the short time Congress provided for implementation made use of the APA procedures "impracticable" and "not in the public interest."[309] The regulations were published as "interim rules," not merely proposed rules, to give the states some confidence that federal law would not be abruptly changed in "midstream."[310] Nonetheless, the agency did solicit comments and advice until November 20, 1981, thus providing a 60-day period for comment before promulgating the rules in final form.[311]

The rules in question in large part restated the changes made by the legislation. However, some relatively minor matters had been left to

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[304]669 F.2d 877 (3d Cir. 1982).

[305]Pub. L. No. 97–35, 95 Stat. 357 (1981).

[306]42 U.S.C. §§ 601–676 (1976 & Supp. V 1981).

[307]States which comply can obtain reimbursement for more than half of the benefits paid and administrative expenses incurred. *Id.* § 603.

[308]A study group was created in May to formulate plans for drafting new rules. In two mailings in July, HHS sent out requests for comments and ideas to individuals and organizations. Representatives of HHS met twice with representatives of the American Public Welfare Association (APWA) and sent a rough draft to the states through APWA on August 13. HHS also held conferences for state administrators in mid-September. 669 F.2d at 880.

[309]46 Fed. Reg. 46,570 (1981).

[310]*Id.*

[311]*Id.*

the Secretary's discretion. The Secretary argued that the states needed guidance on those matters to be able to comply with federal law.[312] Some such matters, such as defining a full-time student, determining whose income would be disregarded, or fixing the amount of equity interest in an automobile which would be disregarded in computing a family's resources, were of direct concern to recipients.[313]

Challenges to the new rules were brought in Ohio[314] and Pennsylvania. In Pennsylvania, Chief Judge Lord invalidated the HHS regulations for failure to provide for notice and comment.[315] Judge Lord noted the effects of the changes on AFDC recipients in Pennsylvania alone: some 53,520 persons in 17,840 households would become ineligible for any benefits and an additional 23,950 households composed of 57,050 individuals would face reductions of their monthly checks. The effect on the state treasury was also substantial: some $5.2 million per month if the changes were not implemented on time.[316]

Despite this substantial impact and the short time available, Judge Lord followed Third Circuit precedent[317] and rejected a short deadline as reason to omit a notice-and-comment period. Instead, he held the secretary had not demonstrated that compliance with the APA was "impracticable." He noted that HHS had been engaged in polishing draft regulations from August 13 to September 21, and found that soliciting public comment on them would not have added appreciably to the length of the process. To give petitioners a meaningful opportunity to comment, he issued a declaratory judgment holding the interim rules invalid and permanently enjoined the state from implementing its regulations developed in reliance on the federal rules.[318] The court thus enjoined the state from implementing the AFDC

[312]The Third Circuit majority agreed. 669 F.2d at 884.

[313]A section-by-section analysis of the regulations appears in the District Court opinion as Appendix A. Philadelphia Citizens in Action v. Schweiker, 527 F. Supp. 182, 196–206 (E.D. Pa. 1981).

[314]The rules were upheld in Ohio State Consumer Educ. Ass'n v. Schweiker, 541 F. Supp. 915 (S.D. Ohio 1982). Also upheld against a similar challenge were Medicaid regulations to conform to OBRA in Coalition of Mich. Nursing Homes, Inc. v. Dempsey, 537 F. Supp. 451 (E.D. Mich. 1982). Both courts noted that the Sixth Circuit had upheld EPA's claim of "good cause" in the nonattainment rule controversy, thus signalling a more deferential attitude toward administrative judgment on "good cause" than was exhibited by most other circuits. *See* Republic Steel Corp. v. Costle, 621 F.2d 797 (6th Cir. 1980), and *supra* note 86.

[315]Philadelphia Citizens in Action v. Schweiker, 527 F. Supp. 182 (E.D. Pa. 1981).

[316]*Id.* at 186–87.

[317]American Iron & Steel Inst. v. EPA, 568 F.2d 284 (3d Cir. 1977); Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979).

[318]*See* 527 F. Supp. at 191–95.

cutbacks mandated by Congress because of procedural errors in promulgating the rules in question.[319]

Over the strong dissent of Judge Higginbotham, the Third Circuit reversed and held the secretary in this situation had "good cause" to proceed as he had.[320] The urgency attached to achieving the budget cuts was clear, and the regulations were held necessary for administration of the program. The court noted that the pain of the cutbacks was not attributable to the actions of the secretary; he had been left no discretion on such matters, since those decisions had been made in the Congress.[321]

The court distinguished recent Third Circuit precedent holding that EPA had erred in asserting "good cause" in implementing the Clean Air Act.[322] The majority suggested several times[323] that the concern of the challengers was to halt or delay the reduction in benefits, a decision which was not the secretary's to make. Rather, it was required by OBRA, a fully debated act of Congress. The court distinguished the Clean Air cases, where the deadlines in a fully debated act of Congress were *not* "good cause" for similar procedures, by pointing out that the deadlines there were "substantially more distant."[324] However, in one EPA case, Congress had called for action to be completed in 60 days, a period only 11 days longer than in the case at bar.[325]

The court further distinguished the EPA cases by noting that Congress had exempted rules regarding benefits from notice and comment.[326] In considering EPA's claim of "good cause," the Third Circuit had given weight to the absence of any statutory language in the Clean Air Act dispensing with APA requirements.[327] Since Congress had not subjected HHS to the same requirements, its silence on procedures would not indicate that the requirements were meant to apply. Congressional silence on procedure should not be dispositive even when an agency is subject to the APA, however. It is a matter for

[319]"The [state] stands to lose $2.5 or $5 million dollars per month as a result of [this] holding." *Id.* at 194.

[320]Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877 (3d Cir. 1982).

[321]*Id.* at 888.

[322]*See* cases cited *supra* note 317.

[323]669 F.2d at 880 n.1, 886, and 888.

[324]*Id.* at 885 n.8.

[325]The court noted that the states were given more than a year to complete and implement plans under the Clean Air Act. *Id.* at 883. However, Congress gave EPA only 60 days to review state-proposed designations, the action challenged in Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979).

[326]5 U.S.C. § 553(a)(2)(1982), discussed in 669 F.2d at 885.

[327]Sharon Steel Corp. v. EPA, 597 F.2d 377, 380 (3d Cir. 1979).

interpretation whether Congress' desire for speedy implementation overrides its intention that rules receive public comment, since the APA procedures contain the "good cause" exemption.[328]

Despite the protest of Judge Higginbotham that 110,570 poor people have as much right to procedural protection as the steel companies did in the *Sharon Steel* case,[329] the Third Circuit majority held that the secretary had acted reasonably and in good faith to fulfill his statutory duty to give reliable guidance to the states. The majority even questioned whether the interest of benefit recipients in the rules was sufficient to confer standing,[330] again viewing their real quarrel as being with the benefit reductions ordered by Congress. The dissent's response was, of course, accurate: the interest which petitioners asserted is their interest in their right to comment on the rules.[331] Whether or not that comment influences the benefit cuts, their right was violated if the secretary lacked "good cause" to forego notice and comment, thus furnishing ample "injury in fact."

The court's endorsement of the secretary's actions seemed to rest on its view that notice and comment in this instance would have been essentially useless. It was apparent to the court that the views of the petitioners and others would be well known to the secretary: welfare recipients would want him to be as generous as possible, while those interested in cutting government spending would seek more restrictive guidelines. After the major battle which had just taken place in the Congress between the two views, another opportunity to ventilate the two positions would produce no useful information whatsoever. Instead, it might delay implementation of a major piece of legislation considered urgent by elected officials.

This rationale undervalues the importance to petitioners of being assured access to the federal decisionmaker, even if in most cases, the secretary was as generous as the statute allowed him to be.[332] It denies to the people most directly affected by the secretary's choices the chance to influence decisions of critical importance to them. Even if their participation would predictably have little effect on the final outcome, other courts have placed more value on it than in this case, especially

[328]5 U.S.C. § 553(b)(B)(1982) was designed to allow agencies to dispense with public participation where circumstances warranted.

[329]669 F.2d at 893 (Higginbotham, J., dissenting).

[330]*Id.* at 880 n.1. The District Court for the Eastern District of Louisiana took the hint and held that a mere interest in one's statutory right to comment was insufficient to confer standing. Wells v. Schweiker, 536 F. Supp. 1314, 1320–21 (1982).

[331]669 F.2d at 889 n.1 (Higginbotham, J., dissenting).

[332]*See* Philadelphia Citizens in Action v. Schweiker, Appendix A, 527 F. Supp. 182, 196, (E.D. Pa. 1981).

when the courts are convinced that recognition of that interest could have been accommodated at very little additional cost to the agency.[333]

The balancing exercise in which courts must engage in evaluating an agency claim of "good cause" to omit notice and comment may usefully be compared with the due process calculus set out by the Supreme Court in *Mathews v. Eldridge*,[334] another case involving welfare recipients. Although the notice-and-comment procedures are normally considered of statutory, not constitutional, dimension,[335] in both types of cases courts explicitly weigh the burden on government operations against the benefit of additional procedures.

In *Mathews*, the Court was called upon to decide whether the constitution requires an evidentiary hearing prior to termination of social security disability benefits. To answer such a question, a court must first weigh "the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[336]

Noteworthy among the *Mathews* factors is the Supreme Court's express recognition of the goal of "accurate" or "correct" decision-making as the end of the procedures used. Thus, the benefit to be derived from more or different procedures must be some incremental improvement in the accuracy of the decision-making process.

In contrast, in good cause cases, this question seems irrelevant. Many courts have not required any showing that more procedures than those afforded would make any contribution whatever to the accurate or correct resolution of the question facing the agency. Courts rarely point to any input the challenger would have provided had he been given his opportunity. Rather, the issue seems to be framed exclusively in terms of whether the agency had sufficient justification for not providing more opportunity to comment. Of course, the courts can and do point to the clear congressional command to provide the section 553 procedures with only narrow exemptions. Since Congress

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[333]*See, e.g.*, cases cited *supra* note 86.

[334]424 U.S. 319 (1976).

[335]*But see* Curlott v. Hampton, 438 F. Supp. 505 (D. Alaska 1977), which applied the *Mathews* test and held as a matter of *due process* that an opportunity to submit written comments was required. *Id.* at 509 n.2. The case is characterized as "very provocative" by Professor Davis. 1 DAVIS, *supra* note 14 at 598. *See also* Sinaiko, *supra* note 292.

[336]424 U.S. at 335.

believed the process in general to be beneficial when rules are being formulated, courts may defer to that general judgment rather than inquire into the utility of the procedures in each specific case. Yet, Congress did invite the agencies to dispense with the procedure if conditions warrant, and the courts are faced with the considered judgment of an arm of the executive branch that congressional purposes will be frustrated if the procedures are used. Therefore, it is somewhat surprising that so little attention is devoted to whether any additional benefit, in terms of more accurate or better decisionmaking, will be gained from additional procedures.

Sometimes the connection is obvious. A case such as *Standard Oil Co. v. Department of Energy*[337] represents a situation where agency decisionmaking was patently ill-informed. In attempting to regulate petroleum prices, the Federal Energy Administration issued regulations on February 1, 1976, specifying how refiners could "pass through" certain increased costs.[338] The agency took the position that the regulation entailed no change in the regulatory framework, and merely made explicit what had been implicit in the regulations previously in effect. Therefore, no notice or comment was provided.

The rule was greeted by "a storm of protest,"[339] causing the agency to issue a notice of proposed rulemaking and schedule a public hearing. As a result of the information gathered, on April 6, 1976, the FEA repealed the rule in question retroactively to February 1, 1976, concluding that the rule would have caused the following undesirable effects: "(1) inflation; . . . (3) 'a disincentive for refineries to build up inventories', (4) an incentive to 'decrease refinery production', and (5) reconsideration, deferment, or even elimination of 'capital investment to expand refinery capacity.' "[340]

In this case, the error was clear and palpable. Even the agency admitted that the rule as promulgated was substantively deficient, and the deficiencies were clearly related to incorrect and incomplete information. Had the agency taken the time to solicit the views of the industry beforehand, a different, less calamitous rule would have been issued. Furthermore, the agency was constrained not only by the APA, but also by the Federal Energy Administration Act,[341] in which special

[337]596 F.2d 1029 (Temp Emer. Ct. App. 1978).

[338]41 Fed. Reg. 5111, 5113, 5120 (1976).

[339]596 F.2d at 1060.

[340]41 Fed. Reg. 15,330, 15,331 (1976), quoted in 596 F.2d at 1038.

[341]Section 7(i)(1)(B) and (C) of the Federal Energy Administration Act of 1974, 15 U.S.C. § 766(i)(1)(B) and (C), was applicable to the Federal Energy Agency at the time. The section was repealed in 1977 by the Department of Energy Organization Act. 596 F.2d at 1058.

procedural safeguards were included to guard against hasty and uninformed agency action. Where the educational process intended by Congress had so clearly failed, the court had little difficulty in voiding retroactive application of the rule for the period from January 1, 1975, to January 31, 1976.[342]

Another case where the court was confident that public comment would most likely have improved the final rule is *Mobay Chemical Corp. v. Gorsuch*.[343] The Federal Insecticide, Fungicide, and Rodenticide Act charges the Environmental Protection Agency with controlling and limiting environmental damage from pesticides.[344] To carry out this assignment EPA registers and licenses for sale only those pesticides whose use can be demonstrated not to harm the environment. Much test data are required in support of an application. Such data represent a substantial investment by applicants, and are considered proprietary information held as trade secrets by them.

In an effort to speed up the application and registration process, Congress in 1978 ended trade secret protection for test results,[345] and instituted a system of forced sharing of information. The legislation offered a 10-year period of exclusive use for information about new chemicals contained in pesticides registered after September 30, 1978. The EPA was authorized to use any nonexclusive use data submitted after December 31, 1969, in support of another application, with the requirement that the later applicant pay compensation to the original submitter. If the parties could not agree upon amount, either side might initiate binding arbitration proceedings.[346]

Constitutional challenges to the legislation as a "taking" of valuable property were joined with attacks on the regulations promulgated by EPA to implement the statute. Concerning the rule in question, the agency decided that each applicant must "cite all," relying not only on his own data but using any pertinent information in EPA's files and paying compensation to each prior submitter.[347] Mobay and others contended that such an interpretation of the statute flew in the face of congressional language giving an applicant a choice of whether to use his own data or instead to rely on data already in the public domain or in EPA's files.[348]

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[342]*See also* Shell Oil Co. v. FEA, 574 F.2d 512, 516 (Temp. Emer. Ct. App. 1978).
[343]682 F.2d 419 (3rd Cir.), *cert. denied*, 103 S. Ct. 343 (1982).
[344]7 U.S.C. § 136a (1982).
[345]Pub. L. No. 95-396, 92 Stat. 819 (1978).
[346]7 U.S.C. § 136a(c)(1)(D)(1982).
[347]40 C.F.R. § 162.9-4,-5(1983).
[348]U.S.C. § 136a(c)(1)(D)(1982).

Mobay also complained that the regulations were procedurally defective since they were not subjected to full notice-and-comment procedures, and were made effective immediately.[349] The EPA had determined that a full round of notice and comment would be "contrary to the public interest" because of the compelling need to resume the pesticide registration process as quickly as possible.[350] On review, the Third Circuit rejected the constitutional challenge, and found it unnecessary to address the question of whether the agency had properly interpreted the statute, relying instead on the failure to use proper procedures. The court noted the agency's apparent confusion about what the statute required, and admonished it that its failure to observe the notice-and-comment procedures "is directly responsible for many of the problems caused by the regulations." Had the agency taken the time to educate itself about the statute, the court observed that its "difficult task would have been facilitated."[351]

In *Buschmann v. Schweiker*,[352] in contrast, the connection between the notice-and-comment procedure and a different outcome was not obvious. There, the only complaint could be to the procedures used in issuing the interim rules, since the final identical twin was upheld as being substantively valid and procedurally impeccable.[353] Since after full notice and comment the rule remained unchanged, there was strong evidence that prior notice and comment in and of itself would not have made any difference. Nonetheless, the court refused to overlook the procedural misstep as "harmless error," and invalidated the interim rule.[354] Since the improperly promulgated rule had resulted in a loss of social security benefits to the petitioner and the class he represented, this decision meant that they would receive the additional amounts for the three and one-half years during which the invalidated regulation had been applied.

Refusing to consider the procedural lapse harmless error, the court noted that procedural protections are just as important to social secu-

[349]The procedural history is set out in 682 F.2d at 425.

[350]44 Fed. Reg. 27,952, 27,945 (1979).

[351]682 F.2d at 426–27.

[352]676 F.2d 352 (9th Cir. 1982).

[353]*Id.* at 358.

[354]The Secretary urged that the procedural misstep was "harmless error," and the lower court held that the defect was not prejudicial. *See* 5 U.S.C. § 706(1982), which provides that the court must take "due account" of the rule of "prejudicial error" in reviewing agency actions. The majority in Buschmann v. Schweiker was not convinced that the failure to afford prior notice and comment "clearly had no bearing on . . . the substance of decision reached," citing Braniff Airways v. CAB, 379 F.2d 453, 466 (D.C. Cir. 1967), and refused to hold the error "harmless." 676 F.2d at 358. *See infra* text accompanying note 368.

rity recipients as they are to powerful corporations.[355] Indeed, they may be more important.

The difference between administrative rulemaking and the decision at issue in *Mathews v. Eldridge*[356] shows that judges are correct to enforce the APA procedures without regard to whether using them would likely produce a more "correct" decision. There are great differences between the agency decision reviewed in *Mathews* and the one at issue in *Buschmann*. In *Mathews*, the task is to determine the facts, existing or historical (is this person still disabled?) and then apply the law, the essence of adjudication.[357] In contrast, an agency promulgating rules of general applicability is engaged in a quite different effort. In exercising the law-making power delegated to it by Congress, it is trying to determine "legislative" facts,[358] which are often more political judgments rather than a reconstruction of historical events.

In making such judgments, the information which any one participant might provide would often be redundant, but the fact that he and others register an opinion or preference would nonetheless be very important data in the intensely political process of hammering out rules. Richard B. Stewart has identified an important function of American administrative law: courts now insist on "provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision."[359] In carrying out this function, courts should be most zealous in guarding access to the process for those with the most to lose but the smallest ability to assert their interests.

In rulemaking with respect to mass benefit programs, large numbers of citizens are vitally concerned about how the administrator exercises the discretion Congress gives him. They are often among society's least advantaged, however, so that effective participation in any procedures government provides is especially difficult for them.[360] Courts viewing

[355]676 F.2d at 357.

[356]424 U.S. 319 (1976).

[357]The APA draws a "bright line" between two types of administrative activities, rulemaking (5 U.S.C. § 551(5)) or adjudication (5 U.S.C. § 551(7)). Commentators question whether the line is really so bright. *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Hahn, *Procedural Adequacy in Administrative Decisionmaking: A Unified Formulation*, 30 AD. L. REV. 467 (1978); Verkuil, *supra* note 10, at 304.

[358]The term is defined in K. DAVIS, ADMINISTRATIVE LAW TEXT § 15.03 (3d ed. 1972).

[359]Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975). *See also* Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1259 (1966).

[360]*See, e.g.*, Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969), suggesting that agencies should increase their efforts to ascertain the views of poor people, and also recommending creation of a Poor People's Counsel organization to

this group as a "discrete and insular minority"[361] may think it appropriate to insist on extra effort to seek out their views when their most basic interests are at stake. Because of their inability to influence the normal political process, moreover, they may need extra protection from the impatience of the majority. In this particular case, the interim rule in question was promulgated some 22 months after the statutory change which triggered reexamination of this area and was given retroactive effect. It is difficult to see why notice and comment could not have been solicited while this change in policy was being considered by the agency, thus giving our poorest citizens at least a chance to avoid a reduction of the benefits on which they depend.

The importance of assuring this access is highlighted by the deference a reviewing court owes the substantive decisions made by the agency.[362] Because of the very broad discretion Congress has entrusted to the agency, its final decisions are often effectively unchallengeable on the merits. Hence, an opportunity to participate in the administrative process may be "an affected party's only defense mechanism."[363] Even if he fails in his efforts to persuade the decisionmaker, his opportunity to try may be rooted in the First Amendment's right of petition as well as the Due Process Clause.[364]

In *D.C. Federation of Civic Associations, Inc. v. Volpe*,[365] one court analogized the right to participate in administrative decisionmaking to the right to vote. Although the opinion conceded that the rights were not exactly equivalent, Judge Wright noted that the purpose and effect of both a hearing and a vote were to elicit the wishes of the "electorate." Given the basic and fundamental nature of the right of effective participation in the political process, the court held that excluding residents of the District of Columbia from the procedural protections granted residents elsewhere to public hearings on federally funded

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help the poor obtain affirmative representation of their interests. *Id.* at 523–45. *See also* Crampton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972).

[361]United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), suggesting that prejudice against such groups might seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities.

[362]*See* Costle v. Pacific Legal Found., 445 U.S. 198, 214–16 (1980). One court commented, "When substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure the public access to the decisionmaker should be vigorously enforced." Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980).

[363]*See* Chamber of Commerce v. OSHA, 636 F.2d 464, 470 (D.C. Cir. 1980), discussing the importance of the APA procedures.

[364]The same possibility was raised in debate on the Senate's Regulatory Reform Bill. *See* 128 CONG. REC. S2703 (Daily ed. Mar. 24, 1982) (remarks of Sen. Levin).

[365]434 F.2d 436 (D.C. Cir. 1970).

highway construction might render the statute unconstitutional on equal protection grounds.

The right to vote is not an exact analogy, however. When questions are to be decided by vote of the electorate, the method of decision is clear. The votes are counted, and the outcome is determined by that count. Officials have no discretion to exercise and no weighing to do: the majority rules. In notice-and-comment rulemaking, however, the responsible official has been given some discretion about how to achieve congressionally mandated goals. Decision-making power and responsibility have been delegated to him or her, and not to the interested public.[366] He or she is required to exercise that discretion in the public interest and not merely to count noses. Indeed, a nose count of those who choose to comment would rarely approximate a true picture of the electorate, since notice-and-comment proceedings are much less comprehensible and accessible to the average citizen than is the process of voting.[367]

The analogy of a right to lobby or persuade is also more apt because the impact of comments on outcome cannot so easily be discerned. If an election were a landslide, one can be certain that the marginal effect of any excluded voter would be negligible. It is not so easy to dismiss opportunity to comment, since each comment is not merely tallied, pro or con. It is always possible that one well-reasoned presentation could trigger a change of mind by the responsible decision-maker. Because the effect on outcome is much more speculative, a focus on whether the result would be changed by accepting comments[368] would be inappropriate in notice-and-comment cases.

Moreover, denials of voting rights, while serious, are by nature of limited duration. Terms will expire and new elections will be held. Prospective injunctive relief can offer remedy then. Federal rulemak-

[366]*See* Bonfield, *Public Participation supra* note 14, at 542.

[367]The cost of effective participation in agency proceedings is a highly significant barrier. *See* Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1060, 1096–97 (1971). Of course, even the results of an election may not reveal the true preferences of the electorate, since the right to vote, however precious, is one which ordinary citizens often do not exercise. In 1968 Richard M. Nixon was elected president by only 27% of the total number of potential voters. *See* REPUBLICAN NATIONAL COMMITTEE, THE 1968 ELECTIONS (rev. ed. 1970). *See also Federal Voter Registration: A Proposal to Increase Voter Participation*, 8 COLUM. J.L. & SOC. PROBS. 225 (1972).

[368]Federal courts considering whether to invalidate state elections because of voting irregularities have been hesitant to take this extraordinary step unless the violation clearly could have altered the outcome. *See, e.g.*, Griffin v. Burns, 431 F. Supp. 1361, 1368 (D.R.I. 1977). *See generally* Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.U. L. REV. 1092, 1124–27 (1974). Such authority should not be transferred uncritically to the administrative arena.

ing, on the other hand, is not cyclical, so the effects of procedural lapses cannot so easily be left for redress "the next time."

V. REMEDY FOR PROCEDURAL ERROR

Courts which find that an agency erred in assuming it had "good cause" to omit some procedures are troubled by the problem of affording an appropriate remedy. They wish to affirm the importance of providing proper procedure and deter agencies from taking shortcuts, yet it is impossible to turn the clock back even if the agency is ordered to begin again. Furthermore, even compromise solutions often mean substantial disruption of important government programs.

When an agency did not afford proper prior notice and opportunity to comment in formulating a rule, the court faces difficult choices. One possibility often sought by petitioners is to invalidate the rule, compelling the agency to begin again, this time following the prescribed procedures. This alternative comes closest to ensuring the petitioners and other members of the public their full procedural due, enabling them to offer input before the agency has made its choices a matter of public record. However, unless there are substantive problems with the invalidated rules, so that the agency's original choices have been foreclosed, it might be expected that the agency would exhibit the same attachment to the choices already made that courts point to in insisting that input must come early in the process to have any chance of persuading.[369] Nonetheless, of the options presently available, invalidation unquestionably has the strongest impact on the agency and underlines the importance attached to procedural regularity.

Especially in "good cause" cases, however, courts are hesitant to employ that option.[370] Agencies advance plausible reasons to support the choice to act with dispatch; rarely will an agency act in complete bad faith to circumvent the congressional choice of procedure. Even if a reviewing court finds that the value of public participation outweighs those justifications, it is faced with rules already in place. Invalidation would often mean confusion in trying to administer on-going programs being run by those rules. Furthermore, if part of the reason why notice and comment were not provided was time constraint, asking the

[369] "After the final rule is issued, the petitioner must come hat-in-hand and run the risk that the decisionmaker is likely to resist change." Sharon Steel Corp. v. EPA, 597 F.2d 377, 381 (3d Cir. 1979).

[370] *See infra* text accompanying notes 371–376, and Note, *Remedies for Noncompliance with Section 553 of the Administrative Procedure Act*, 1982 DUKE L.J. 461.

agency to begin again introduces additional delay before often worthy substantive goals can be achieved.

In light of these considerations, some courts have exercised their inherent equitable powers to reconcile the need to uphold the value of prior public participation, yet allow the agency to carry out important responsibilities. For instance, in several cases challenging EPA's promulgation of designations of "nonattainment" areas, the courts held that although the EPA did not have good cause to omit notice and comment, the improperly promulgated designations would be left in effect pending completion of new administrative proceedings in accordance with the APA.[371]

Curiously, these same courts rejected EPA's argument that any procedural error had been cured by its solicitation and consideration of comments at the time the designations were promulgated. The court's remand for another round of notice and comment while the rules remained in effect seems designed to do little more than repeat the post-promulgation exercise which the agency had already provided and which the courts had held was insufficient to remedy the harm. The "psychological and bureaucratic realities"[372] which reduce the value of an opportunity to persuade once the agency has staked out a public position seem little changed even if the opportunity is provided by court order.

Other courts facing the problem of fashioning a remedy which will redress the harm but not unduly interfere with the goal of attaining clean air without delay have chosen a different solution. They have afforded very narrow relief, leaving the challenged rules in effect except as to the named petitioners and the classifications they specifically object to.[373] Any limited effect might be hard to maintain; others against whom enforcement of the procedurally defective rules was sought would have a strong argument that collateral estoppel should extend the benefit of the decision to them.[374] Moreover, even if relief could be limited to only those who complain, this solution appears to invite redundant litigation if the only fault with a rule is its defective procedural history. Surely one decision should be enough on that point, although EPA's nonattainment rule has already spawned seven

[371] *See, e.g.*, Western Oil & Gas Ass'n v. EPA, 633 F.2d 803 (9th Cir. 1980); United States Steel Corp. v. EPA, 649 F.2d 572 (8th Cir. 1981).

[372] New Jersey v. EPA, 626 F.2d 1038, 1050 (D.C. Cir. 1980).

[373] Sharon Steel Corp. v. EPA, 597 F.2d 377, 381–82 (3d Cir. 1979); New Jersey v. EPA, 626 F.2d 1038, 1050 (D.C. Cir. 1980).

[374] *But see* Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C.L. REV. 123 (1977).

appellate opinions as each circuit renders its own.[375] Widespread use of "relief only for those who ask for it" decrees would foreseeably increase the number of challenges filed as each regulated entity would probably seek to protect its interest by docketing a request for relief.

In other cases, the concern is more often to avoid the chaos which an abrupt invalidation of rules in place would generate. There, courts have stayed the effect of a decree of invalidation, thereby giving the agency a limited time to conduct proper rulemaking procedures.[376] As in the EPA cases, some skepticism may be appropriate about the efficacy of a judicial order to the agency to keep an open mind, especially once regulations are in place and functioning.

Nonetheless, these decisions do attempt to make clear to the agency that in future rulemaking, greater effort should be made to ensure prior notice and comment. Courts recognize that although the choices are not perfect, some judicial action is required. Otherwise, agencies would render the provisions of section 553 unenforceable by simply ignoring them and presenting the reviewing courts with a fait accompli.[377]

VI. RECOMMENDATIONS

The problem of crafting a general exemption from public participation requirements involves three issues. First, the agencies must be instructed about the importance Congress attaches to procedural regularity. Second, Congress should define with more specificity second-best procedures to be used, even in emergency situations, to safeguard the value of public participation. Third, Congress should address the problem of remedy for procedural error.[378]

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[375]The only court to explicitly consider the collateral estoppel argument rejected it. *See* Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 808–10 (9th Cir. 1980).

[376]*See, e.g.*, Mobay Chemical Corp. v. Gorsuch, 682 F.2d 419 (3d Cir. 1982).

[377]As Judge McGowan wrote, "An agency's functions will be impaired any time it is reversed on procedural grounds, and such occasional impairments are the price we pay to preserve the integrity of the APA." New Jersey v. EPA, 626 F.2d 1038, 1048 (D.C. Cir. 1980).

[378]There are hints that courts may discover a constitutional due process basis for the right to offer comments. *See, e.g.*, Curlott v. Hampton, 438 F. Supp. 505 (D. Alaska 1977), and *supra* note 385. If the right emanates from our basic charter and is not a matter of congressional grace, Congress may not have the last word about how that right is to be safeguarded. See the celebrated article by Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1975). *See also* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

Under the Supreme Court's current analysis, due process is a flexible concept, in which the needs of the polity must be weighed against the interest of the individual. But as

In a statute designed to govern agencies as diverse as the ICC, SEC, HHS, and EPA, to name a few, it may be impossible for Congress to specify with more precision what is or is not "good cause." Congress must allow agencies some flexibility to determine when public procedures may come at too high a price as new situations present themselves, but it is appropriate for Congress to express a strong presumption in favor of using public participation. The benefits of the procedure are often articles of faith, "soft" and general, such as enhanced public satisfaction with an "open" process. The costs are much more visible and apparent to an agency understandably concerned about accomplishing its substantive mission. Precisely because agencies may tend to undervalue process benefits, it is up to Congress and the courts to safeguard them.[379]

The APA's "good cause" exemption was intended to be[380] and has remained a narrow one.[381] Congress has devoted attention to the "good cause" exemption in several regulatory reform bills. In Senate bill 1080, which passed the Senate unanimously on March 24, 1982, attention was focused on the "good cause" exemption in an attempt to underline the need for public participation. The exception was split: in issuing minor or technical rules which have "insignificant impact,"[382] roughly those situations where current law would deem public procedures "unnecessary,"[383] agencies were permitted to dispense with public participation. Rules of this nature would probably not move any person to go to the expense and effort to offer comment if notice were given, so any procedure would be a sterile exercise and an unnecessary delay. If the agency misjudges the impact of a rule, and the affected public does wish to comment,[384] petitions to reconsider can alert the agency to the need for more deliberation and public procedures.

Senate bill 1080 made separate provision for rules where the agency for good cause finds that prior public procedure will be "impracticable

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Rabin points out, the administrative hearing cases do not involve access to court, which could be regarded as both fundamental and less intrusive and costly than a requirement of a hearing. See Rabin, *supra*, at 909 n.20.

[379]Similar arguments have been advanced in support of the National Environmental Policy Act. *See* Cramton & Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511, 514–17 (1973).

[380]See *supra* text accompanying note 25.

[381]Courts have taken this intention seriously. *See, e.g.*, Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981).

[382]S. 1080, § 553(b)(3), 97th Cong., 2d Sess., 128 CONG. REC. S2713 (daily ed. Mar. 24, 1982).

[383]*See supra* text accompanying notes 96–101.

[384]For a particularly striking example, *see* Standard Oil Co. v. Department of Energy, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978), discussed *supra* at text accompanying notes 337–342.

or contrary to an important public interest."[385] In such cases, the agency would not be excused entirely from APA procedures; rather, it would have to comply with notice-and-comment requirements to the maximum extent feasible prior to the promulgation of the final rule and would have to fully comply as soon as reasonably practicable thereafter.[386] Thus, the agency would be under an obligation to open and maintain a rulemaking file and accept comments *after* the rule is promulgated if events make it difficult or impracticable to do so ahead of time.[387] Furthermore, "major" emergency rules would require a regulatory impact analysis as soon as possible.[388]

This revision, although perhaps unavoidably leaving considerable flexibility to the agencies facing varied problems, clearly expressed the congressional intention that public participation in federal rulemaking be very much the normal practice. The Report of the Senate Committee on Governmental Affairs stated its "fundamental belief that notice-and-comment procedures are valuable and should be applied wherever possible."[389]

Although these revisions do not at first glance appear to be major changes, they do serve the useful function of underscoring the importance Congress ascribes to public procedures. This congressional "mood"[390] would doubtless affect both agencies and reviewing courts whenever potential "good cause" situations arise. In addition, agencies would not be able to short-circuit completely the procedural requirements of the act except when they would be "unnecessary." Any temptation to overuse the "good cause" exception in order to avoid the bother of notice and comment, to the extent it now exists, would disappear.

As previously noted,[391] the Senate bill regularized the procedure when public comment would be desirable and useful, but cannot be solicited before action is required. In such situations, the bill directed the agency to solicit input to the maximum extent feasible prior to promulgation of the final rule, and to fully comply with its procedural obligations as soon as practicable thereafter.[392]

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[385]S. 1080, *supra* note 382, § 553(b)(2)(A).

[386]*Id.* § 553(b)(2)(C).

[387]*Id.* § 553(c) and (f).

[388]*Id.* § 622(d)(1).

[389]S. REP. No. 305, 97th Cong., 2d Sess. 16 (1981).

[390]*See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

[391]*See supra* text notes accompanying 385–88. An identical bill was introduced in the 98th Congress on April 19, 1983. S. 1080, 98th Cong., 1st Sess., 129 CONG. REC. S4909 (daily ed. Apr. 19, 1983).

[392]S. 1080, *supra* note 382, § 553(b)(2)(C).

This solution is an improvement over current law, where no such requirements are formally imposed.[393] However, it faces the same problems that a post-promulgation period for comment now poses: potential comment is often considered a waste of time by the public, which views the agency as having made its decision.[394] One possible response is to force the agency to take further action on the rule in light of comments received. One way to do this is to limit the agency's ability to issue "emergency" rules as permanent solutions to a regulatory problem.[395] Agencies could be instructed that only "interim" rules can be so issued, and be required to conduct proceedings leading to final rules in accordance with the procedures listed.[396]

Section 553(b)(2)(C) of Senate bill 1080 does use the term "final" rule,[397] perhaps hinting obliquely that interim measures may be appropriate, but the bill does not explicitly limit agency "good cause" rules to interim status. Another portion of the Senate measure does fix a time limit on the rules which may be issued without full procedural consideration. In the provision dealing with congressional review of agency rules, agencies are excused from submitting to Congress rules falling within the "good cause" exemption or issued in response to an emergency situation.[398] This subsection specifies that any such "emergency" rule shall terminate 120 days after the date on which it is issued, unless earlier withdrawn or set aside by judicial action.[399]

These two provisions, one requiring the agency to complete work on emergency rules, including a regulatory analysis if the rule is "major," and the other guaranteeing the rules a [illegible]

[393]Current § 553(b)(B) provides that notice and public procedure thereon are not required. The agency must comply with § 553(d) unless "good cause" separately exists not to, and must entertain petitions for reconsideration (§ 553(e)).

[394]See *supra* text accompanying note 85.

[395]Some "rules" are of such short duration, aimed at transitory events, that review of them becomes very difficult. *See, e.g.*, Fund for Animals v. Frizzell, 530 F.2d 982 (D.C. Cir. 1976), a challenge to the decision of the Secretary of the Interior to allow a limited hunting season for the greater snow goose and the Atlantic brant. By the time the case was argued on appeal, the harvest was "pretty well over," and a preliminary injunction would be all but futile. *Id.* at 987. The court did suggest that the Fish & Wildlife Service could and should solicit public comment ahead of time on the general standards it intends to apply in deciding whether an open season should be allowed on a species previously closed to hunting. *Id.* at 990.

[396]Such a solution was reached in American Fed'n of Gov't Employees v. Block, 655 F.2d 1153 (D.C. Cir. 1981). Levesque v. Block, 723 F.2d 175 (1st Cir. 1983).

[397](C) the agency complies with the provisions of this subsection and subsections (c) and (f) of this section to the maximum extent feasible prior to the promulgation of the *final* rule and fully complies with such provisions as soon as reasonably practicable after the promulgation of the rule. (Emphasis added). S. 1080 *supra* note 382 § 553(b)(2)(c).

[398]*Id.* § 802(a)(1)(C).

[399]*Id.* § 802(a)(3).

serve the useful function of encouraging the agency to devote its resources to improving any final rule rather than shoring up an "emergency" provision which will soon become moot.[400] The legislative veto provision turns any "emergency" rule into a 120-day "interim" solution to longer-term problems.[401] This automatic expiration will make any post-promulgation comment period more productive, since the agency will have to take further action to review and reissue a final rule for congressional approval.

Because the legislative veto has been held unconstitutional,[402] the concept of limited duration for summarily produced rules may be worth moving and lodging in section 553 itself. Just such a solution was advanced in House bill 1776, introduced in the 98th Congress on March 2, 1983,[403] cosponsored by 107 members. In the House bill, a new class of rule is created. "Emergency rule" is added to the definitional section, and describes a rule which is "promulgated and made temporarily effective without public notice and comment. . . ." Such a rule could be issued pursuant to a finding that delay "would: (a) seriously injure an important public interest; (b) substantially frustrate legislative policies; or (c) seriously damage a person or class of persons without serving any important public interest."[404]

Special procedures are spelled out for adopting emergency rules. At the time such a rule is issued, rulemaking proceedings would begin. The period for public comment would be limited to 60 days, but could be extended to 90 days if necessary to enable interested persons to participate. Within 30 days after the close of the public comment, the agency may issue a final rule replacing the emergency rule, but the bill provides for another round of comment if the agency proposes to adopt a rule "different in substance from the emergency rule." In any case, an emergency rule expires 210 days after its issuance unless earlier withdrawn, set aside by court action, or replaced by a final rule.[405]

Any such attempt to limit the duration of interim rules should be based on the time needed to produce a procedurally correct rule and should make clear that Congress expects "interim" rules to be valid

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[400]If the "emergency" rule is enforced, the question of procedural adequacy may well be a very live issue for appeal by those seeking relief from enforcement. *See, e.g.*, Daniel Int'l Corp. v. OSHRC, 656 F.2d 925 (4th Cir. 1981).

[401]If the rule will expire of its own weight before the 120 days have run, no repromulgation would be required.

[402]*See* INS v. Chadha, 51 U.S.L.W. 4907 (U.S. June 21, 1983).

[403]H.R. 1776, 98th Cong., 1st Sess. (1983).

[404]*Id.*

[405]*Id.*

until permanent rules are in place, so that the agency is not tempted to issue a series of "emergency" rules[406] or continue to enforce those which have technically expired.[407] Although it may be difficult to specify a hard-and-fast time frame, some outside limit on duration seems advisable to prod agencies to complete final rulemaking expeditiously.[408] Even seven months may not be long enough for some particularly controversial rules, so another element of discretion would be appropriate here, allowing the agency to take longer if it can demonstrate good reason to do so.

Another related improvement would be congressional instruction to tailor emergency measures no more broadly than to meet the emergency at hand wherever possible.[409] Agencies should be expected and encouraged to engage in more deliberate and open decisionmaking to decide upon long-range solutions to recurring regulatory problems.

The issue is worthy of explicit consideration, given the tension between allowing government to act expeditiously and the risks of any summary procedure.[410] Even limiting government to "interim" rules is not a perfect solution: compliance with rules is often a costly effort, and voluntary compliance may become even more difficult to obtain if

[406]Careful drafting should avoid the holding of SEC v. Sloan, 436 U.S. 103 (1978), that the SEC's practice of "tacking" 10-day summary trading suspension orders for long periods violated the congressional will. In that case, not "rules" but "orders" were involved. The pointed impact of such orders directed at one company and its shareholders raises serious due process concerns if drastic measures can be imposed for up to 13 years with no notice, opportunity to be heard, or statement of reasons beyond a laconic reiteration of the statutory criterion. Rulemaking, with its more diffuse impact, has traditionally been thought to be subject to fewer due process constraints. *Compare* Londoner v. City of Denver, 210 U.S. 373 (1908) *with* Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915).

[407]Such dilemmas were common in Wisconsin, where "emergency rules" remain in force for 120 days. WIS. STAT. § 227.0217(1) (1975). *See* Comment, *The Wisconsin Emergency Rule Provision: Increased Use in Response to a Slow Rulemaking Process*, 1978 WIS. L. REV. 485, 501 (1978).

[408]James O. Freedman suggested in an analogous situation that "Congress should impose statutory limitations on the effective periods of summary orders . . . only after a particularized examination of the agency and function involved." Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1, 54 (1972). Further, he suggested as appropriate the possibility that each agency would be required to implement by rule a general congressional directive to limit the duration of specified actions. *Id.*

[409]As is often the case, the source of this suggestion is an appellate court struggling to reconcile legitimate governmental interests with the need for public participation. *See* American Fed'n of Gov't Employees v. Block, 655 F.2d 1153 (D.C. Cir. 1981).

[410]When action is taken summarily, the decision may be based on incomplete or inaccurate information and may be perceived as high-handed and arbitrary. *See* Freedman, *supra* note 408.

regulated entities are on notice that the rules may change.[411] Where investment in capital goods, new forms, or employee retraining will be necessary, agencies may be hampered in enforcing "interim" standards unless certainty can be built into the process. Furthermore, whatever compliance does take place in the interim period will have an effect on long-term agency decisions.[412] Reliance costs incurred by regulated parties are a legitimate factor to be considered when an agency contemplates whether to make a change from its "interim" rules.

Perhaps the most difficult question is what Congress can or should specify about enforcement of the procedural requirements it creates. Views on this question depend in large part on one's view of the primary purpose of procedure. Laurence Tribe has identified two alternative conceptions: one view is that there are *intrinsic* values to process, in that it ensures that persons will be treated as "persons," worthy of respect, and not as things. The other approach views process as *instrumental*; its goal is to assure the accuracy of the decision-making process.[413] The difference can be considerable, since the instrumental approach takes a much more generous view of harmless error. So long as the result is "right," lapses in procedure are "harmless," since the deficiencies did not interfere with reaching the correct result. If, on the other hand, process is intrinsically valuable, fewer errors will be considered "harmless," since a dignitary interest is invaded if process is slighted, regardless of the effect on outcome.[414]

The Senate's Regulatory Reform Act takes a very instrumental view of its procedural requirements. Senate bill 1080 and its legislative history exhibit a determination that court review of strictly procedural questions should be avoided unless the entire rulemaking has been seriously compromised. For instance, although various procedures

[411]For a recent example, companies which had installed costly water pollution control equipment bitterly oppose relaxing the rules to help their smaller competitors survive. An argument against the change in policy is that it will encourage foot dragging and increase the cost of achieving compliance. *See* Wall St. J., Sept. 23, 1982, at 37, col. 4.

[412]Although the CAB was not engaged in rulemaking, the same principle was at work when it made an interim award of an international airline route. Since substantial capital investment would be required in startup costs, the interim award could influence the selection of a permanent carrier. *See* Pan American World Airways, Inc. v. CAB, 54 Ad. L. Rep. (P&F) 419, 440–41 (D.C. Cir. 1982).

[413]*See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10–7 (1978).

[414]The Supreme Court has generally taken an "instrumental" view in deciding what process is due before government acts. *But see* Carey v. Piphus, 435 U.S. 247 (1978), where the Court recognized "the importance to organized society that [procedural] rights be scrupulously observed," and held that denials of procedural due process would support an award of nominal damages without proof of actual injury. *Id.* at 266. Thus, the Court recognized the intrinsic value of process, but refused to award substantial compensatory damages without proof of injury. The objective of constitutional tort remedies, said the Court, was to redress plaintiff's injury, not to punish defendants unless conduct was aggravated and malicious.

such as oral argument and opportunity for cross-examination are listed as appropriate for rulemaking leading to a major rule, the bill provides for very limited court review. No court shall hold unlawful or set aside an agency rule for failure to use the procedures unless "such failure substantially precluded a fair consideration and information resolution of a central issue of the rule making taken as a whole."[415] Likewise, courts are forbidden from invalidating a rule for failure to properly maintain the rulemaking file unless "such violation has precluded fair public consideration of a material issue of the rulemaking taken as a whole.[416] Most important is the preclusion of review of the regulatory analysis except as a part of review of the final rule.[417]

Without some form of judicial review, it is difficult to enforce the requirements which Congress seeks to impose. If in fact the process is thought important enough to be made a model for a wide range of government activity, it seems anomalous that so much discretion is lodged with the agencies about whether and how conscientiously to allow it. Other attempts to improve "internal management standards" designed to make agency policymaking more open, thoughtful, and candid, have been judged a failure.[418] Absent judicial oversight, the reform process proceeds on the same "optimistic assumption" that is said to underlie the Regulatory Flexibility Act:[419] that "highlighting the problem . . . and offering suggestions will allow agencies to solve problems they have largely created."[420] Outright preclusion of judicial review would be a clear signal to the agencies that these "requirements" were hortatory only; but overintrusive review was thought undesirable, adding expenses and delay and transforming the candid discussion of a probing analysis into a litigation brief.[421]

Both houses of Congress[422] propose a "balance," holding courts to a

[415]S. 1080, *supra* note 382, § 553(c)(3)(B)(ii).

[416]*Id.* § 553(f)(4).

[417]*Id.* § 623(d). This limit on judicial review of the analysis parallels the review provided by the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (1982), at § 611. That compromise is characterized as "extremely qualified and ambiguous." Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213, 259.

[418]Note, *Regulatory Analyses and Judicial Review of Informal Rulemaking*, 91 YALE L.J. 739 (1982).

[419]5 U.S.C. §§ 601–612 (1982).

[420]Verkuil, *supra* note 417, at 229.

[421]*See* remarks of Charles Schultze, quoted in 128 CONG. REC. S2396 (daily ed. Mar. 18, 1982) (remarks of Sen. Leahy). *See also* S. REP. No. 305, 97th Cong., 2d Sess. 59–60 (1981).

[422]In the House, H.R. 746 § 622(b)(4) and § 623(b) contain similar provisions. H.R. 746 was introduced on January 6, 1981, and was referred to the House Committee on the Judiciary. The bill was favorably reported on February 25, 1982. H.R. REP. No. 435, 97th Cong., 2d Sess. (1982).

very instrumental view of procedure. Senator Leahy indicated that the backers of the Senate bill were concerned that this bill not become the lawyers' relief bill of 1982.[423] Judicial review was carefully and explicitly curtailed. Purely procedural missteps would not be enough to overturn an otherwise proper rule. Yet, given the broad discretion vested in many agencies, decisions are often virtually unchallengeable on the merits.

The bill provides strong evidence of a new trend in American administrative law. Instead of relying on the political process to identify and force modifications of ill-conceived regulations, the new faith is in better agency analysis.[424] Senate bill 1080 would impose on most federal agencies the obligation to prepare a regulatory impact analysis for "major" rules.[425] Such a requirement has already been imposed on agencies within the executive branch by Executive Order 12291.[426] If this requirement becomes law, most federal agencies will be required to justify a major rule by discussing the costs and benefits associated with it as compared with other reasonable alternatives considered by the agency.[427] Although no mathematical precision is feasible or expected, the Senate clearly expects agencies to strive to achieve more "correct," efficient rules in terms of costs imposed and benefits achieved.[428]

Of course, there is no necessary conflict between accepting comments and preparing a regulatory impact analysis. The analysis, like any other, is only as good as the data on which it is based. An agency conscientiously carrying out its analytic responsibilities would want to gather as much input as possible from affected members of the public about potential costs and benefits. In fact, the Senate bill seeks to encourage more public participation and directs the agency's preliminary regulatory analysis to be included with the notice of proposed rulemaking to stimulate public input on these questions.[429]

What may change, however, is the nature of the judicial review of rulemaking. Courts may focus more on the outcome and less on the process. Martin Shapiro[430] has noted that courts in the 1960s and 70s accepted the "group theory" of politics, which defined a good policy as any policy which was the product of a decision-making process to which all the relevant groups had appropriate access. Therefore, any

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[423]128 CONG. REC. S2392 (daily ed. Mar. 18, 1982) (remarks of Sen. Leahy).
[424]*See* Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).
[425]*See* S. 1080, *supra* note 382, §§ 621–624.
[426]46 Fed. Reg. 13,193 (1981), reprinted in 5 U.S.C. § 601 (1982).
[427]S. 1080 *supra* note 382, § 622(d)(2).
[428]*See* 128 CONG. REC. S2389–92 (daily ed. Mar. 18, 1982) (remarks of Sen. Laxalt).
[429]*Id.* at S2390.
[430]Shapiro, *On Predicting the Future of Administrative Law*, 6 REGULATION 18 (1982).

decision was automatically suspect if a group had not been heard. Now, however, the concern is with substantive rationality, to ensure that the decision is objectively "correct" and not just politically acceptable. If the yardstick for good decisionmaking has changed, the independent value of safeguarding access to the decisionmaker may decline. As the Senate bill makes clear, excluded challengers will have to demonstrate that additional participation would have a likely effect on outcome before courts even consider their complaint.[431] If the agency can convince a court that its rule is synoptically correct,[432] such challenges will likely fail. Even from this perspective, however, it may be that the change will not be so stark. Cost-benefit analysis is not an exact science, and there may be room in the equations for feelings of satisfaction with the way decisions were reached. If so, even in instrumental terms, the cost of extra procedure may well be justified in order to produce that political benefit.

VII. CONCLUSION

The problem faced by Congress, courts, and agencies is weighing the importance of notice-and-comment procedures relative to other important values. It is very similar to the balance to be struck whenever government seeks to act summarily: the risk of acting on incomplete or inaccurate information, coupled with the cost in political acceptability when action is perceived as arbitrary and high-handed, must be measured against the need for government economically.[433] Although the Supreme Court has demanded more process when government action is taken against one individual or a small group of individuals "exceptionally affected . . . upon individual grounds",[434] the impact of some more general rules can be equally calamitous to the individuals affected.

If the rule changes do have an especially drastic impact, courts could subject the question of public participation to constitutional scrutiny.[435] In most cases, however, this weighing and balancing will be left to the

[431] *See supra* text accompanying notes 415–417. Successful challenges are not impossible even with this standard. The D.C. Circuit recently interpreted a similar restriction in the Clean Air Act, 42 U.S.C. § 607(d)(9)(D) (1982), and found the standard met. *See* Kennecott Corp. v. EPA, 54 Ad. L. Rep. 2d (P&F) 630 (D.C. Cir. 1982).

[432] Diver characterizes the "synoptic" decision-making method as "comprehensive rationality," where the decision-maker defines his goals, identifies and considers all possible methods of reaching his goals, and selects the alternative which will make the greatest progress toward the desired outcome. Diver, *supra* note 424, at 396.

[433] *See* Freedman *supra* note 408.

[434] Bi-Metallic Investment Co. v. State Board of Equilization, 239 U.S. 441, 446 (1915).

[435] *See supra* note 378.

Congress. Since 1946, Congress has in fact devoted considerable attention to procedural matters in creating new regulatory agencies.[436] However, as the flurry of "good cause" cases shows, Congress has also sent agencies potentially conflicting signals. Congress wants regulatory rules to be carefully analyzed, well-reasoned, subjected to public comment, and in place on very short notice. In many instances, except for the opaque "good cause" exemption, Congress has not specified which of these expectations should be given priority.[437]

Senate bill 1080 is an attempt to draw the lines more clearly. Even so, it may be impossible to be much more precise in advance. In all probability, courts and agencies may have to do the final balancing as cases arise in the future, just as they have in the past.

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[436]Hamilton, *supra* note 19.

[437]Congress could design unique procedures for each agency, and in creating new agencies, it often has, with the result that "the procedural portions of these statutes are almost unbelievably choatic." Hamilton, *supra* note 19, at 1315. Alternatively, Congress could focus on agency functions, such as imposing sanctions, ratemaking, and so on, and tailor procedures for each. Verkuil, *supra* note 10, presents such an analysis. But as Scalia reminds us, what appears to drive congressional concern with administrative procedure is not fairness or efficiency; rather, both Congress and lobbyists know full well that procedure is a way to adjust power, "not just the power to be unfair but the power to act in a political mode, or the power to act at all." Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 405 (1979).