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Charles H. Koch Jr.

William & Mary Law School

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DISCOVERY IN RULEMAKING

CHARLES H. KOCH, JR.*

INTRODUCTION

For years, administrative law theorists have advocated alternatives to the use of judicial mechanisms in administrative decision-making.¹ The search for alternatives has greatly increased the use of rulemaking procedures. At the same time, rulemaking itself has evolved into a flexible procedural tool which can be tailored to the needs of specific administrative problems.

Too often this evolutionary development has involved exploring methods for engrafting selected judicial mechanisms onto the essentially

* Assistant Professor of Law, DePaul University; B.A. 1966, University of Maryland; J.D. 1969, George Washington University; LL.M. 1975, University of Chicago.

THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

ADVISORY COMMITTEE ON CIVIL RULES, EXPLANATORY STATEMENT CONCERNING AMENDMENTS OF DISCOVERY RULES, 48 F.R.D. 487 (1970) [hereinafter cited as RULES ADVISORY COMM.];

Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113 (1968) [hereinafter cited as Gellhorn];

Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132 (1972) [hereinafter cited as Hamilton];

Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89 [hereinafter cited as Tomlinson]

Comment, *Discovery in Federal Administrative Proceedings*, 16 STAN. L. REV. 1035 (1964) [hereinafter cited as *Stanford Comment*];

Note, *Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange*, 80 YALE L.J. 811 (1971) [hereinafter cited as *Yale Note*].

1. E.g., ASH COMMISSION, A NEW REGULATORY FRAMEWORK, REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 5 (1971); Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 LAW & CONTEMP. PROB. 658 (1957); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 972 (1965). See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.07 (1958) (suggesting that due process does not require a formal hearing where no adjudicative facts are in dispute); Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 278 (1938) (contending that the adversary procedure is ill-suited to the formulation of general regulations).

legislative process of rulemaking. Almost without exception, these efforts at innovation urge the use of the testimonial devices of trial. Yet, rulemaking, like a legislative hearing, is essentially investigatorial; its purpose is to gather as much information as possible concerning a particular, sometimes very limited, policy question.² The testimonial devices of the trial process, on the other hand, are purifiers. Some, particularly the rules of evidence, actually exclude great quantities of relevant, material and often valuable information. Because they do not increase the quantity of information, they often detract from, rather than aid, the investigative function of the rulemaking process.³

While the testimonial devices of trial have received an inordinate amount of attention, little consideration has been given to the information-gathering mechanisms of the judicial process.⁴ These mechanisms are traditionally combined under the term discovery. This Article will discuss those mechanisms usually associated with discovery as they may relate to the rulemaking function.

THE CONCEPTUAL BASIS FOR DISCOVERY IN RULEMAKING

The right to discovery is not firmly established in administrative procedure, and indications are that agencies do not guarantee discovery mechanisms in their decision-making processes.⁵ The Administrative Procedure Act (APA) makes no provision for discovery in rulemaking.⁶ Section 4(b) permits "interested persons" to submit written information, views or arguments, and provides for more formal proceedings where, by statute, an agency's rules must be "made on a record."⁷ It is clear that the drafters of

2. See ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 105-08 (1941).

3. Testing the truth of facts and the basis of opinion is not insignificant in rulemaking. Where the truth of facts is at issue, though, methods other than the trial process may in some cases be more efficient for testing accuracy. See *National Resources Defense Council, Inc. v. NRC*, 547 F.2d 663, 645 (D.C. Cir. 1976).

4. Discovery has been described as "the key to effective federal civil procedure," Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 481 (1958), and is generally considered essential to fair litigation. See RULES ADVISORY COMM. 489. The federal law relating to judicial pre-trial practice is contained in FED. R. CIV. P. 26-37.

5. See W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 564 (6th ed. 1974); B. SCHWARTZ, *ADMINISTRATIVE LAW* 279 (1976). The NLRB, for example, is just now considering adoption of prehearing discovery. See Quarterly Meeting of Task Force on NLRB, 91 LAB. REL. REP. (BNA) 286-87 (1976).

6. See Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 381-84 (1974).

7. APA § 4(b), 5 U.S.C. § 553(c) (1970). The Supreme Court has required strict interpretation of the APA requirement of formal hearing in rulemaking. See *United States v. Florida East Coast Ry.*, 410 U.S. 224, 237-38 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-57 (1972). No procedural safeguards have been found to be constitutionally mandated in rulemaking. See Note, *The Judicial Role in Defining Procedural Requirement for Agency Rulemaking*, 87 HARV. L. REV. 782, 785, 787 n.34 (1974).

the APA envisioned the role of participants as primarily adding to the fund of knowledge available to the agency, and did not see "interested persons" as antagonists.⁸ As a result, they felt no need to assure the participants an avenue for obtaining information for the purpose of vindicating any particular point of view.

The absence of a specific statutory provision for discovery, however, does not necessarily mean that a rulemaking agency will not be required to provide it. Administrative agencies have been urged to provide for discovery in all formal proceedings.⁹ Although there has been little interest in the establishment of discovery procedures for informal processes,¹⁰ due process considerations may require the availability of some means of discovery. The

8. S. Doc. No. 248, 79th Cong., 2d Sess. 200-01, 258-59 (1946). See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26 (1947).

9. See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT at 89; Berger, *Discovery in Administrative Proceedings: Why Agencies Should Catch Up with the Courts*, 46 A.B.A.J. 74 (1960).

The Administrative Conference of the United States studied the problem of discovery in agency proceedings and made a recommendation with respect to the adoption of discovery in formal adjudication. *Recommendation No. 21: Discovery in Agency Adjudication*, in 1 RECOMMENDATIONS AND REPORTS OF THE AD. CONF. OF THE U.S. 37 (1968-70). However, the Conference specifically excluded rulemaking from its analysis:

Formal discovery rules have apparently never been tested in administrative rulemaking . . . Rulemaking proceedings, even those subject to sections 7 and 8 [5 U.S.C. §§ 556 and 557] of the Administrative Procedure Act, raise different considerations which require a separate model for discovery. Rulemaking frequently involves large numbers of parties and a wide range of issues, including basic issues of national policy. These features are found much less frequently in adjudicatory proceedings and make impracticable the wholesale application of these Discovery Recommendations to rulemaking. This Report therefore does not consider the applicability of discovery to rulemaking.

Report of the Comm. on Compliance and Enforcement Proceedings in Support of Recommendation No. 21, in 1 RECOMMENDATIONS AND REPORTS OF THE AD. CONF. OF THE U.S. 577, 582 (1968-70). A more recent Conference recommendation expands the coverage of the discovery scheme to formal rulemaking. *Subpoena Power in Formal Rulemaking and Formal Adjudication* (Recommendation No. 74-1), 1 C.F.R. § 305.74-1 (1976). See *Explanatory Memorandum in Support of Recommendation 74-1: Subpoena Powers in Formal Agency Proceedings*, in 3 RECOMMENDATIONS AND REPORTS OF THE AD. CONF. OF THE U.S. 408 (1973-74).

For a discussion of the advisability of discovery in Food and Drug Administration formal rulemaking, see Hamilton 1170-75:

The Administrative Conference has made extensive recommendations dealing with prehearing discovery in agency *adjudications*; arguably such recommendations should also be applicable to section 701(e) [of the Food, Drug and Cosmetic Act, 21 U.S.C. § 371(e) (1970)] proceedings. Rulemaking on a record, however, differs from typical agency adjudication in two important respects: first, the issues are usually considerably broader in rulemaking than in adjudication; and secondly, the issues have been substantially explored in the proposal-comment-order portion of the section 701(e) procedure. The danger of surprise is thus not as great as in normal adjudication. As a result, in rulemaking on a record the efforts of discovery should be directed toward isolating issues and building a record rather than toward learning witnesses' versions of what happened. Any discovery procedures should be carefully tailored to the peculiar needs of the section 701(e) procedure.

Id. at 1171-72 (emphasis in original).

10. See Tomlinson 92-93 (suggesting that formal discovery may detract from informal processes).

Supreme Court's decision in *Goldberg v. Kelly*¹¹ signaled a new approach to the requirement of providing an opportunity to participate. It is no longer sufficient for an agency to stop with the unilateral determination of whether or not a trial-type hearing is required by statute; the analysis must also include an examination of the extent to which fairness requires the availability of some adversarial procedures. Since *Goldberg*, it is necessary to determine whether something less than a full trial-type hearing—"some kind of hearing"—may be appropriate where a full hearing is not.¹² This more flexible approach has brought about "a due process explosion"¹³ in which procedures are being tailored to the individual decision-making process.¹⁴ Rather than paring the right to full trial-type procedure, this approach opens the way to some form of public proceedings where full-trial would be either counter-productive or too extensive relative to the decision at hand. This trend is reflected in recent cases involving rulemaking procedures.

In *American Airlines, Inc. v. CAB*,¹⁵ Judge Leventhal suggested that cross-examination may be necessary in special informal rulemaking situations in the interest of fairness even though not required by statute.¹⁶ Although this dictum did not have immediate impact, many courts ultimately began to consider tailoring informal rulemaking procedures in accordance with the particular issue which had to be resolved.¹⁷ Most of these cases

11. 397 U.S. 254 (1970).

12. See Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

13. *Id.* at 1268.

14. *E.g.*, *Goss v. Lopez*, 419 U.S. 565 (1975) (school disciplinary proceeding); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (prison disciplinary proceeding). The *Goldberg* opinion did not reach the question of what procedural safeguards are necessary where "there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues." *Goldberg v. Kelly*, 397 U.S. 254, 268 n.15 (1970).

15. 359 F.2d 624 (D.C. Cir.) (en banc), *cert. denied*, 385 U.S. 843 (1966).

16. *Id.* at 632-33. Judge Leventhal reiterated his position in *International Harvester v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973). *Friends of the Earth v. AEC*, 485 F.2d 1031 (D.C. Cir. 1973), contains a very enlightening dialogue between Judge Bazelon and Judge Leventhal. Judge Bazelon's opinion suggests that he would make cross-examination an almost universal requirement in rulemaking. *Id.* at 1003. But see *National Resources Defense Council, Inc. v. NRC*, 547 F.2d 633, 655-56 (D.C. Cir. 1976) (separate opinion of Bazelon, C.J.). Apparently recognizing the substantial experience and scholarly opinion against cross-examination in rulemaking, Judge Leventhal took the position that while cross-examination might have utility in formal rulemaking, it should be available only on a showing that it was the *only* method for developing the necessary information. *Id.* at 1035. *Accord*, *Walter Hohm & Co. v. Hardin*, 449 F.2d 1009 (D.C. Cir. 1971).

17. *E.g.*, *City of Chicago v. FPA*, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972):

The ability to choose with relative freedom the procedure it will use to acquire relevant information gives the Commission power to realistically tailor the proceedings to fit the issues before it, the information it needs to illuminate those issues and the manner of presentation which, in its judgments, will bring before it the relevant information in the most efficient manner.

See *South Terminal Corp. v. EPA*, 504 F.2d 646, 660 (1st Cir. 1974); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Virgin Island*

were premised on the notion that considerations of fairness required the engrafting of certain trial procedures onto the basic structure of notice and comment rulemaking. In one case involving a Federal Power Commission rule, however, the District of Columbia Circuit stated that some trial procedures were needed in order to permit review of the rule.¹⁸ The court reasoned that in order to determine whether the Commission's findings of fact were supported by "substantial evidence," the statutory standard for review, it required a record which resembled that which would be produced by a trial.¹⁹ The decision, therefore, was based not on the utility of the trial procedures to the rulemaking process, but rather on the perceived need for such procedures to enable a subsequent reviewing court to perform its duty in a meaningful fashion. Two other circuits have rejected this analysis,²⁰ and the District of Columbia Circuit itself has limited the holding of the case to a requirement that agencies provide adequate notice to permit effective participation.²¹ The prevailing approach, therefore, is to utilize age-old and familiar techniques where they may be useful to the information-gathering and policymaking functions of rulemaking.²²

One important procedural consideration is discovery.²³ While rulemaking is not adversarial in the traditional sense, self-interest cannot be ignored

Hotel Ass'n v. Virgin Island Water & Power Auth., 476 F.2d 1263 (3d Cir.), *cert. denied*, 414 U.S. 1067 (1973); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972). Even in the context of formal rulemaking, the tailored procedure approach affects the range of required procedures. *See, e.g., Long Island R.R. v. United States*, 318 F. Supp. 490, 498-99 (E.D.N.Y. 1970), *rev'd on other grounds sub nom. United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973) (written submission will be appropriate in most formal rulemaking).

18. *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973).

19. *Id.* at 1257-63.

20. *Shell Oil Co. v. FPC*, 520 F.2d 1061, 1075-76 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 2661 (1976); *Phillips Petroleum Co. v. FPC*, 475 F.2d 842, 851-52 (10th Cir.), *cert. denied*, 414 U.S. 1146 (1973).

21. In *American Public Gas Ass'n v. FPC*, 498 F.2d 718, 723 (D.C. Cir. 1974), another panel of the D.C. Circuit inaccurately but expediently read Judge Wilkey's opinion as holding merely that the FPC had failed to give notice and an adequate opportunity to participate.

22. *See Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633, 644 (D.C. Cir. 1976); *Walter Hohm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971) ("What counts is the reality of an opportunity to submit an effective presentation . . ."); *cf. Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1267 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) ("mere significance and complexity of the policy issues . . . do not render the . . . rejection of evidentiary hearings an abuse of discretion"). *See generally*, Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 504-06 (1970).

23. *See Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633, 653 (D.C. Cir. 1976) (listing several devices for improving procedure, including several traditional discovery devices). As one commentator has noted in discussing judicial review of agency rulings, "[s]wift access to information is often essential if challenges to administrative action are to be successful." Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895, 927 (1974). Discovery makes pleading less important. *See K. DAVIS, supra* note 1, § 8.04 (Supp. 1970).

and it will compel persons and groups to present the agency with information supporting their position. This process serves to maximize the information available to the agency.²⁴ Therefore, although a sense of fairness alone supports the availability of all the tools necessary to effective participation, providing those with an interest in the decision an independent means of uncovering information should also help to produce a better decision.

Recognition of the potential utility of discovery is important, since any procedure which is not useful will almost surely be unfair to some interest. For example, trial procedure in FDA rulemaking may increase the fairness of the proceeding for the regulated industry, but the incidental delay causes untold injury to the consuming public. Rulemaking involves different types of interest groups with different perspectives on a variety of relevant issues. Any procedure which protects one side without regard to the overall efficacy of the rulemaking process will necessarily act to the detriment of other interest groups or perspectives, including the general "public interest." In examining the imposition of discovery techniques on rulemaking, therefore, one must be sensitive to the interplay of fairness and utility.

APPLICATION OF THE VARIOUS DISCOVERY MECHANISMS TO THE RULEMAKING PROCESS

The term discovery encompasses several mechanisms and areas of analysis. The Administrative Conference's adjudicative discovery recommendation dealt with nine aspects of the discovery process: prehearing conferences, depositions, witnesses, written interrogatories, requests for admission, production of documents and tangible things, role of the presiding officer, protective orders, and subpoenas.²⁵ The following discussion of discovery in rulemaking will also proceed according to these nine analytical categories.

Prehearing Conferences

In informal rulemaking, the APA guarantees only an opportunity to present written comment.²⁶ Nonetheless, agencies are resorting to oral

24. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1300-01 (1972). On the other hand, there is a fear that "an open discovery system" may create a cumbersome record and potential for industry harassment and delay. See Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 86-88 (1975). Clearly, substantial controls are necessary for discovery in informal rulemaking, but, as one commentator had explained:

The only rational justification for not employing discovery in administrative adjudicatory proceedings must be that agencies differ from courts in ways related to the appropriateness of discovery.

Stanford Comment 1058.

25. Discovery in Agency Adjudication (Recommendation No. 70-4), 1 C.F.R. §305.70-4 (1976). See note 9 *supra*.

26. APA § 4(b), 5 U.S.C. § 553(c) (1970).

proceedings in rulemaking with increasing frequency, and the rise of hybrid procedures requires or encourages agencies to permit some trial procedures. Thus, the potential use of prehearing conferences becomes an important element in rulemaking discovery. Indeed, even where only written procedures are contemplated, meetings with the various interest groups may often be an effective tool in assuring a successful rulemaking proceeding.

(a) *Prehearing conferences to deal with complex or obscure subject matter.* It has been recognized for years that pretrial conferences can act in several ways to untangle complex and shapeless controversies. Particularly in protracted litigation, pretrial conferences have been used to trim the controversy down to size and to focus the proceeding on the major contested issues.²⁷ In rulemaking, conferences may also be necessary just to identify the issues raised by the proposed rule.²⁸ When an agency is contemplating an initial expedition into a virgin policy area, the very nature of the issues may be obscure.²⁹ Thus, the agency typically begins the rulemaking process with less understanding than when it begins an administrative adjudication, but will reach a result which may have substantially greater effect and will be subject to only limited judicial scrutiny.³⁰ Conferences permit the agency to assess the number and variety of questions raised by a proposed rule and to determine what must be accomplished during the rulemaking process before it can confidently issue a final rule. By uncovering subtle problems and by defining or settling disputed issues, the prehearing conference can serve to mark the very direction of rulemaking.

In addition, prehearing conferences can be used to define the issues on which cross-examination will be afforded in rulemaking, either formal or hybrid, which incorporates some degree of trial procedures. The prehearing conference will help to define the specific issues that are appropriate for testimonial devices and limit the use of those devices to the type of issues for

27. JUDICIAL CONFERENCE OF THE UNITED STATES, RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, 25 F.R.D. 351, 385-86 (1960). See Burch, *Discovery Procedures and Techniques Before Government Boards of Contract Appeals*, 4 PUB. CONTRACT L.J. 119, 133-34 (1971).

28. See Hamilton 1165 (noting practical problems in using pre-trial conferences in FDA formal rulemaking); Tomlinson 97. See generally JUDICIAL CONFERENCE, *supra* note 27, at 386-87; Kaufman, *Have Administrative Agencies Kept Pace With Modern Court-Developed Techniques Against Delay?—A Judge's View*, 12 AD. L. BULL. 103 (1959-60).

The EPA, for example, uses a "two round process." The first round serves to define the controversy in order to develop the proposed rule, which is the subject of the second round. Williams, "Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 451-54 (1975). The FAA, CAB, FPC and ICC apparently use prehearing procedures similar to but less formalized than the prehearing conference approach suggested here. *Id.* at 451 n.237.

29. Experimentation is one of the major benefits of rulemaking. See *American Airlines, Inc. v. CAB*, 359 F.2d 624, 633 (D.C. Cir.) (en banc), cert. denied, 385 U.S. 843 (1966) ("It is the kind of issue where a month of experience will be worth a year of hearings.").

30. K. DAVIS, ADMINISTRATIVE LAW IN THE SEVENTIES § 658 (1976).

which they are best suited. Groups with similar views on these issues can be identified and representatives chosen to conduct the cross-examination.³¹ Where the opportunity for cross-examination is not institutionalized, the disclosure of issues may enable the participants to demonstrate a need for it in the particular case.

The typically broad range of issues and interests involved in a rulemaking would therefore appear to make the prehearing conference almost essential. However, an objection to the adaptation of this device to rulemaking could be based on the diversity and number of interested persons. In most rulemaking situations, there are three general groups of potential participants: the industry, the interested public and the agency. Ordinarily, the proceeding is dominated by the industry and the agency.³² But where the rulemaking visibly affects the public, representatives from numerous segments of "the public" may participate. Thus, in some situations, rulemaking takes on the character of a multiple class action controversy. The diffuse nature of the inquiry means that a prehearing conference will not be a preliminary encounter of two opposing parties, but rather an interaction among members of an amorphous mass of participants. Because the rulemaking process itself is likely to be an informal exchange of information and views, the prehearing conference could usurp these functions if all the various interests were to participate. Thus, if prehearing conferences are to be used in rulemaking, participation in the conferences must somehow be allocated among narrowly defined interests. Yet, can anything be accomplished if all interested persons are not involved? The answer may be that several prehearing conferences should be held between the agency staff and the various interested groups.³³ Each interest group's problems can be worked out separately between the group and the agency, and the prehearing conference can serve to inform the agency of each group's point of view. In this way, the controversies may at least be mitigated, if not resolved, as to some groups.

31. Once these determinations are made, the workability of the hybrid process demands that the participants adhere strictly to the restrictions. *See* Hamilton 1169.

32. *See* Hamilton 1182. The affected industry, however, is often a diverse group. *See Yale Note* 832-33. For example, in an FTC food advertising rulemaking, the presiding officer segregated the interested persons into the following groups: manufacturers and trade associations; the cholesterol industry (known affectionately as the "Fats and Fatty Acid people"); retailers; the health, natural and organic foods industry; advertising and media interests; and consumers and consumer groups (the one non-industry group). In the Matter of Proposed Trade Regulation Rule Concerning Food Advertising [16 C.F.R. Part 437], Public Record No. 215-40: "Presiding Officer's Notice Identifying Groups with the Same or Similar Interests in the Proceedings" (Apr. 22, 1976).

33. *See* Tomlinson 95: "Complex cases may require a series of prehearing conferences, some of them quite informal and off the record."

(b) *Prehearing conferences and settlement.* Traditionally, one of the primary purposes of prehearing conferences is to facilitate consideration of settlement.³⁴ Admittedly, the notion of settlement appears somewhat inconsistent with the concept of general public participation in policy-making through rulemaking. Despite this apparent incompatibility, however, settlement may have a place in the overall rulemaking process.

Settlement always involves a weighing of the merits of the agreement and the cost of continued litigation against the benefits to be lost through concession. In rulemaking, the costs of proceeding are much less for those adversely affected than in formal adjudication, and hence, the incentives to settle are less apparent.³⁵

Justifying a settlement presents another practical obstacle. The government always has a problem in settlement negotiation, because it must weigh "the public interest"—a nebulous term which affords ample opportunity for second-guessing. It is also very difficult for government staff attorneys to defend a settlement, especially on the basis of pessimistic estimates of the chance of success.³⁶ A government admission that a proposal is weak leaves the agency open to criticism from both interested parties and the public. The private party will contend that the rule never should have been proposed if the government did not have a sound basis, and members of the public may assert that the support for the proposed rule was deficient because of agency incompetence. In addition, disagreement over the value of the concession is inevitable as is the charge that one group is more disadvantaged by the settlement than another.

Rulemaking magnifies these practical difficulties. In the first place, rulemaking involves policy judgments rather than determinations of specific factual issues. As a result, an agency negotiating a settlement immediately falls into the role of a "co-conspirator" with the target industry.³⁷ Striking a bargain on policy decisions delegated to the agency, it may be argued, is a corruption of the agency's role in the legislative scheme. Often the agency is charged by Congress with responsibility to fill in the policy details of legislation. The agency can consult the industry and the public; indeed, that is the purpose and value of rulemaking. But it is not part of the agency's

34. See Tomlinson 95.

35. The industry must nonetheless weigh the threat of rulemaking. See *Yale Note* 819. The more formalized the proceeding, the more the cost of the process alone will encourage both the agency and the industry to compromise. Hamilton, *Procedures*, *supra* note 24, at 1287.

36. FDA bargains to avoid formal rulemaking have been alleged to be contrary to the public interest. Hamilton, *Procedures*, *supra* note 24, at 1290.

37. Characterization of agencies as "captured" or clientele-oriented is one of the most consistent complaints in administrative law. Actually, it is probably less a case of actual corruption than of myopia bred from close association. W. GELLHORN & C. BYSE, *supra* note 5, at 1020-21.

legitimate function to bargain on the proper application of legislation to an industry.³⁸ While it might concede some facts in exchange for concession on other facts, and then agree to a settlement based on these concessions, it cannot support a finding as to the best policy by agreement with the industry. It must make its own independent policy judgment.

Furthermore, the necessary exclusiveness of participation in the settlement process deviates from the goal of permitting a wide range of contribution in rulemaking. The principles of rulemaking are not satisfied where only a single interest is consulted, even if that interest is the one most affected by the proposed rule.³⁹ Although the notice and comment procedures are intended to assure certain rights for the target of a rule, they are also intended to provide input of adequate information for decision-making⁴⁰ and avenues of participation for others who will be less directly affected by the rule.

In spite of these conceptual problems, the settlement function of pre-hearing conferences can be important in rulemaking, and an effort should be made to accommodate the participatory rights of all interest groups to settlement. If the affected industry concedes the factual predicate of a proposed rule, the disputed factual issues as between the industry and the agency are resolved, and the parties to the settlement concede any participatory rights they might have. The settlement can then be legitimized by notice of the agreement and an opportunity for written comment.⁴¹ Participation in addition to written comment hinges on the existence of "disputed issues of material fact."⁴² Since the settlement presumes the resolution of such issues, written comments must demonstrate why an oral or hybrid proceeding is necessary despite the settlement, and if no such showing is made, the settlement may be finalized without resort to such procedures.

This abbreviated settlement procedure would appear to be permissible despite its bypass of participatory rights. In the course of a recent FTC rulemaking, for example, the target industry offered a settlement to the

38. *Home Box Office, Inc. v. FCC*, No. 75-1280 at 88 (D.C. Cir. Mar. 25, 1977):

[W]e are particularly concerned that the final shaping of the rules we are reviewing here may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest the Communication Act vests in individual commissioners.

39. See *Yale Note* 818.

40. See *City of Chicago v. FPC*, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3d Cir. 1969); *Pacific Coast European Conference v. United States*, 350 F.2d 197, 205 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965).

41. The agency should provide evidence demonstrating that it dealt with the comments. See *Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633, 46 (D.C. Cir. 1976); *Yale Note* 820-21, 824, 832 (noting that the SEC often opens informal settlements to comments after it is virtually locked into the bargain).

42. *FTC Improvement Act* §§ 202(c), 15 U.S.C.A. § 57a(c) (Supp. 1976); *Securities Exchange Act*, 15 U.S.C.A. § 78f(e)(4) (Supp. 1976); K. DAVIS, *supra* note 30, §§ 6.01-.03. See *Walter Hohm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971) ("critical issues").

agency.⁴³ The industry offered to stipulate to the disputed issues of material fact in exchange for some concessions in the substance of the rule. The FTC statute requires an oral hearing and some cross-examination where there are disputed issues of material fact.⁴⁴ Where the agency finds no disputed issue, as it would be justified in doing where it has reached an agreement with the affected industry, these additional procedures are not required. The FTC can, therefore, settle the case with notice of the proposed settlement and an offer of an opportunity to make a written submission raising disputed factual issues. If no one can raise a legitimate disputed issue of material fact, the agency may dispense with further participation and make the necessary policy judgment on the basis of stipulated facts. While the policy judgment must be solely the decision of the agency, there is no reason why that judgment cannot be tempered by the industry's settlement proposal and the benefits which will accrue from industry cooperation. If the agency decides not to accept the settlement, then, as in adjudication, the industry has the right to insist on the full procedures due.

(c) *Conferences in lieu of hybrid procedures.* In his study of hybrid rulemaking, Professor Williams discovered that agencies may use what he termed "inquiry conferences"—conferences with special interest groups in lieu of hybrid proceedings rather than in anticipation of such proceedings.⁴⁵ These conferences are intended to resolve certain issues which are of concern to a particular interest group, usually the affected industry, through exchanges between the agency staff and representatives of the interest. The exchanges are to be substituted for testimonial rights such as cross-examination. Although many situations may arise where such conferences would be appropriate, an agency considering the technique should exercise caution to assure that there is no infringement of the participatory rights of others who are not members of the affected industry.

(d) *Preproposal conferences.* At the opposite end of the spectrum is the *preproposal* conference, which is used to explore the feasibility of some form of regulation with the industry.⁴⁶ The advantage of such conferences is

43. In the Matter of Proposed Trade Regulation Rule on "Disclosure of Combustion Characteristics in the Marketing and Certification of Cellular Plastics," Motion by Staff Requesting Hearing Officer to Seek Commission Authorization to Accept Proposed Conditional Stipulation and Agreement (Aug. 1, 1975). Section 202 of the FTC Improvement Act, 15 U.S.C. § 57a (Supp. IV 1974), incorporates much of the best thinking relating to hybrid rulemaking. Congress no doubt will use it as a model for the future. See *Gordon v. New York Stock Exchange*, 422 U.S. 659, 680-81 (1975); 15 U.S.C.A. § 78f(e) (Supp. 1976) (recent amendment to an SEC rulemaking provision). Therefore, study of the FTC's efforts in implementing this procedure is particularly valuable, and these efforts will be used as examples.

44. FTC Improvement Act § 202(c) (1) (b), 15 U.S.C. § 57a(c)(1)(b) (Supp. IV 1974).

45. Williams, *supra* note 28, at 451-54.

46. See Hamilton 1162 (suggesting informal preliminary opinions by the agency as a means of bringing out enforcement problems).

that they permit the investigation of the subject without committing the agency so far toward regulation that it is politically unable to withdraw.⁴⁷ The agency should be careful, however, to avoid institutionalized "informal" preproposal conferences. The rulemaking process is itself an investigative, policy-making technique. A rule proposal represents a determination that some problem exists. This determination is solely within the province of the agency and should not involve the industry. The industry should be consulted only to determine whether something can be done about the regulatory problem that the agency finds to exist. Instead of holding clandestine meetings with the industry prior to a proposal in order to enable it to abandon unwise rulemaking without publicity, the agency should recognize that it is not committed to every rule once it is proposed. The value of public participation in policy decisions should outweigh whatever pressure the agency feels to issue a rule once rulemaking is initiated. If the record of the public rulemaking supports the abandonment of the regulation, then the agency is not only justified in not promulgating a final rule, but is compelled not to do so.

(e) *Prehearing conferences to develop procedures.* The prehearing conference may also serve a function in rulemaking which it rarely serves in adjudication—it can be used to arrive at particularized procedures in each specific case.⁴⁸ This approach appropriately advances the concept of tailored or hybrid procedures. Public and industry contributions to the determination of what procedure is necessary will certainly enhance the procedural tailoring. In addition, procedure negotiated by the participants will be more likely to withstand the scrutiny of judicial procedural review. Even where the agency refuses to provide all of the procedures demanded by interested persons, the negotiation process will promote careful consideration of alternative procedures. While a court may question the adequacy of the procedures selected, deference will generally be given to reasonable agency procedural decisions.⁴⁹ Evidence of solicitation of participants' views and conferences on procedures will surely add weight to the hybrid procedure adopted by the agency.

The FTC's experience under the FTC Improvement Act has demonstrated the value of the prehearing conference in hybrid rulemaking.⁵⁰ Under the Improvement Act, the presiding officers meet with the groups of par-

47. See *Yale Note* 837-38.

48. Cf. FED. R. CIV. P. 16(4) (pre-trial conference used to consider limitation on expert witnesses).

49. See *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976); *FCC v. Schrieber*, 381 U.S. 279, 290 (1965), and cases cited therein.

50. Interview with William D. Dixon, Chief of Rulemaking Presiding Officers at the FTC (Aug. 9, 1976).

ticipants before the oral hearing to discuss procedure. This process alerts the participants to how the hybrid procedure will operate. In addition, it permits resolution of the major procedural question: the handling of cross-examination. The FTC Improvement Act process is based on an initial designation of certain issues as appropriate for testimonial hearing⁵¹ and envisions limits on cross-examination. At the prehearing conference, the presiding officer can find out which interest groups will cross-examine on particular issues and whether several groups can be combined for purposes of cross-examination. In this way, the presiding officer can maintain the necessary control over the testimonial proceeding.⁵² The prehearing conference also benefits participants by permitting exploration into testimony which will be presented at the oral hearing, thus enabling them to plan their approach to cross-examination.

In short, prehearing conferences have become an integral part of the FTC's procedural engineering under the FTC Improvement Act. This experience indicates that prehearing conferences could be profitably employed in most informal rulemaking to particularize procedures, especially where some testimonial opportunity will be afforded.

(f) *The exchange of information.* Another traditional function of the prehearing conferences is to foster the exchange of information. In trial practice, the rise of the prehearing conference reflects the modern abhorrence of forensic gamesmanship. Conferences present the parties with an opportunity, and increasingly with compulsion, to disclose much of their respective cases before trial in order to take the element of surprise out of the litigation. One of the purposes of the Administrative Conference recommendation for extensive discovery in agency adjudications⁵³ was to remove surprise from such adjudication by encouraging the early exchange of information.⁵⁴ Indeed, the Conference envisioned the exertion of consider-

51. Procedures and Rules of Practice for the Federal Trade Commission, 16 C.F.R. §1.12 (1977).

52. Consistent with the flexibility intended in the Improvement Act, some presiding officers have found it useful in many instances to bargain time limits in exchange for granting the cross-examiners freedom to probe any issue. The consensus of FTC presiding officers seems to be that, in cases which are not confined to specific questions of fact, it is virtually impossible to determine whether a particular question is or will be relevant to a disputed issue. Interview with Chief Presiding Officer William D. Dixon (Aug. 9, 1976) and with Presiding Officer Christopher Keller (Aug. 10, 1976). FTC staff attorneys agree with this approach. Interview with FTC Attorney Ellis Ratner (Aug. 11, 1976). For a discussion of the problems which arise with respect to the issue designation approach of the FTC Improvement Act see Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act*, 44 GEO. WASH. L. REV. 679 (1976).

53. See note 9 *supra*.

54. 1 K. DAVIS, *supra* note 1, § 8.15 at 392 (Supp. 1970): "The most important feature of the recommendation is emphasis upon the prehearing conference as a device for directing parties to exchange their evidentiary exhibits and witness lists."

able pressure on the parties in administrative adjudication to exchange information prior to hearing. This has in fact occurred, and many agencies now require the exchange of information prior to adjudication.⁵⁵

Avoiding the specter of participants arguing without complete access to their adversaries' information is no less a worthy goal in informal rulemaking. Yet the problem takes on a substantially different gloss in the rulemaking context. A participant is not surprised to his disadvantage by information disclosed for the first time at an oral proceeding because the record remains open so that additional evidence can be entered into the record afterwards. A participant may be disadvantaged, however, when information is submitted too near the closing of the record to permit meaningful comment. This practice endangers the efficacy of the entire notice and comment procedure and results in a poorer record for the rulemaking agency.

Unfortunately, agencies do not immediately place all the information they possess on the public record, and there is no incentive for private participants to submit written comment prior to the closing of the record. Some mechanism should be established to assure that the participants will come forward with information sufficiently early to elicit responsive comment. Prehearing conferences would be one way to accomplish this: as in adjudication, the presiding agency employee should have the power to compel participants, including the agency staff, to come forward with information in sufficient time to permit comment.⁵⁶ A problem arises in informal rulemaking when, as is often the case, there is no presiding officer. Under these circumstances, the agency should instruct its staff to disclose immediately all relevant information in its possession to insure the effective solicitation of public participation.⁵⁷ In turn, the staff should be empowered to pressure private participants, especially those directly interested, such as the members of the affected industry, to submit their information early enough to permit comment and rebuttal. The comment process will thereby become a dialogue among interested persons and eliminate to some extent the need for testimonial devices for disputing information in the rulemaking record.

(g) *Official notice.* In adjudicatory proceedings, prehearing conferences also serve to inform the parties of areas where official notice might be

55. See Tomlinson 96-97 (listing some of the agencies which provide for exchange of information).

56. Tomlinson advocates a strong presiding officer to handle discovery in adjudications, noting that the success of agency proceedings will depend on the competence of the presiding officer. *Id.* at 97-98. The FTC experience to date suggests that the presiding officer can make a significant difference in the success of hybrid rulemaking. See notes 50-52 *supra* and accompanying text.

57. See *Home Box Office, Inc. v. FCC*, No. 75-1280 at 94-98 (D.C. Cir. Mar. 25, 1977).

taken.⁵⁸ As Professor Davis has suggested, official notice can often be taken of "legislative facts"—"general facts which help the tribunal decide questions of law and policy and discretion"—which are at issue in an adjudicatory proceeding.⁵⁹ Since rulemaking involves primarily the making of policy judgments, it is generally a search for such legislative facts. Therefore, official notice could eliminate the conceptual need for a factual predicate to support a rule. Since this result cannot be permitted, the practice of taking official notice would seem to be of little utility.

There remain, however, two potential uses of the official notice device. First, the agency, like a court, can take notice of those things which are indisputable among reasonable people, such as generally accepted facts, statutes or studies.⁶⁰ Second, the agency can use something in the nature of official notice to distinguish those facts which it feels are genuinely in dispute from those which it assumes are settled. The prehearing conference presents an excellent opportunity for the presiding officer, or the agency through its staff, to disclose the issues considered settled or worthy of only abbreviated discussion and for the participants to disabuse the agency of any notion that an issue is not controversial.⁶¹

(h) *Public or private prehearing conferences.* One final question is whether prehearing conferences must be "on the record."⁶² Industry representatives would obviously prefer to meet with the agency staff off the record.⁶³ The propriety of off-the-record conferences involves the conflict between the value of closed-door candor⁶⁴ and the prospect of industry-agency deals which are never disclosed. Off the record candor, however, serves little purpose in policy-making, which involves policy judgment rather than fact-finding. Covert advocacy of policy, in fact, presents a real danger of improper influence. In rulemaking, therefore, the agency should rarely consider any material which it does not disclose to the public.⁶⁵

58. See Tomlinson 99-100.

59. 2 K. DAVIS, *supra* note 1, §15.02 at 353 (1958); see *id.* § 7.02; Davis, *An Approach to Problems in Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-10 (1942).

60. See 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 200 (1975).

61. Pedersen, *supra* note 24, at 68 n.111, noted the problems of adding newly discovered supporting information to a rulemaking record. The official notice process may solve this problem by enabling the agency to add the information with notice to participants and opportunity to rebut.

62. The APA clearly envisioned a "nonpublic investigatory proceeding." APA § 6(b), 5 U.S.C. § 555(c) (1970). See *Yale Note* 836-37 (discussing the pros and cons of candor engendered by off-the-record conferences).

63. See Williams, *supra* note 28, at 434 (discussing a situation in which the industry representative was willing to exchange the right to cross-examine for an off-the-record meeting with the staff). See also *E. Griffiths Hughes, Inc. v. FTC*, 63 F.2d 362 (D.C. Cir. 1933); Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: The Hearing*, 116 U. PA. L. REV. 401, 404 (1968) (favoring open hearings).

64. See Williams, *supra* note 28, at 454.

65. *Home Box Office, Inc. v. FCC*, No. 75-1280 at 94-98 (D.C. Cir. Mar. 25, 1977).

Although some factual information may justifiably be kept off the record,⁶⁶ policy arguments should never be presented in non-public conferences. Thus, prehearing conferences, though they need not be open to the public, should never be totally off the record. Where transcripts are not taken and disclosed, minutes should be prepared for inclusion in the public record of the rulemaking. The minutes should contain the exact terms of any bargains struck between an interest group and the agency staff,⁶⁷ as well as a summary of any material information disclosed or arguments presented in the conferences. In general, there does not appear to be any reason why a prehearing conference with specific groups of participants cannot be open to public observation as long as there are limits for practical reasons on who may contribute.

Depositions

Depositions in federal trials and agency adjudications are generally limited to preserving testimony.⁶⁸ Therefore, there would seem to be no reason to provide for depositions in rulemaking.⁶⁹ Written submissions can become part of the rulemaking record without being introduced in an oral proceeding. Theoretically, written material stands on the same footing as oral evidence, and it would appear that, even after a hybrid proceeding, an agency could base a rule on nothing more than written submissions.

Nonetheless, the requirement of hybrid procedures appears to include an implicit assumption that oral testimony should be given greater weight than written submissions, particularly when the oral testimony has been "tested" by cross-examination. A careful participant might, therefore, wish to preserve the testimony of an important witness through deposition because it would then stand on the same footing as the "evidence" developed in a trial-type record.⁷⁰ Rather than encouraging such use of depositions, the

66. An exception should be made for rare instances of confidential information which should be covered by a protective order or assurance of confidential treatment. See text accompanying notes 186-93 *infra*.

67. Cf. FED. R. CIV. P. 16 (requiring the court to disclose the agreements reached in pre-trial conference).

68. See FED. R. CIV. P. 27(a)(1); Burch, *supra* note 27, at 151. See generally Mezones & Parker, *Discovery Before the Federal Trade Commission*, 18 AD. L. REV. 55, 59-62 (1966) (discussing FTC deposition practice); *Stanford Comment* 1043 (noting that prior practice and legislative history of 5 U.S.C. § 556(c)(4), authorizing depositions "whenever the ends of justice would be served thereby," suggest that the section was not intended to authorize depositions for discovery purposes).

In administrative agency practice, the granting or denying of depositions rests in the discretion of the presiding officer. APA § 7(b)(4), 5 U.S.C. § 556(c)(4) (1970). See *NLRB v. C.H. Sprague & Son Co.*, 428 F.2d 938, 940 (1st Cir. 1970).

69. See Burch, *supra* note 27, at 154.

70. It is important to recognize that the terms "record" and "evidence" are not as limited in rulemaking as in formal adjudication. In formal proceedings, the term "evidence" connotes information which has passed through the procedural filters which limit variety and quantity. In

agency involved in the rulemaking should inform the participants that written and oral evidence are of equal stature⁷¹ and should suppress whatever preference it may have for oral testimony. The reliability of written evidence can be demonstrated; it can be subjected to testing in the nature of cross-examination if included in the public record early enough in the proceeding to permit written comment and rebuttal. The primary function of depositions, therefore, can be fulfilled in rulemaking by proper use of written submissions.

Nor should depositions be used for discovery purposes in rulemaking. The great number of potential participants and sources of relevant information make it necessary to curtail even written interrogatories, which are much less burdensome and time consuming than oral depositions.⁷²

Witnesses

Although those who participate in rulemaking and witnesses in formal adjudication are conceptually distinguishable, in practice they may be quite similar, particularly when the rulemaking is a hybrid proceeding. The Administrative Conference recommended the exchange of witness lists and narrative summaries of testimony in formal proceedings.⁷³ Where rulemaking includes any oral proceeding, this recommendation is equally valid. Where there is a hybrid proceeding with some possibility of cross-

rulemaking, on the other hand, experience shows that immaterial and irrelevant information, both factual and non-factual, often finds its way into the records. It has been impossible, however, to purge the rulemaking lexicon of the term "evidence." Similarly, the term "record" itself has an expanded scope in rulemaking, for a rule's "factual predicate," *City of Chicago v. FPC*, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972), contains great quantities of information of varying value and relevancy. *See, e.g.*, FTC Improvement Act § 202(e)(3), 15 U.S.C. § 57a(e)(3) (Supp. IV 1974): "The term 'evidence' . . . means any matter in the rulemaking record"; *id.* §202(e)(1)(B); 15 U.S.C. § 57a(e)(1)(B): "The term 'rulemaking record' means the rule, its statement of basis and purpose, the transcript . . . , any written submissions, and any other information which the Commission considers relevant to such rule."

71. *See* *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (Court reviewed a record containing only written information submitted to an agency under 5 U.S.C. § 553).

72. *See* *Hamilton* 1172 (asserting that depositions are not desirable for FDA formal rulemaking). Written interrogatories and written questions as to methodology should be preferred to oral testimony with cross-examination. This observation has special force in extra-hearing oral proceedings.

73. *Recommendation No. 21: Discovery in Agency Adjudication*, *supra* note 9, § 3(b). *Hamilton, Rulemaking on the Record*, 26 *FOOD, DRUG & COS. L.J.* 627, 636 (1971) (a similar recommendation for formal rulemaking at the FDA). The *Jencks* rule, requiring the government to disclose to a criminal defendant all prior statements by prosecution witnesses in the possession of the prosecution which relate to the witnesses' testimony, *see Jencks v. United States*, 353 U.S. 657 (1957), is often applied to agency proceedings, and it is often expanded to require disclosure of witness statements before the hearing. Ideally, there should be no *Jencks* problem in rulemaking. The agency should place in the public record as soon as possible all information in its possession, including witness statements.

examination, such an exchange is essential. Even in hybrid rulemaking, cross-examination will be closely restricted and some procedure for the identification of witnesses and the disclosure of expected testimony permits potential participants to determine which witnesses they will cross-examine and how much cross-examination they wish of a particular witness. Such disclosure also enables the presiding agency employee to designate representative groups and to judge how much cross-examination to permit.⁷⁴ Where no right of cross-examination is established in a particular agency's rulemaking process, the disclosure of witness identity and summary of testimony may form the basis on which one seeking the right to cross-examine can advocate the need for some cross-examination of a particular witness.⁷⁵

The FTC uses a procedure involving prehearing discussions and the disclosure of witnesses and testimony in conducting rulemaking under its model hybrid procedure. In fact, it has proven to be the only method by which rulemaking can be conducted under the Improvement Act. FTC presiding officers have been able to manage cross-examination successfully because they know what to expect and how much. In short, this process gives the presiding officers the control necessary to make testimonial procedures practical in rulemaking.⁷⁶

Under the Federal Rules of Civil Procedure, a party may discover "the identity and location of persons having knowledge of any discoverable matter."⁷⁷ A participant in rulemaking should be able to obtain this same information from the agency. A rulemaking agency should be required to disclose the identity of all persons who have special knowledge about the subject matter. In addition, unlike the federal judicial practice, the agency should be required at the earliest possible time to disclose those persons

74. See Tomlinson 119-20.

75. See *Virgin Islands Hotel Ass'n v. Virgin Islands Water & Power Auth.*, 476 F.2d 1263, 1268-69 (3d Cir.), *cert. denied*, 414 U.S. 1067 (1973) (cross-examination denied because of failure to demonstrate inadequacy of written questions). Compare *Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633, 643-44 n.25 (D.C. Cir. 1976) (proffer adequate to support some additional procedures) with *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 782-83 (D.C. Cir. 1976) (proffer failed to support additional procedures).

76. A high FTC official suggested to the author that the FTC Improvement Act hybrid procedure has been made to work by brute force: the presiding officers have made it work through a triumph of will. Interview with assistant to the general counsel, Barry Rubin, (Aug. 9, 1976).

77. FED. R. CIV. P. 26(b)(1). Use of the word "matter" rather than "fact" indicates that the inquiry may include persons who might disclose opinions. See Panzer, *The New Federal Discovery Rules in Civil Cases*, in *NEW FEDERAL CIVIL DISCOVERY SOURCEBOOK* 216 (W. Treadwell ed. 1972). See also C. WRIGHT, *LAW OF FEDERAL COURTS* 400 (3d ed. 1970) (stating that it has been routinely held that a party may be required to disclose the names of "occurrence witnesses").

whom it may call as witnesses.⁷⁸ In informal rulemaking, however, private individuals should not be required to disclose the identity of all those having information relating to the rule, but should at some time before the hearing disclose the identity of persons who will submit either written or oral presentations on their behalf.

Federal Rule 26(b)(4), which provides for the discovery of an opposing party's experts, could also be adapted to rulemaking. The rule draws a distinction between experts expected to be called as witnesses and experts who are consulted in preparation for trial, and precludes discovery of experts who are informally consulted, but not retained or specially employed for the litigation.⁷⁹ It provides a broad range of discovery of those experts to be called as witnesses, but such discovery is limited to interrogatories.⁸⁰ In order to question an expert who is merely consulted, the opposing party must make "a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by the other means."⁸¹ The major impediment to adapting similar discovery to rulemaking is the absence of the limiting concept of "party." On the other hand, because of the nature of most rulemaking, a special effort should be made to provide expert testimony or written submissions. Thus, rather than relying on such private discovery, the agency staff should make a special effort to uncover and disclose the identities of experts in the field. In order to uncover such experts, the agency staff should request that the "more interested" participants, for instance the regulated industry, disclose experts whom they perceive as being able to contribute. The right of interested persons to question experts who do not volunteer to contribute should, however, be severely limited, particularly when the expert does not intend to testify either on behalf of an interest or on his own. In these situations, private discovery should be permitted only under the "exceptional circumstances" standard set forth above. Where an interested party demonstrates that an expert will be of assistance, the agency itself should seek out and obtain information from the expert, particularly where the interested person does not have the resources to pay an expert fee.⁸² In this way, the agency takes on the expense of expert advice in

78. The agency should, however, be able to claim the same privilege against revealing informants available in adjudication. See Stewart & Ward, *FTC Discovery: Depositions, The Freedom of Information Act and Confidential Informants*, 37 ANTITRUST L.J. 248, 258 (1968). The informant privilege, though, must yield to a showing of "good cause for revelation," see Gellhorn 169-70. Cf. ATTORNEY GENERAL'S MEMORANDUM ON THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT 10 (1975).

79. See RULES ADVISORY COMM. 504

80. FED. R. CIV. P. 26(b)(4)(A)(i).

81. *Id.* 26(b)(4)(B).

82. The Federal Rules require payment of expert fees. *Id.* 26(b)(4)(C). An expert should not be expected to donate the very services from which he makes a living.

formulating its policy. This imposition seems justified since, unlike adjudication in which individual interests are more directly at stake, rulemaking furthers the agency's interest by permitting it to carry out a duty assigned by Congress.

Written Interrogatories

Written interrogatories have proven to be an inexpensive discovery tool,⁸³ and for that reason alone they would be useful in informal rulemaking. But there is another compelling reason for incorporating interrogatory procedure into the rulemaking process: written interrogatories may be an essential alternative to compelling a greater shift to trial-type, testimonial procedures.⁸⁴ Written submissions are the backbone of informal rulemaking, even where some trial procedures are permitted. Nonetheless, there must be a method for testing the submission or for exploring the written comments in greater depth. Written interrogatories can be used for this purpose.

Use of written interrogatories could greatly reduce the need for cross-examination. Although cross-examination of experts has been thought to be particularly useful,⁸⁵ written exchange might often produce more reliable information.⁸⁶ The record formed by interrogatories would no doubt be more direct and understandable than a record formed by transcripts of oral questions. Moreover, written questions would create the opportunity for

83. See Tomlinson 121.

84. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 630-31 (D.C. Cir. 1973) (written questions may substitute for cross-examination); accord, *O'Donnell v. Shaffer*, 491 F.2d 59, 61-62 (D.C. Cir. 1974). But see Currie, *Rulemaking Under the Illinois Pollution Law*, 42 U. CHI. L. REV. 457, 471-72 (1975) (asserting that, for state pollution control agency, trial procedures were more efficient than written interrogatories).

85. See Robinson, *supra* note 22, at 521-23; see also Clagett, *Informal Action—Adjudication—Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 79 (suggesting that an expert may be profitably cross-examined even on legislative facts). But see Hamilton 1156 (asserting that the prospect of cross-examination has alienated experts from the FDA).

86. See Prettyman, *How to Try a Dispute Under Adjudication by an Administrative Agency*, 45 VA. L. REV. 179, 190 (1959). Expert witnesses do not always make a strong personal impression on the stand. Yet given the sanctuary of carefully considered written answers, they will display the value of their opinion, not in their demeanor, but in the quality of their scholarship. Professor Wigmore, although characterizing cross-examination as "the greatest legal engine ever invented for the discovery of the truth," conceded that it may do more harm than good with respect to testimony of experts. J. WIGMORE, EVIDENCE §1367 (J. Chadbourn rev. ed. 1974). See *Upjohn Co. v. Finch*, 422 F.2d 944, 955 (6th Cir. 1970) ("No amount of . . . cross-examination can change scientific studies and data . . ."). But see Robinson, *supra* note 22, at 521-24; Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. PA. L. REV. 39, 95-97 (1971) (pointing out countervailing considerations which might support cross-examination of experts).

exchange between opposing experts rather than between an attorney and an expert. The caliber of the exchange would certainly be enhanced if, instead of educating an attorney so that he might cross-examine, the expert communicated directly with his counterpart.⁸⁷

In judicial proceedings and formal agency proceedings, interrogatories must be directed at "parties."⁸⁸ In rulemaking, if all participants are considered "parties" for purposes of discovery, then anyone who comments will face the possibility of receiving a request to answer interrogatories. If uncontrolled authority to serve interrogatories is given to participants, as under the Federal Rules,⁸⁹ the result could be extremely detrimental. Procedural control should be maintained by routing interrogatories through the agency or its delegate. The presiding officer or an employee in charge of rulemaking discovery should screen the requests to eliminate redundancy and other unnecessary burdens.⁹⁰

Control of interrogatories, however, should not be left to ad hoc determinations. A rational, controlled program for making interrogatories available demands that the agency develop guidelines for their issuance. These guidelines should establish general categories of substantive content which will or will not be subject to interrogatories. The guidelines should also define the types of participants who will be subject to interrogatories. Certainly some participants, such as an industry trade association, are more interested than others and can be fairly expected to answer interrogatories, upon direction from the agency. In general, interrogatories should be permissible only when directed at significantly interested persons: those immediately affected by the rule who are active in getting comments into the record and who indicate that they intend to participate fully in the proceeding. In addition, those subject to interrogatories should be categorized according to their ability to answer. Interrogatories should perhaps be permitted only to such larger participants as corporations, trade associations, groups representing the public and the agency.

Interested persons who are the targets of interrogatories can, of course,

87. In support of pre-trial exchange of information produced by experts, the Federal Rules Advisory Committee noted: "The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand." RULES ADVISORY COMM. 503.

88. FED. R. CIV. P. 33 (a) (interrogatories may be served upon "any other party"); see Tomlinson 121.

89. Interrogatories may be served directly on a party without leave of the court. FED. R. CIV. P. 33(a).

90. See Kroll & Maciszewski, *Pre-trial Discovery: Change in the Federal Rules*, DISCOVERY RULES SOURCEBOOK, *supra* note 77, at 206.

minimize the burden by refusing to answer the questions. Considerable incentive to respond will result from a calculation of the effect the refusal to answer questions may have on the weight of the person's submission or testimony and from the psychological drive to demonstrate the soundness of one's submission. But ultimately, there is no compulsion to respond unless the agency has formalized the proceeding so as to create some right to have interrogatories answered. Thus, the formality of the particular rulemaking may be an appropriate index of how much control the agency should exercise over interrogatories. Where the proceeding is very informal, the person's refusal to answer might be sufficient to prevent overwhelming interrogatories, but where a hybrid procedure includes some formal right to discovery, including interrogatories, substantial agency control is necessary.⁹¹

When the interrogatories are directed at the agency, there is a need to prevent delving too far into the decision-maker's mental processes.⁹² The Administrative Conference recommendation would limit interrogatories in agency adjudication to agency employees with knowledge of relevant facts.⁹³ This approach is as appropriate for rulemaking as it is for adjudication. Whereas rulemaking is a policy-formulating device and hence the thinking of the agency may be important to a participant, disclosure of the agency's thinking should be a function of the notice requirement rather than discovery.⁹⁴ On the other hand, factual questions directed at the staff should be answered.⁹⁵ In addition, because interrogatories to staff members, par-

91. Even in trials, there may be considerable freedom to refuse to answer interrogatories. See *Huff v. N.D. Cass Co.*, 468 F.2d 172, 176 (5th Cir. 1972), *modified on other grounds*, 485 F.2d 710 (5th Cir. 1973); *Bell v. Swift & Co.*, 283 F.2d 407, 408-09 (5th Cir. 1960). Techniques for enforcing interrogatories vary. See *Stanford Comment* 1076; FED. R. CIV. P. 37(b)(2)(d). Under the Federal Rules, the party serving the interrogatory must move for enforcement rather than the answering party moving to quash. FED. R. CIV. P. 33(a). See RULES ADVISORY COMM. 522-23. Because the proposal herein envisions initial agency involvement in judging the propriety of an interrogatory, failure to answer will be tantamount to ignoring an administrative order.

92. See *United States v. Morgan*, 313 U.S. 409, 422 (1941); *J.H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 234 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973). But see Note, "Mental Process" Privilege Prevents Discovery of Existence of Agency Head's Statutorily-Required Personal Decision, 50 WASH. L. REV. 739 (1975). Compare *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (permitting some inquiry into the mental process in the absence of agency reasoning necessary for review) with *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (requiring reliance on "contemporary explanation" if available).

93. See *Report of the Comm. on Compliance and Enforcement Proceedings in Support of Recommendation No. 21*, *supra* note 9, at 629-31.

94. See text accompanying note 204 *infra*.

95. See Gellhorn 176. In addition, interrogatories to the agency may be necessary to uncover the existence or location of documents which can then be requested. See Tomlinson 121.

ticularly experts, will often include matters of opinion, questions requiring staff opinion should be permitted as long as the opinions called for are intertwined with the factual inquiry,⁹⁶ and as long as the expression will not disclose the mental process of the ultimate decision-maker.⁹⁷

Requests for Admission

Admissions perform a modest role in agency adjudicatory discovery⁹⁸ and generally have little place in rulemaking. However, admissions as to some issues would certainly expedite the rulemaking process and focus attention on disputed material issues.

Where some trial procedures are provided in both hybrid and formal rulemaking, requests for admission, especially those from the agency, need not go so far as to ask for concessions on the truth of facts. Rather, an interested group may be asked to admit that an issue is not a factual one or is not major in the decision-making. If agreement can be reached that an issue is a policy judgment or question of law, then the agency is justified in not providing testimonial procedures and may decide the issue on the basis of participation by oral argument or written comment. The requirement of some trial procedure has generally been limited to "crucial," "critical" or "material" factual issues, and an agency need not provide such procedure for minor or peripheral factual issues. Consequently, an admission that the resolution of certain facts is not crucial to the outcome of the rulemaking would justify limiting participants to written proof as to that fact.

The use of admissions in informal rulemaking does present some practical difficulties. As with settlement, the major problem is the absence of two clearly identifiable adverse interests. Getting one group of participants to admit to an issue may not eliminate that issue as to other participants. Nonetheless, there may be instances where it will be profitable to ask one

96. Under the Federal Rules, interrogatories may involve "opinion or contention that relate to fact *or* the application of law to fact," FED. R. CIV. P. 33(b); *See* RULES ADVISORY COMM. 524, and may inquire into questions of legal theories where intertwined with factual questions, *id.* at 524. The Federal Rule provision may not always be applied to administrative interrogatories. *See* *Wurlitzer Co. v. EEOC*, 50 F.R.D. 421 (N.D. Miss. 1970).

97. These opinions should not be binding on the agency in any way. Except where there is "exceptional reliance," answers to interrogatories do not limit proof. RULES ADVISORY COMM. 524.

98. *See* Tomlinson 124. The Federal Rules Advisory Committee noted two purposes to be served by admissions: "first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be." RULES ADVISORY COMM. 531-32. A request for admission may even focus on ultimate disputed facts. Kroll & Maciszewski, *supra* note 90, at 211.

group to admit to certain issues. Where this is properly done, the agency may be justified in confining further discussion on that issue to written comment or even to written submission as to why the issue should not be resolved by the admission.

A corollary to the use of admissions is the agency's authority to discipline those who refuse to admit to an issue which should not be in dispute. Such authority appears inconsistent with the informal rulemaking process. The amorphous nature of the rulemaking controversy requires the agency to designate which issues are of crucial importance, and a special interest's willingness to admit to the resolution of a question will certainly be relevant to this determination. But it is the power of the agency to define the issue of concern, not the fact that an admission was made, which is of primary significance in the rulemaking context.

As an alternative to adjudicatory-type requests for admissions, proposed initial findings by the agency could accompany the publication of the proposed rule. The initial findings should disclose assumed facts and shift to participants the burden of demonstrating that the assumptions are in error or, at least, that there is substantial controversy as to a fact which the proceeding must attempt to resolve.⁹⁹ Rulemaking is a method for informing the agency, and this initial finding procedure can serve to disclose the areas where the agency most needs information. The agency will also be able to control the course of the proceeding and limit the issues that are considered to be in dispute.

Compulsory Process

(a) *Subpoena power in general.* At present, the failure of an agency to provide for compulsory process, even in formal adjudication, does not violate due process,¹⁰⁰ nor is there any general statutory guarantee making compulsory process available.¹⁰¹ The APA does not guarantee compulsory process, or empower agencies to issue subpoenas, but provides only that a subpoena shall be issued to a party where an agency already has subpoena

99. The APA provision that the proponent of a rule bears the burden of proof applies only to rules which must be made on a record, APA § 7(c), 5 U.S.C. § 556(d) (1970). This requirement would not seem to apply to informal rulemaking.

100. See *Low Wah Suey v. Backus*, 225 U.S. 460, 470-71 (1912); *Ubietica Corp. v. FDA*, 427 F.2d 376, 381 (6th Cir. 1970).

101. See *NLRB v. Seine & Line Fishermen's Union of San Pedro*, 374 F.2d 974, 982 (9th Cir. 1967) (refusal to issue a subpoena not necessarily prejudicial); *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962) (trial court abused its discretion by rendering judgment for taxpayer simply because the government would not allow discovery). But see *FTC v. United States Pipe & Foundry Co.*, 304 F. Supp. 1254, 1259 (D.D.C. 1969) (in FTC adjudication, party has right to a subpoena "on a showing of general relevance and reasonable scope of the evidence sought"). See generally 1 K. DAVIS, *supra* note 1, § 8.15 (1958); K. DAVIS, *supra* note 30, at 298.

authority.¹⁰² This provision merely attempts to place the agency and private parties on an equal footing.¹⁰³

However, this equality is somewhat illusory, because agencies may have other investigative powers to compel disclosure of information or filing of reports which are not available to private persons.¹⁰⁴ The APA expressly

102. APA § 6(c), 5 U.S.C. § 555(d) (1970).

Uniformly, agencies do not have power to enforce their own subpoenas, but must seek enforcement in the courts. The Constitution and considerations of fundamental fairness require this bifurcation of power. *United States v. Security State Bank and Trust*, 473 F.2d 638, 641 (5th Cir. 1973). See *Stanford Comment* 1076. Thus, one can receive interlocutory review of an agency subpoena merely by refusing to comply. However, the degree of judicial deference to agency subpoena requests suggests that this review is often not worth the time and expense. See note 108 *infra*.

Sanctions for failure to comply with a discovery order are unclear under APA § 9(a), 5 U.S.C. § 558(b) (1970), and depend on individual enabling acts. See *Stanford Comment* 1051, 1054-55. In addition to judicial enforcement through the contempt power, administrative sanctions for failure to respond to discovery include refusal to permit testimony from the disobedient party on pertinent issues and decision of pertinent issues adversely to the disobedient party. See *Burch*, *supra* note 27, at 181. See also *NLRB v. C.H. Sprague & Son Co.*, 428 F.2d 938, 942 (1st Cir. 1970) (agency may enforce subpoena by refusing to permit cross-examination "with reference to any matter which could have been produced by complying with the subpoena").

Most agencies with compulsory process procedures also provide interested persons the right to move to quash a subpoena issued by its staff. If an agency has a procedure for testing discovery orders through a motion to quash, that procedure must be exhausted before a written interrogatory can be challenged in court. See *National Lawyers Guild v. Brownell*, 225 F.2d 552, 558 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927, *reh. denied*, 351 U.S. 990 (1956). Also, a third party will not be permitted to intervene in an effort to quash the subpoena unless it has some privilege or proprietary interest in the proceeding. See *Donaldson v. United States*, 400 U.S. 517 (1971) (taxpayer cannot intervene in IRS enforcement proceedings against his employer in order to quash subpoena for records affecting his own tax liability); *United States v. Moore*, 485 F.2d 1165, 1168 (5th Cir. 1973) (where the subpoena is issued to one who will adequately defend the third party's interest, there is no prejudice in denying third party intervention).

Even where there is no provision for motion to quash, APA § 6(d), 5 U.S.C. § 555(e) (1970), guarantees the right to petition the agency and the right to an explanation for a denial of the petition. This provision should provide the basis for a petition to quash a discovery order. A motion to quash should always precede a refusal to comply because by this means the agency will be forced to disclose its arguments for enforcing the subpoena prior to the judicial proceeding. Often an effective motion to quash or expression of intent to refuse to comply will serve best when used in conjunction with a clear intent to compromise. Agency staff will often agree to lesser access to avoid going through all the procedural steps necessary to enforce a subpoena fully.

103. The purpose of this provision is to make agency subpoenas available to private parties to the same extent as to agency representatives It should be emphasized that Section 6(c) [5 U.S.C. § 555(d)] relates only to existing subpoena powers conferred upon agencies; it does not grant power to issue subpoenas to agencies which are not so empowered by other statutes.

APA MANUAL *supra* note 8, at 67. See Tomlinson 104.

104. See Tomlinson 124-25. See also *Papercraft Corp. v. FTC*, 307 F. Supp. 1401 (W.D. Pa. 1970) (participant has no right to reports furnished to agency under authority separate from subpoena power, even though participant alleged that the FTC investigative powers had been used as "tool of litigation" in the particular agency adjudication).

recognizes that many agencies have powers to make investigative demands which are separate and distinct from any compulsory process which may be available in conjunction with specific proceedings.¹⁰⁵ The investigative powers of many agencies, especially the large rulemaking agencies, may be exceedingly broad,¹⁰⁶ and the law permits very little judicial interference with those powers.¹⁰⁷ Whereas an agency can satisfy its informational needs through its investigative powers, the participants, even in formal proceedings, must rely on the agency's discovery rules to find a means of obtaining information.¹⁰⁸ Therefore, the targets of a rulemaking will not likely have the same access to information as the agency.

105. APA § 6(b), 5 U.S.C. § 555(c) (1970).

106. While the APA limits investigative demands by the language "as authorized by law," many agencies have broad authority to issue investigative requests. *See, e.g.,* *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (an agency's investigative request will be enforced even if motivated by "nothing more than official curiosity"); *EEOC v. University of N.M.*, 504 F.2d 1296, 1303 (10th Cir. 1974) (administrative subpoenas enforceable unless "plainly incompetent or irrelevant to any lawful purpose"); *United States v. Marshall Durbin & Co.*, 363 F.2d 1, 5 (5th Cir. 1966) (FTC may subpoena records pertinent to an investigation which are in possession of third person who is not the subject of such investigation); *Adams v. FTC*, 296 F.2d 861, 867 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962) ("broadness alone is not sufficient justification to refuse enforcement of a subpoena so long as the material sought is relevant"); *cf. FTC v. Gladstone*, 450 F.2d 913, 915 (5th Cir. 1971) (even where administrative subpoena enforced by court may be overbroad, one who destroys subpoenaed documents is guilty of criminal contempt). The burden of showing that an agency subpoena is unreasonable remains with the respondent. *See Donaldson v. United States*, 400 U.S. 517, 527 (1971); *United States v. Powell*, 379 U.S. 48, 58 (1964).

Constitutional challenges to administrative subpoenas, based on the fifth amendment privilege against self-incrimination, are exceedingly difficult to maintain. *See Fisher v. United States*, 425 U.S. 391, 400-02 (1976) (regardless of whether documents would have been privileged in hands of taxpayers, IRS could subpoena documents transferred to taxpayer's attorney in connection with an investigation); *Donaldson v. United States*, 400 U.S. 517, 536 (1971) ("an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution"). This traditional deference may be ripe for questioning. In *CAB v. United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976), the Seventh Circuit questioned the CAB's plenary inspection authority to search several broad categories of the carrier's records. Relying in large part on *Burlington Northern, Inc. v. ICC*, 462 F.2d 280, 287-88 (D.C. Cir.), *cert. denied*, 409 U.S. 891 (1972), the court found that the right to inspect was not unlimited and that an agency must describe the purpose for inspection so that a court can review its appropriateness. The court cited *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 62 (1974), in which it had been pointed out that the challenged regulations "[did] not authorize indiscriminate rummaging among the records of the plaintiffs." The Seventh Circuit noted that some limited "expectation of privacy" did exist for a corporation. "In summary, the decisions uniformly require that an investigative demand be reasonably definite and reasonably relevant to some proper investigative purposes. The Board cites no case, and we have found none, holding that any statute has conferred a general warrant power on any agency." *Id.* at 399. While the case involved the problem of inspection, the thrust of the opinion displays a closer examination of the agency's investigative purpose than is usual.

107. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 214 (1946); *FTC v. Feldman*, 532 F.2d 1092, 1095 (7th Cir. 1976).

108. *See K. DAVIS, supra* note 30, at § 8.15.

In addition, it is doubtful that the guarantee of equal treatment applies to informal rulemaking. The subpoena provision is contained in the "ancillary" section of the APA¹⁰⁹ which has rather general application in accordance with applicability of each individual subsection.¹¹⁰ Thus, while it is clear that certain provisions of the section could apply to rulemaking, it does not necessarily follow that each subsection applies to rulemaking. Although there is no explicit limiting language, the subpoena subsection suggests that it was intended to apply only to formal proceedings. The use of the term "party" in subsection (d) compels this conclusion. While the APA definition of "party" is broad,¹¹¹ the notion of "party" does not coincide with the concept of informal rulemaking.¹¹² This dissonance is demonstrated by the APA drafters' use of "interested persons," not "parties," in section 553.¹¹³ A party is a person who is particularly focused upon in a formal proceeding. One who is not directly connected with a proceeding must move to intervene and prove sufficient interest to become a party before he may participate.¹¹⁴ In rulemaking, participation is open to anyone, and the term "party," with its connotation of limited access to the proceeding, is inappropriate; thus the language of subsection (d) implies that it was not to apply to informal rulemaking.¹¹⁵

109. APA § 6, 5 U.S.C. § 555 (1970).

110. The intent of the provision was clearly to promulgate miscellaneous procedural categories:

Section [555] defines various procedural rights of private parties which may be incidental to rulemaking, adjudication, or the exercise of any other authority.

APA MANUAL, *supra* note 8, at 61; *accord*, S. DOC. NO. 248, *supra* note 8, at 263. The Senate report's title refers to "incidental or miscellaneous rights, powers and procedures." *Id.* at 204. In addition, the definition of agency proceeding, APA § 12(g), 5 U.S.C. § 551(12) (1970), includes all rulemaking.

111. APA § 2(b), 5 U.S.C. § 551(3) (1970).

112. See Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 236 (1974). In *Bristol-Myers Co. v. FTC*, 469 F.2d 1116, 1119-20 (2d Cir. 1972), the concurring judge, in an opinion concurred in by another judge on the panel, found that "party" in section 555 referred to the context of a formal proceeding and not informal negotiation. He relied on the specific provision in section 554(c) for informal negotiation, and the same analysis would serve to exclude section 553 informal rulemaking procedures. The third judge seemed to lean in the same direction but felt the issue should not be decided until the administrative remedies had been exhausted. *Id.* at 1117 n.5.

113. APA § 4, 5 U.S.C. § 553 (1970).

114. However, intervention in administrative proceedings has become much easier. Public Participation in Administrative Hearings (Recommendation No. 71-6), 1 C.F.R. § 305.71-6A (1977). Leading cases liberalizing intervention include *Office of Cunication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conf.*, 384 U.S. 941 (1966). The trend-setting scholarly works include Crampton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, GEO. L.J. 525 (1972); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968).

115. But see *A.O. Smith Corp. v. FTC*, 396 F. Supp. 1125, 1133 (D. Del. 1975), *vacated on other grounds*, 530 F.2d 515 (3d Cir. 1976) (5 U.S.C. § 553, referring to "interested persons" rather than "parties," does not preclude application of 5 U.S.C. § 555(d)).

Practical considerations support this semantic argument. The Administrative Conference has found that compulsory process is inappropriate in informal proceedings in general and rulemaking in particular.¹¹⁶ The major difficulty in providing compulsory process in rulemaking is the uncontrollable numbers of potential participants. Rulemaking by a major federal agency may have national, and even international impact, and the agency's subpoena power is often coextensive with the reach of the proceeding.¹¹⁷ To permit all participants in a rulemaking access to subpoenas could result in an oppressive convulsion of compulsory process.¹¹⁸

On the other hand, compulsory process cannot be totally excluded from the participatory rights incorporated into rulemaking.¹¹⁹ Discovery is necessary to effective participation: it permits an interested person to defend his interest and, by maximizing the ability to represent an interest, it assures greater information on which an agency may make a decision. Compulsory process not only provides a tool whereby an interested person may gather more information, it also permits an interested person the right to confront the information which is to be used against him. The Supreme Court has mandated that the targets of all varieties of informal administrative action be given such an opportunity,¹²⁰ and access to compulsory process would seem

Section 7 of the APA, 5 U.S.C. § 556 (1970), which clearly applies to proceedings on the record (hence neither informal adjudication nor informal rulemaking), provides that the presiding officer shall issue subpoenas authorized by law, 5 U.S.C. § 556(c)(2) (1970), and take depositions, 5 U.S.C. § 556(c)(4) (1970). There can be no doubt that this section applies only to formal adjudication and rulemaking.

116. *Report of the Comm. on Compliance and Enforcement Proceedings in Support of Recommendation No. 21*, *supra* note 9, at 582. The Administrative Conference recommended that the APA be amended to authorize explicitly agency subpoena power and guarantee the right to compulsory process, but only in proceedings covered by sections 7 and 8, 5 U.S.C. §§ 556-57 (1970). Discovery in Agency Adjudication (Recommendation No. 70-4), *supra* note 9, at 46-47. See Tomlinson 142 (expanding the recommendation to adjudications which are within the spirit if not the letter of these provisions). An ABA resolution would have extended subpoena power to informal as well as formal adjudication. *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 AD. L. REV. 389, 408 (1972).

117. See *FTC v. Browning*, 435 F.2d 96, 99-101 (D.C. Cir. 1970) (FTC subpoena can have nationwide service); *FMC v. DeSmedt*, 366 F.2d 464, 468-69 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966) (administrative service may extend beyond the U.S.).

118. Cf. *Papercraft Corp. v. FTC*, 472 F.2d 927, 929 (7th Cir. 1973) (upholding FTC refusal to issue subpoenas duces tecum to 550 companies where there were other methods of developing the data).

119. The legislative history of the FTC Improvement Act suggests the availability of subpoena in that hybrid rulemaking procedure. The FTC effectuated this suggestion in its procedural rules. 16 C.F.R. § 1.13(d)(6) (1977).

One court has held that an agency may not provide for compulsory process without statutory authorization. *FMC v. Anglo-Canadian Shipping Co.*, 335 F.2d 255 (9th Cir. 1964). This opinion has been severely criticized, Galland, *A Note on Maritime Discovery*, 19 AD. L. REV. 119 (1966), and is probably not good law. See *FCC v. Schreiber*, 381 U.S. 279 (1965).

120. See *Goss v. Lopez*, 419 U.S. 565 (1975); *Goldberg v. Kelly*, 397 U.S. 254 (1970). See generally Note, *Procedural Due Process After Goss v. Lopez*, 1976 DUKE L.J. 409.

to be a necessary complement to this right.¹²¹

Even though compulsory process is necessary to effective participatory rights and can enhance the rulemaking record by increasing the availability of information, compulsory process should only be required where its detrimental effects can be mitigated.¹²² Some measure of control is provided by the APA which, unlike the Federal Rules,¹²³ authorizes agencies to require a showing of reasonable scope and relevance prior to the issuance of a subpoena.¹²⁴ This general standard, however, does not seem sufficient in the context of rulemaking. Because of the number and variety of participants, some subpoenas which are both clearly relevant and limited in scope should not be issued. The availability of subpoenas must be substantially narrower. Agencies which do a considerable amount of rulemaking should articulate when compulsory process will be made available through restrictive guidelines which are carefully drafted in light of their particular proceedings.

Furthermore, where there is to be compulsory process in rulemaking, it cannot be permitted without some initial screening. However, it may not be feasible to rely on the presiding officer to perform this function, since unlike

Neither *Goss* nor *Goldberg* arose in the context of rulemaking, but both cases set forth certain basic requirements for due process in informal proceedings. In *Connecticut State Dep't of Pub. Welfare v. HEW*, 448 F.2d 209 (2d Cir. 1971), the state of Connecticut, which was challenging an informal action by the federal government, alleged that the HEW procedure was unfair because there was no provision for discovery by deposition or interrogatory and the hearing officer lacked the power to subpoena witnesses, papers and other evidence. Noting that the issues were not ones of adjudicative fact but questions of law, the Second Circuit cited *Goldberg* for the proposition that due process is not an unvarying standard but depends on the interests affected. *Id.* at 212. The court apparently believed that, since the aggrieved party (the state) had been given a hearing with the right to present and cross-examine witnesses, it could not show inadequacy of its right of confrontation, and hence it could not show, in this context, that its rights were prejudiced by the lack of subpoena power and discovery. *Id.* at 212-13.

121. See K. DAVIS, *supra* note 30, § 8.15 (citing cases on both sides of the proposition that discovery is a requisite element of fairness. The need for compulsory mechanisms would seem to vary with each individual informal process).

122. The most significant detriments to compulsory process are harassment and delay. Friendly, *supra* note 12, at 1282-83.

123. FED. R. CIV. P. 34. The elimination of a "good cause" requirement was a major change of the 1970 revision of the Federal Rules. RULES ADVISORY COMM. 487.

124. APA § 6(d), 5 U.S.C. § 555(d) (1970). See Tomlinson 128-29. Relevancy may also become an issue if an agency subpoena is resisted. Although the courts apply a very liberal notion of relevance, numerous cases have held that the agency subpoena must be relevant to an investigation. See, e.g., *J.H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 234 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973) (one requesting subpoena must "state with sufficient particularity what value, if any, the files would have to it"); *General Eng'r, Inc. v. NLRB*, 341 F.2d 367, 376 (9th Cir. 1965) (one requesting a subpoena may be required to show relevance and reasonable scope).

The ABA has proposed that administrative subpoenas be issued on request without a showing of relevance. *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, *supra* note 116, at 408.

adjudication,¹²⁵ rulemaking does not always include a clearly recognizable presiding officer who has control over the proceeding. Consequently, rulemaking agencies should delegate to an official the authority to issue subpoenas¹²⁶ under the same sort of restrictive guidelines which would accompany delegation to a presiding officer.¹²⁷ Agencies which use informal action, including informal rulemaking, to conduct business should designate an official to handle all compulsory process requested in connection with all informal proceedings and not spread this function among the various employees who are in charge of informal proceedings. Recognizing the special problems of informal action, this official should have discretion to limit the availability of compulsory process even beyond the agency delegation guidelines whenever the benefits derived from a specific request would not outweigh the potential for oppression, harassment or delay.

In summary, where the procedure is relatively formalized as in hybrid rulemaking, a presiding officer can control subpoena authority in much the same way as in an adjudicative hearing but under the restrictions prescribed by the delegation guidelines. For the great bulk of rulemaking, the absence of a clearly defined presiding employee will make the necessary control more difficult, and hence, the agency should appoint a special discovery official to handle all such requests under one set of guidelines. Whichever type of employee is utilized, the official should have discretion to limit compulsory process further than the restrictive guidelines but within certain general bounds.

(b) *Subpoena ad testificandum*. Compelling the attendance of witnesses in informal rulemaking raises substantial conceptual problems. While participants are offered or guaranteed the right to make an oral presentation with increasing frequency, there is no movement to compel persons to participate in rulemaking. The target of a rule has the right of confrontation only to the extent needed to rebut written or oral comments which have been voluntarily submitted. Although cross-examination is an important device in hybrid procedure, if a participant does not voluntarily appear to give oral testimony, he may avoid cross-examination.

125. In formal adjudication, there will be an administrative law judge who will automatically exercise the agency's subpoena authority. See Tomlinson 141.

126. Authority to issue subpoenas may be sub-delegated to agency employees. *EEOC v. Exchange Security Bank*, 529 F.2d 1214 (5th Cir. 1976); *FTC v. Gibson*, 460 F.2d 605 (5th Cir. 1972); *United States v. Marshall Durbin & Co.*, 363 F.2d 1, 6-7 (5th Cir. 1966). The sub-delegation is usually confined by an investigative order, and the subpoenas issued by the lower level official must be within the scope of that order. *SEC v. First Security Bank*, 447 F.2d 166, 169 (10th Cir.), cert. denied sub nom. *Nemelka v. SEC*, 404 U.S. 1038 (1971) (upholding the issue of a subpoena on the basis of a very broad investigative order).

127. See *K. Davis supra* note 30, § 9.05-1 (1976) (sub-delegation should include administrative standards); Hamilton 1175.

As a general proposition, it does not seem consistent with the concept of rulemaking to require persons to appear in order to be cross-examined. Nonetheless, there is a limited place in informal rulemaking for use of the subpoena ad testificandum. In order to assemble a complete record, it may be necessary in special cases to require such subpoenas for experts, especially where they may be the only source of certain relevant information. Interrogatories may ferret out most of this information,¹²⁸ but appearance of an expert may be required by fairness considerations. For example, fairness may compel the appearance of an expert who has been consulted by the agency when there is no other way to refute his findings or opinions. Subpoenas should also be available to compel testimony of persons other than experts who may have special knowledge of relevant facts, or persons such as employees, competitors, or those with other business relationships, who may be reluctant to come forward for fear of retaliation unless afforded the trappings of compulsion. Subpoena ad testificandum in rulemaking should nonetheless be reserved for very special circumstances.

(c) *Return of subpoena.* The Administrative Conference study expressed particular concern for the practice of many agencies in providing for return of subpoena at the hearing,¹²⁹ thereby avoiding prehearing discovery. In a sense, this is not a problem in rulemaking because the record remains open for an extended period and does not close at the end of any oral proceeding. If, because of the absence of prehearing discovery, the participant cannot present his full position, the further presentation can always be added to the record. This process, however, is equivalent to the much criticized "hearing by interval."¹³⁰ The goal in rulemaking, therefore, should be the return of subpoenas in time to permit rebuttal.

Production of Documents and Tangible Things

A participant in rulemaking may obtain documents either through discovery, which can operate on either the agency or a private person, or through a Freedom of Information Act request, which can operate only on the agency but which may result in access to private documents. A participant should first attempt to obtain access to documents through a traditional subpoena duces tecum, because this process will be directly related to the specific proceedings. Where a traditional subpoena duces tecum is not available, however, or where the desired documents are outside the scope of the agency's discovery provisions, an effective participant must understand

128. The problem may be mitigated by some compulsion to answer written interrogatories. See FED. R. CIV. P. 37(d).

129. See Tomlinson 127.

130. See Rowe, *The Role of Discovery in Federal Trade Commission Proceedings*, 21 AD. L. REV. 439 (1968-69); see also Tomlinson 128.

and use the Freedom of Information Act. Familiarity with the potential of that Act will greatly increase the fund of information available for use in rulemaking.

(a) *Agency process for discovery of documentary material.* In rulemaking, there is often no testimonial procedure or only an abbreviated testimonial phase. A participant must therefore have an adequate means of obtaining documentary evidence in order to prepare for and to support an effective written presentation or oral argument. To the extent that such access to documentary evidence is limited, therefore, the argument for testimonial devices becomes much stronger. An agency's reticence to provide adequate discovery of relevant documents may work against its efforts to avoid the imposition of formal testimonial procedures. In addition, as discussed above, notions of fairness and the concept of equality of opportunity articulated in section 6(d)¹³¹ of the APA compel the conclusion that some process must be provided to enable private participants to obtain materials which are necessary to represent their interests.¹³²

The open admissibility of documentary "evidence" creates a unique problem. The adjudicative process contains various procedures for testing documentary evidence before it is admitted for use in the decision-making. In rulemaking, there is no such testing. Even in hybrid rulemaking, only those documents directly related to oral testimony may be tested by cross-examination. Other documents, even where there are some trial procedures, will enter the record with no screening. Since it would be contrary to the whole notion of informal rulemaking to reject documentary evidence which has not gone through the screening processes used in adjudication, a rulemaking record will necessarily be full of documentary material of indeterminate value. Yet rulemaking is primarily concerned with argument over policy, and the only purpose served by trial procedures in rulemaking is to permit the introduction of oral proof into the record; the procedures are not intended to create trial-type thresholds for the admissibility of evidence. Therefore, the agencies will inevitably have a great deal of discretion in determining the authenticity and competence of documents, the inferences which can be drawn from the written material presented, and the weight to be given documents. One limitation on this discretion would be a requirement that the agency carefully explain the value placed on significant, untested documentary evidence in its "statement of basis and purpose."¹³³

Another potential control is participant questions of the competence and value of a document. However, the ability of the participants to

131. 5 U.S.C. § 555(d) (1970).

132. See notes 119-21 *supra* and accompanying text.

133. See *Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633, 646 (D.C. Cir. 1976); Pedersen, *supra* note 24, at 79.

challenge or bolster documentary evidence may depend on their ability to find information relative to the subject of the document. Written interrogatories provide one method for uncovering further information, but it would also serve this purpose if the agency assisted participants in obtaining further documentary material. Because written submissions are so important to informal rulemaking, the discovery of documents should be preferred over other forms of discovery, particularly where the documents are sought to support a response to other participants' documentary submissions.

An interesting question is whether documentary requests aimed at non-participants should be treated differently from requests to participants, especially dominant participants. The Administrative Conference recommendation for formal proceedings distinguishes parties from non-parties, making access to party documents more difficult to obtain than access to non-party documents.¹³⁴ As previously noted, the party/non-party distinction breaks down in rulemaking.¹³⁵ Even though some persons are clearly more interested than others, a distinction between parties and non-parties, or interested and not-so-interested persons, serves no purpose. If any such distinction is to be made, it should be done only to facilitate documentary requests to participants and to restrict closely requests to non-participants. On the whole, a subpoena duces tecum should be available to elicit documentary material from any person, and should be issued to any potential participant who demonstrates that the subpoena will produce valuable information. The scope of the right to subpoenas duces tecum should not be limited according to who is asking for the information or from whom the information would be obtained: the key issue is whether the subpoena will be likely to produce information valuable to the rulemaking process. Indeed, a petition demonstrating a valuable line of inquiry should lead the agency staff to follow that line on its own. Rulemaking is, after all, investigative and not adversarial. The agency should actively pursue any source of information, and it should delegate to its staff authority to determine the value of lines of inquiry suggested by an interested person. The agency's more active role, however, should be in lieu of the ready availability of subpoena duces tecum. Such subpoenas should be issued to a private participant in rulemaking under fairly limited circumstances.

As suggested above, a special staff person should have control of such subpoena power for all informal rulemaking.¹³⁶ This official should be delegated discretion, under careful guidelines, to limit the availability of

134. *Report of the Comm. on Compliance and Enforcement Proceedings in Support of Recommendation No. 21*, *supra* note 9, at 643-45. This divergent treatment is based on the need for the presiding officer to exercise control over interparty discovery and on the fact that such discovery is likely to be quantitatively greater than that between parties and non-parties. See Tomlinson 131-32.

135. See text accompanying notes 32-33 *supra*.

136. See text accompanying notes 126-27 *supra*.

subpoenas duces tecum more narrowly than the statutory bounds of relevancy and reasonable scope. The agency should provide some mechanism for reviewing any failure to issue a private subpoena and for challenging any subpoena so issued. Because of the special utility of documentary material in rulemaking, a subpoena duces tecum should be more readily available than a subpoena ad testificandum and refusal should be more carefully considered. Judicial review, however, must await the final rule, as in the case of other nonconstitutional procedural denials.¹³⁷

Under the Administrative Conference's recommendation for adjudications, when a party applies for production of documents, the burden shifts to the person from whom the documents are requested. In other words, the burden of persuasion is placed on the party opposing the production of documents.¹³⁸ The scope of informal rulemaking, however, generally dictates against free-wheeling requests for documents from private individuals. Rather, the initial burden in rulemaking should be on the applicant to demonstrate, in addition to relevancy and reasonable scope, the need for the documents and the substantial benefit they will confer on the rulemaking process. The production of documents is always a burden. Corporations are already straining under the information demands of the government, and even a limited request for documents will be burdensome to most private individuals. Thus, before the government acquiesces in any increase in this burden, an applicant should be required to overcome a threshold showing of need and potential benefit. The requesting participant should also be required to show that the agency rulemaking staff has not or will not pursue a source of important, relevant documentary material. This last requirement will, of course, substantially raise the threshold because it can be presumed that the staff will attempt to secure any useful documentary information to which it is alerted.

(b) *Discovery of agency documents.* While strict limitations on the right to obtain documents from private individuals are imperative to prevent oppression, harassment and delay, the right to obtain information from the rulemaking agency need not be so confined. Two possibilities exist for tapping this source: discovery and the Freedom of Information Act.

An agency's procedures for allowing discovery of documents in its possession should permit at least the level of access to such documents afforded in judicial proceedings. Traditionally, discovery of agency docu-

137. Interlocutory appeal of an agency decision with regard to discovery is not generally permitted. *E.g.*, *FTC v. Feldman*, 532 F.2d 1092, 1096 (7th Cir. 1976); *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1394 (5th Cir. 1971); *Maremont Corp. v. FTC*, 431 F.2d 124, 127-28 (7th Cir. 1970); *cf.* *First Nat'l City Bank v. FTC*, 38 Ad. L.2d 211 (S.D.N.Y. 1975) (pre-enforcement review of subpoena denied).

138. Tomlinson 121.

ments under the Federal Rules¹³⁹ has been limited by only two privileges: the "state secret" privilege¹⁴⁰ and the official documents privilege.¹⁴¹ The state secret privilege is limited to military or diplomatic secrets.¹⁴² Ordinarily, rulemaking will not involve national secrets;¹⁴³ hence allowing the agencies broad discretion to deny access to such documents will rarely result in detrimental withholding. It is also probable that agencies with sensitive documents will not release them to other agencies. As a result, non-military and non-diplomatic agencies whose rules may affect these areas will not possess truly "secret" information in most cases.

Thus, only the official document privilege will be likely to impose substantial limitations on discovery of agency documents in rulemaking. Where the privilege is provided for by statute,¹⁴⁴ no serious definitional problems will be presented. On the other hand, the scope of the judge-made privilege is not clear and must be determined on a case-by-case basis.¹⁴⁵ The theory behind the case-by-case determination is one of balancing. Courts have differed, however, on which interest should be balanced.¹⁴⁶

Generally, the courts have balanced the discoverant's need for the information against the agency's need to protect the document. An agency conducting an administrative proceeding would be justified in making a similar determination before disclosing any of its own documents which might be privileged. Striking this balance, or delegating to an employee the authority to strike this balance, will be preferable to a stonewall refusal to release a certain official document. However, the "public interest" should also be considered in the formula,¹⁴⁷ and in rulemaking the public interest is strongly in favor of disclosure of any government documents which a

139. FED. R. CIV. P. 26, 34.

140. See *United States v. Reynolds*, 345 U.S. 1, 6-9 (1953); Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966). See also *United States v. Nixon*, 418 U.S. 683, 706, 710-11 (1974).

141. See generally 4 J. MOORE, *FEDERAL PRACTICE* ¶¶ 26.61[1]-[6.1], [7] (2d ed. 1975); 2 J. WEINSTEIN & M. BERGER, *supra* note 60, ¶¶ 509[05]-[10]; Berger, *How the Privilege for Governmental Information Met Its Watergate*, 25 CASE W. RES. L. REV. 747 (1975); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1962).

142. 2 J. WEINSTEIN & M. BERGER, *supra* note 60, ¶¶ 509[02]-[04].

143. Many agencies make rules affecting foreign affairs or national defense and rulemaking directly involving these subjects may be exempt from notice and comment procedures. APA §4 (a), 5 U.S.C. § 553(a) (1970). See Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 222 (1972).

144. See Comment, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 149-56 (1976).

145. See Tomlinson 136.

146. See Comment, *supra* note 144, at 143-45.

147. See *id.* at 143. See also FED. R. EVID. 509(a)(2) ("Official information . . . the disclosure of which is contrary to the public interest . . .").

participant in the proceeding feels may lead to a more complete record. Agencies should, therefore, be hesitant to withhold any information from a rulemaking participant on the grounds of the official information privilege.

(c) *The Freedom of Information Act as a discovery tool.* The enactment of the Freedom of Information Act (FOIA) reflected Congress' determination that widespread disclosure of government information is in the public interest.¹⁴⁸ Indeed, if a rulemaking participant desires information contained in a government file, the FOIA may be the best available discovery tool.¹⁴⁹ Access to agency documents through the Act need not be in conjunction with a particular proceeding, therefore an attempt to secure documents may begin immediately after an interested person receives any hint that a rulemaking is being considered. The time limits under the new amendments to the FOIA should permit prompt access to agency files.¹⁵⁰

The FOIA provides de facto prehearing discovery since the agency cannot limit access to information in its files to return at hearing. The judicial opinions enforcing the Act evidence a much greater inclination to open up the files of agencies than do judicial interpretations of the ordinary discovery provisions. On the other hand, while the use of the FOIA for discovery purposes has not been proscribed, some courts have taken a dim view of efforts to use the Act as a substitute for Federal Rule 26.¹⁵¹ Nonetheless, in agency proceedings where discovery is limited, as in most rulemaking, the FOIA may fill an important void.¹⁵²

148. See S. Doc. No. 93-82, 93d Cong., 2d Sess. 1-3 (1974).

149. The FOIA does not require creation of material in government files. A request which requires compiling information may be refused, and hence the Act will not serve the same function as interrogatories or the like.

150. See 5 U.S.C.A. § 552(a)(6) (Supp. 1976) (requiring agency response within 10 days to any person requesting information under the Act). *But cf.* *Open American v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976) (permitting FBI to exceed time limits where compliance efforts were shown to have been made with "due diligence" and in "good faith").

151. See, e.g., *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *National Cable Television Ass'n v. FCC*, 479 F.2d 183, 193 (D.C. Cir. 1973); *Lincoln National Bank v. Lampe*, 45 U.S.L.W. 2195 (N.D. Ill. Sept. 13, 1976) *Verrazano Trading Corp. v. United States*, 349 F. Supp. 1401, 1403 (Cust. Ct. 1972). *But see* K. DAVIS, *supra* note 30, at 63 (contending that FOIA was intended to benefit party in an agency proceeding as well as to compel disclosure to the electorate); Comment, *Taxpayers Discovery in Civil Federal Tax Controversies*, 51 NEB. L. REV. 290, 294 (1971).

The FTC attempted to separate the FOIA from discovery by channeling discovery through administrative law judges (in accordance with traditional procedures) and FOIA requests through agency-wide FOIA processes. See *J.J. Newberry Co.*, 30 Ad. L.2d 816 (FTC 1972); *Hearst Corp.*, 30 Ad. L.2d 92 (FTC 1971). A similar approach is suggested in Hamilton at 1175.

152. See *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 352 (D.C. Cir. 1972), *rev'd*, 415 U.S. 1 (1974) (staying an agency proceeding until information was released under the FOIA, apparently because the renegotiation process did not include the availability of discovery).

It is important to emphasize that the FOIA does not permit the agency to distinguish between requesting parties; it requires disclosure to "any person."¹⁵³ One implication of this terminology is that access is available without any demonstration of need. Thus, from an interested person's point of view, the Act is the perfect discovery device: the agency cannot limit access to information by requiring a showing of need, reasonable scope or relevancy to a proceeding.¹⁵⁴ Secondly, the Act's language implies that any number of interested persons may seek such unlimited "discovery." Although the broad scope of the Act enhances its utility from a private interest's point of view, its breadth is a mixed blessing in terms of the general public interest. While Congress clearly found that the public was best served by burdening the public treasury with the considerable expense of providing broad disclosure of information and ordained that disclosure take precedence over the agencies' ability to perform their primary functions, a paramount public interest still dictates that information requests not be permitted to interfere with or interrupt the rulemaking process. The FOIA may arm those who are adversely affected by a proposed regulation with a technique for frustrating the rulemaking effort by preventing a rulemaking agency from closing the record or issuing a rule pending disclosure of great quantities of information no matter how important or relevant.

In situations not involving rulemaking, there has been substantial controversy over whether courts can stay agency proceedings until final determination with respect to an FOIA request. Although the Supreme Court refused to stay proceedings in the only context in which this question has been presented to it, it refused to eliminate the possibility that it might do so in other settings.¹⁵⁵ Despite the statutory effort to speed compliance by the imposition of strict time limits within which an agency must act on a request,¹⁵⁶ any documents which the agency wishes to protect and which are arguably exempt from disclosure may be released only after a court proceeding. An FOIA case may take considerable time and thus the danger remains of a de facto denial of access to information necessary for meaningful participation in rulemaking. But rulemaking involves a broad public interest, and a court should be reluctant to bridle that interest for the purpose of a

153. 5 U.S.C. § 551(a)(3) (1970).

154. The Act is probably an overreaction to the agencies' use of "good cause" and similar language in the old public information provision of the APA to shut out virtually all public scrutiny. See S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965); Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 765-66 (1967) (criticizing broad access without requiring a reason).

155. *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 17-20 (1974); *accord*, *Encyclopedia Britannica, Inc. v. FTC*, 517 F.2d 1013 (7th Cir. 1975); *General Cigar Co. v. Nash*, 36 AD. L.2d 1073 (D.D.C. 1975); *Title Guarantee Co. v. NLRB*, 37 AD. L.2d 685 (S.D.N.Y. 1975).

156. See note 150 *supra* and accompanying text.

single Information Act request. This is especially true since an interested person who receives new information can always petition for modification of a final rule under section 4(d) of the APA.¹⁵⁷ The present posture of the courts, therefore, is probably correct: stays should be considered, but only reluctantly granted.

Nine exemptions limit access to information under the FOIA and specifically define the information which the agency may withhold.¹⁵⁸ Thus the structure of the Act is to grant total access and then withdraw, through the exemptions, specific categories of documents. The agencies may withhold information only by overcoming the presumption in favor of disclosure through a demonstration that one of the exemptions applies. Two exemptions in particular serve to protect the kind of government information frequently desired by rulemaking participants: exemption 5, the interagency and intra-agency information exemption, and exemption 7, the exemption for investigatory files compiled for law enforcement purposes. A brief discussion of these two exemptions in the rulemaking context may be helpful.

The internal documents exemption is the one most closely related to traditional discovery doctrines.¹⁵⁹ Interpretation of this exemption has been based on the notion that discovery of the mental processes of agency personnel should not be permitted. This interpretation is supported by the

157. 5 U.S.C. § 553(e) (1970).

158. 5 U.S.C. § 552(b) (1970), *as amended by* Pub. L. No. 93-502, 88 Stat. 1561 (1974), provides that the Act does not require disclosure of matters that are:

- (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (9) geological and geophysical information and data, including maps, concerning wells.

159. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148-53 (1975); EPA v. Mink, 410 U.S. 73, 85-86 (1973).

FOIA's legislative history, which clearly indicates that the exemption was intended to prevent the agencies from operating in a "fishbowl."¹⁶⁰ This exemption protects the opinion portions of agency documents,¹⁶¹ and hence, the overall effect is to render the FOIA useless as a means of uncovering the reasons behind a proposed rule.¹⁶²

The other important exemption, the investigatory files exemption, may not apply to rulemaking files. As amended in 1974, this exemption applies only to "investigative records compiled for law enforcement purposes."¹⁶³ Clearly, rulemaking has law enforcement goals and, as such, any investigation conducted for the purpose of promulgating a rule would appear to be within the language of the exemption. Records compiled for rulemaking may be considered law enforcement because the law-defining process of rulemaking is essentially prophylactic;¹⁶⁴ that is, its function is to define the law so as to prevent violations.¹⁶⁵ Nevertheless, the Attorney General specifically stated that "[r]ecords generated for such purposes as determining the need for new regulations . . ." are not compiled for law enforcement purposes.¹⁶⁶ This conclusion is supported by a statement made by the sponsor of the 1974 amendment to this exemption, Senator Hart, who suggested that the exemption was intended to cover only judicial-type law enforcement proceedings which focused on specific violations.¹⁶⁷ Further support for limiting the exemption to proceedings involving actual violations is found in the few FOIA cases which have tried to define the extent of the term "law enforcement."¹⁶⁸

160. S. REP. NO. 813, *supra* note 154, at 9.

161. See *EPA v. Mink*, 410 U.S. 73, 85-89 (1973).

162. However, opinion-type documents which are "secret law" must be disclosed. For example, an interpretation of a regulation or an internal directive modifying a regulation would have to be released. See Davis, *supra* note 148, at 797. Also, the thinking of the agency should be disclosed in the notice of proposed rulemaking. See text accompanying note 203-05 *infra*.

163. 5 U.S.C. § 552(b)(7) (Supp. IV 1974). In its original form, the exemption applied to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7) (1970).

164. See *National Petroleum Ref. Ass'n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

165. Support for this notion is found in the Attorney General's memo on the 1974 amendments to the FOIA in which it is suggested that the scope of "[l]aw enforcement" includes not merely the detection and punishment of law violation, but also its prevention." ATTORNEY GENERAL'S MEMORANDUM, *supra* note 78, at 6.

166. *Id.* See Note, *Developments Under the Freedom of Information Act—1974*, 1975 DUKE L.J. 416, 450-51.

167. *Freedom of Information Act and Amendments of 1974 Sourcebook: Legislative History, Texts, and Other Documents*, 94th Cong., 1st Sess., at 333 (Joint Comm. Print 1975) (the exemption would apply to "a concrete prospective law enforcement proceeding").

168. "[W]here the inquiry departs from the routine and focuses with special intensity upon a particular party, an investigation is under way." *Center for National Policy Review v. Weinberger*, 502 F.2d 370, 373 (D.C. Cir. 1974); *accord*, *Rural Housing Alliance v. USDA*, 498 F.2d 73, 81 (D.C. Cir. 1974) (distinguishing between files relating to "surveillance or oversight" and

The 1974 amendment of the exemption which changed "files" to "records" also suggests an intention to protect only specific law enforcement materials.¹⁶⁹ To understand the full impact of what appears to be a mere semantic amendment, one must recognize the perceived trend in the development of the law just prior to 1974. In a major shift in perspective, the District of Columbia Circuit began deciding cases involving the exemption in such a way as to imply a blanket exemption for all files compiled in law enforcement proceedings.¹⁷⁰ The drafters of the 1974 amendment thought that the term "records" would focus the exemption more narrowly on only the investigative portions of agency files and not on entire files compiled in furtherance of investigations. It is difficult to conceive of any portion of a rulemaking file which would take on the aspects of specific law enforcement material. Again, the exemption makes sense only in terms of the specific focus of an investigation on an individual; an investigative "record" implies information related to a particularized quasi-judicial inquiry, not a quasi-legislative record. All of the above is reasonable with respect to subsection (A) of exemption (7), but the other subsections, (B-F), have their own justifications which raise questions as to their applicability in rulemaking. For example, there may be good reason why an informer's identity should be protected, even in rulemaking. Perhaps the specific subsections of the exemption, other than subsection (A), should be treated as expressing specific purposes which have independent significance in addition to the general prevention of interference with agency law enforcement and, hence, should be applied where these specific purposes can be demonstrated. Such an approach conflicts with the clear language of the Act, however, for the phrase "investigative records compiled for law enforcement purposes" applies to all the parts of the exemption. Indeed, the specific provisions of the exemption appear to be intended to limit further

"investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions"). Although these two cases were decided prior to the effective date of the amendment, the above interpretations seem consistent with the thrust of the 1974 changes and hence continue in force with respect to this issue).

169. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 78, at 5-6.

170. See, e.g., *Rural Housing Alliance v. USDA*, 498 F.2d 73 (D.C. Cir. 1974); *Dittlaw v. Brinegar*, 494 F.2d 1073 (D.C. Cir.), *cert. denied*, 419 U.S. 974 (1974); *Aspin v. Laird*, 491 F.2d 24 (D.C. Cir. 1973).

The trend began with *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974), a case that was distinguishable because it involved a criminal investigatory file. Criminal files should be treated separately and given far more protection than civil investigatory files in order to prevent disruption of criminal law enforcement and protect those under criminal investigation. It is possible that the District of Columbia Circuit, with its reputation for strict interpretation of the FOIA exemptions, merely appeared to apply this exemption more broadly because the agencies were presenting specific factual situations which justified a broad reading of the exemption.

the scope of the introductory phrase and not to provide individual excuses for withholding information. On balance, weighing the pro-disclosure bias of the Act, it seems more consistent with the original congressional intent, as well as the congressional intent in amending the Act, to consider rulemaking files outside the exemption altogether.

(d) *Government files as a source of private information.* In discussing the use of discovery techniques and the FOIA to gain access to agency files, it is important to note that these files may also be a prime source of private information.¹⁷¹ An astute participant in a rulemaking proceeding should therefore consider the possibility of seeking access to government files before deciding that a desired private document is unavailable.

The Administrative Conference recommended that non-privileged private information in the hands of the government be discoverable by parties to an agency adjudication, regardless of whether the information was transmitted to the agency in confidence.¹⁷² This proposal would appear to have equal validity in rulemaking.

The FOIA may also offer access to the fund of private information in government files. Two major exemptions, the fourth and the sixth,¹⁷³ may protect this private information, but both have been given very limited scope by the courts.¹⁷⁴ In addition, it is uncertain whether an agency is obliged to assert an available exemption.¹⁷⁵ Even if such action were required by law¹⁷⁶

171. See Gellhorn 126-29.

172. *Report of the Comm. on Compliance and Enforcement Proceedings in Support of Recommendation No. 21*, *supra* note 9, at 654-55. The conference seemed concerned only with the effect public disclosure might have on the agency. The report evidences no concern for individual privacy as such. *Id.* at 655-56 (referring to the potential applicability of FOIA exemption (4), protecting commercial or financial information, rather than exemption (6), personal privacy).

173. The text of the exemptions is quoted in note 158 *supra*.

174. Judicial construction of these exemptions conforms with the apparent lack of respect the drafters of the FOIA had for the right of privacy. The sole exemption which covers individual privacy is triggered only when the invasion is "clearly unwarranted"; disclosure which constitutes an arguably justifiable invasion of privacy is compelled by the Act. See Davis, *supra* note 154, at 783; Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089, 1194 (1969). In applying this exemption, the courts have balanced the right to privacy against the need for disclosure, giving greater weight to the latter consideration. See *Department of the Air Force v. Rose*, 425 U.S. 352, 378-82 (1976); *Getman v. NLRB*, 450 F.2d 670, 674-76 (D.C. Cir. 1971). It would seem that the right to privacy demands better treatment. Indeed, in the context of judicial discovery, federal courts have recognized that interests in privacy may call for a measure of extra protection. See RULES ADVISORY COMM. 497.

175. For a discussion of this question, see Note, *Protection from Government Disclosure—The Reverse-FOIA Suit*, 1976 DUKE L. J. 330. Several private parties who have supplied information to the government have sought to prevent disclosure of the information in response to FOIA requests. *Id.* at 331-32.

It would appear to be a misuse of public funds for the government to defend these "reverse FOIA" cases. The plaintiff has the burden of making a prima facie case, and if a party can carry

or if a common law privilege were created for private documents,¹⁷⁷ the protection afforded would be of limited value since the affected private person would often not receive notice that his privacy had been jeopardized by a request or intention to release.¹⁷⁸ Clearly, the absence of adequate protection for those who submit private information to the government is the one area where lack of diligence by the drafters of the FOIA has done the most damage. Nonetheless, for one seeking information, it is a ready avenue and should not be ignored in preparing for rulemaking.¹⁷⁹

this burden, there is no justification for the government's wasting public funds in an attempt to rebut an individual's right to protect information which is arguably confidential.

176. There has been some suggestion that the fourth exemption, 5 U.S.C. § 552(b)(4) (1970), prohibits disclosure of confidential private information. *See* Westinghouse Elec. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974); *see also* GTE Sylvania v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352 (D. Del. 1975); Burroughs Corp. v. Schlesinger, 403 F. Supp. 633 (E.D. Va. 1975). But the burden is on the one seeking to prevent disclosure. *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171 (D. Del. 1976); *Sears, Roebuck & Co. v. GSA*, 402 F. Supp. 378 (D.D.C. 1975); *Hughes Aircraft v. Schlesinger*, 384 F. Supp. 292 (C.D. Cal. 1975). The state of confusion is demonstrated by two recent Fifth Circuit cases. The first, *Continental Oil v. FPC*, 519 F.2d 31 (5th Cir. 1975), *cert. denied sub. nom. Superior Oil v. FPC*, 96 S. Ct. 2168 (1976), appears to have held that exemption (4) is mandatory. The second, *Pennzoil Co. v. FPC*, 534 F.2d 627 (5th Cir. 1976), concluded that the FOIA did not prevent disclosure. *Cf. LaMorte v. Mansfield*, 438 F.2d 448 (2d Cir. 1971) (the exemption belongs to the agency, not to private individuals).

177. For example, such a privilege could be developed through judicial review of agency decisions to release private information in order to determine whether the action was an abuse of discretion. *See* Note, *supra* note 175, at 344-47.

Whether a private right of action can be implied under 18 U.S.C. § 1905 (1970) (making disclosure of trade secrets and other confidential information by a government employee a criminal offense) is a matter of some dispute. For example, in *Charles River Park "A," Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975), the court originally held that it could imply such a right, but subsequently changed its mind.

178. Although one court has refused to imply a right to notice prior to disclosure of private information in the hands of an agency, *Pharmaceutical Mfrs. Ass'n v. Weinberger*, 401 F. Supp. 444, 448 (D.D.C. 1975), a few agencies have provided for a limited right to notice by regulation. *See* 32 C.F.R. § 1285.7(b)(7) (1976) (Defense Supply Agency required to give notice whenever "there is reason to believe that the source of the information . . . may object to release and may have an enforceable right to prevent release . . ."); 21 C.F.R. §§ 4.45-46 (FDA required to give prior notice where confidentiality is close or "uncertain"). These notice procedures have been found to conform to due process requirements. *See Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171, 178 (D. Del. 1976) (Defense Supply Agency); *Pharmaceutical Mfrs. Ass'n v. Weinberger*, 411 F. Supp. 576, 578 (D.D.C. 1976) (FDA).

One means of providing some protection for private persons would be to require rulemaking participants to attempt to obtain the information from the private person himself prior to seeking access to the agency files. *See, e.g.,* FTC Procedures and Rules of Practice, 16 C.F.R. § 3.36(b) (1977). Such an approach was rejected by the Administrative Conference in developing its recommendations for agency adjudication. Tomlinson 139.

179. Some agencies, such as the FTC, require a showing that the private information was not available through voluntary means. Such requirements have been criticized. Bennett, *Post-Complaint Discovery in Administrative Proceedings: The FTC As a Case Study*, 1975 DUKE L. J. 329.

(e) *Discovery or FOIA requests for Exhibits*. It should be possible for interested persons to obtain exhibits and other "tangible things" to the same extent as documents.¹⁸⁰ Many agency discovery statutes authorize subpoenas only for "documentary evidence,"¹⁸¹ but the realities are that discovery has been made applicable, as recommended by the Administrative Conference, to "documents and tangible things."¹⁸²

An interesting question is whether the FOIA provides access to exhibits and tangible things. The Act refers to "records,"¹⁸³ and one early case held that this did not include exhibits.¹⁸⁴ However, there is no practical reason to distinguish documents from other tangible things; therefore, tangible things should be made available to the same extent as documents despite the semantic argument that they are not "records."¹⁸⁵

Protective Orders and Other Protections for Private Information

Concomitant with the availability of discovery in rulemaking is the need to protect sensitive private and government information through protective orders, assurances of confidentiality, devices in the nature of *in camera* inspection, and other measures.¹⁸⁶ It is clear that, where rulemaking procedure provides for discovery, protective devices should be available.¹⁸⁷ The context of rulemaking does not affect the validity of this general proposition; however, the amorphous character of informal rulemaking does create some difficulties in providing protective devices. One problem is determining who should have authority to grant protective orders. In adjudication, the administrative law judge can perform this function,¹⁸⁸ but,

180. Tomlinson 126.

181. See, e.g., FTC Act § 9, 15 U.S.C. § 49 (1970).

182. See Tomlinson 126.

183. 5 U.S.C. § 552(a)(3) (1970).

184. *Nichols v. United States*, 325 F. Supp. 130, 135-37 (D. Kan. 1971), *aff'd on other grounds*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972) (denying access to exhibits relating to President Kennedy's assassination). See Note, *supra* note 23, at 904 n.55.

185. In *Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973), the court interpreted literally the terms "memorandums or letters" in FOIA exemption (5). It found that the exemption did not include films, and therefore ordered that internal government films be disclosed. *Id.* at 704. See Note, *Developments Under the Freedom of Information Act—1975*, 1976 DUKE L.J. 366, 391. Consequently, exhibits and tangible things may be more available since they could never be subject to the internal document exemption under the *Stokes* rationale.

186. Judge Weinstein lists six measures which should be considered. 2 J. WEINSTEIN & M. BERGER, *supra* note 60, ¶ 508(3). The Administrative Conference lists various protections. *Recommendation No. 21: Discovery in Agency-Adjudication*, *supra* note 9, at 42.

187. See *FTC v. United States Pipe & Foundry Co.*, 304 F. Supp. 1254, 1260-61 (D.D.C. 1969); Tomlinson 140-41. Cf. *FTC v. Crowther*, 430 F.2d 510 (D.C. Cir. 1970) (questioning the agency's refusal to provide same protection for business information given in similar previous case).

188. See Gellhorn 182. The presiding officer can also perform this function in formal rulemaking. See Hamilton 1175.

generally speaking, there is no independent presiding officer in rulemaking. The agency could delegate authority to the discovery official suggested above;¹⁸⁹ however, the power to create non-public files in rulemaking should be closely circumscribed.¹⁹⁰ If the agency delegates this authority to a presiding officer or a special discovery officer, it must do so with very restrictive standards.¹⁹¹ Rulemaking differs from adjudication in that public participation is essential to its functioning. Anything which closes the process or excludes the public detracts from its efficacy. Thus, only in the most extreme case should information be shielded from the public. Caution might, in fact, require that the power to apply protective devices should remain in the agency head. Whether the agency head retains the authority or delegates it, great care should be taken to limit the use of protective devices in rulemaking.

Another major problem is the effect of agency protective orders on information sought under the Freedom of Information Act. The general rule developed by the courts is that assurances of confidentiality—informal protective orders—do not necessarily protect documents submitted to the agency even when submitted in reliance on the assurance.¹⁹² The only effect of such orders, it appears, is to commit the agency to claim an exemption for the document and to attempt to protect the documents from judicial release.¹⁹³

Roles of the Presiding Officer and the Agency Staff in Discovery

(a) *The presiding officer.* The Administrative Conference recommendation for agency adjudication relies throughout on a strong presiding officer, and it would delegate to him broad discovery authority, free from interlocutory appeal except by certification.¹⁹⁴ The difficulty with applying this recommendation to rulemaking is, once again, the amorphous nature of the rulemaking procedure, and particularly the uncertain functions of the presiding officer.

There has been little study of the role of a presiding officer in rulemaking. If the proceeding is totally written, there might be no presiding officer,

189. See text accompanying notes 126-27, *supra*.

190. *Home Box Office, Inc. v. FCC*, No. 75-1280 at 97 (D.C. Cir. Mar. 25, 1977) (requiring that information be disclosed for comment "at some time").

191. See Gellhorn, *supra* note 61, at 422-23 (arguing that the agency should set standards for presiding officers' decisions regarding sensitive private information).

192. See *Petkas v. Staats*, 501 F.2d 887, 889-90 (D.C. Cir. 1974); *Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973). Assurances of confidentiality will protect personal documents from disclosure under the Privacy Act, 5 U.S.C. §§ 552a(k)(2), (5), (7) (1970), but it has been suggested that they be sparingly granted. Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed. Reg. 28,948, 28,973 (1975).

193. See note 175 *supra* and accompanying text.

194. *Recommendation No. 21: Discovery in Agency Adjudication*, *supra* note 9, at 242.

or only a designated agency employee with whom comment should be filed. Where there is only an oral argument-style hearing, the presiding officer may be part of a special staff employed to hear rulemaking proceedings, or simply any designated member of the agency investigative staff. The major hybrid rulemaking cases¹⁹⁵ clearly envision a somewhat judge-like presiding officer. With respect to their ability to control the proceeding, these officers function like a judge. In a hybrid proceeding, such control is exceedingly important to integration of the testimonial devices with the informal process.

In informal rulemaking, however, the judicial model is inappropriate. The presiding officer must remain a functioning party in the information gathering process. Rulemaking is essentially an investigative process which seeks facts and opinions related to questions of policy. A presiding officer in rulemaking must cooperate with the investigative staff to insure that the rulemaking record contains as much useful information as possible. In order to promote the maximum utilization of the available expertise on the subject, the presiding officer should work closely with the staff in formulating the proposed rule and any recommendation to the ultimate decision-maker. Thus, the notion of separation of function is inconsistent with the concept of rulemaking and with the most effective use of the process.¹⁹⁶ In sum, the presiding officer should not sit back passively but should aggressively attempt to develop the record through an informed handling of the proceeding.¹⁹⁷ Where the presiding officer is committed to developing a complete record, formal discovery may be less important because he may be relied upon to explore, or to direct the staff to explore, avenues of information suggested by an interested person.

Where a presiding officer for rulemaking is established by the agency procedure, the Administrative Conference recommendation should be incorporated. The near absolute control proposed by the Conference is a practical necessity; indeed, the breadth of rulemaking supports even more control over discovery by the presiding officer than in adjudication. Interlocutory

195. See, e.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 630-31 (D.C. Cir. 1973).

196. See *Hoffman-La Roche, Inc. v. Keindienst*, 478 F.2d 1, 13 (3d Cir. 1973); see also Scalia & Goodman, *Procedural Aspects of the Consumer-Product Safety Act*, 20 U.C.L.A. L. REV. 899, 922 (1973). On the other hand, two views of the record, that of the presiding officer and that of the investigative staff would be valuable to the ultimate decision-maker and to a reviewing court. Intramural bias could be checked by opening these two recommendations to public criticism before submission to the agency head for decision.

197. The Anglo-American concept of a passive judge has been criticized even in the traditional judicial setting. See Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). Clearly the presiding officer in rulemaking should be knowledgeable and well prepared, and he should bear the greatest responsibility for a complete record.

appeal should be prohibited and certification should be discouraged. Certainly stays should not be issued pending interlocutory appeals.¹⁹⁸

Where there is no presiding officer who can readily control discovery, some other method must be found, for any means of providing discovery still requires substantial control over its use. A member of the agency's investigative staff might be empowered to make unreviewable decisions as to private discovery. As suggested above,¹⁹⁹ perhaps each agency which makes substantial use of informal procedures should designate a permanent discovery officer who will handle all discovery requests made in conjunction with any informal proceeding. One advantage of this special office would be its independence from the rulemaking staff. This independence would enable the officer to make a disinterested determination of the likely value of a proposed avenue of inquiry. Furthermore, under this system, discovery might be available before the actual rulemaking process is underway, and would not have to await the appointment of a presiding official. This benefit would be of particular significance in informal rulemaking, where it is often difficult to tell exactly when the rulemaking begins. Of course, where there is no actual proposed rule, the burden of demonstrating the need for discovery will be severe. Yet there may frequently be situations when a rule is proposed well before the determination is made to have an oral proceeding or to appoint a presiding officer of some sort. Similarly, where there will be no oral proceeding or presiding officer, this permanent discovery officer may be the only mechanism aside from direct request to the agency by which discovery can be made available.

(b) *The agency staff.* The agency staff should not be seen as advocates but as investigators actively developing a record without regard to the implications of the information uncovered.²⁰⁰ A major problem arises when the agency staff itself feels compelled to "prove the rule." It is, of course, human nature for the development staff to become advocates of the initial rule.²⁰¹ However, staff members should be encouraged to avoid this self-image. Discovery should serve to check this potential advocacy and to

198. Harm from the failure to provide timely discovery is less likely to result in rulemaking because there is no absolute time by which information must enter the record. Information of any significance can always be accepted until the final process of molding the rule has begun. Indeed, even after the rule is issued, important information may be submitted to the agency with a petition for amendment or repeal. APA § 4(d), 5 U.S.C. § 553(e).

199. See text accompanying notes 126-27 *supra*.

200. See Gellhorn 177 (FTC should disclose all reports prepared by experts); Verkuil, *supra* note 112, at 224 (agencies should not be permitted to exclude from the rulemaking record evidence adverse to their position). See also Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 524 (1969) (agency should take affirmative steps to obtain information for any point of view which it cannot reasonably expect the interest group to adequately protect).

201. See Pedersen, *supra* note 24, at 56.

assure that the staff does not unconsciously avoid finding some information. The need for discovery and other procedural safeguards, therefore, is greatest when the staff of an agency demonstrates that it perceives itself in an advocate's rather than an investigator's role.²⁰²

Requiring Disclosure to Complement Discovery

While the extent of a right to discovery in informal rulemaking is unclear, many of the devices of discovery should be provided simply because they enhance the efficacy of the information gathering process and because adequate sources of information are essential to effective participation. But the entire problem may be approached from a different angle: information should be gathered and disclosed by the agency as a necessary element of the notice required by the APA and the fundamental notions of fairness underlying the rulemaking process.²⁰³ Certainly, the concept of adequate notice should include a requirement that the agency disclose, to the greatest extent possible, what it intends to do, and may suggest that a preliminary statement of basis and purpose accompany a proposed rule.²⁰⁴ However, not only should the preliminary regulatory intention of the agency be disclosed, but also the information which comes into its possession. An important function of notice is to apprise the public of the information the

202. For a discussion of one staff's failure to attempt to develop a complete record and its inability to avoid becoming an advocate for the rule, see *Yale Note* 827-29.

203. Notice is required by APA § 3(b), 5 U.S.C. § 553(b) (1970). See Verkuil, *supra* note 112, at 235. See also Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 789-90 (1976); Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869, 880-81 (1971) (suggesting that Federal Register notice as required by APA § 3 (b), 5 U.S.C. § 553(b) (1970), is ineffective to inform the public).

204. See *Home Box Office, Inc. v. FCC*, No. 75-1280 at 91-92 (D.C. Cir. Mar. 25, 1977) (requiring agencies "to set out their thinking in notices of proposed rulemaking" so that an agency discloses what it "thinks it knows in its capacity as a repository of expert opinion"); *American Pub. Gas Ass'n v. FPC*, 498 F.2d 718, 722 (D. C. Cir. 1974) ("The procedure chosen by the Commission must of course give the parties fair notice of exactly what the Commission proposes to do . . ."); see also *Maryland v. EPA*, 530 F.2d 215, 222 (4th Cir. 1975); *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1019-20 (3d Cir. 1972) (parties were denied right to participate on a particular issue because the notice failed to disclose that the proposed rule concerned the issue). But see *Common Carrier Conference v. United States*, 534 F.2d 981, 983 (D.C. Cir. 1976) ("Even where there is a technical flaw in the notice, it can be overcome if the actual conduct of the proceeding provides notice to the participants of what is under contemplation."); *Texaco, Inc. v. FEA*, 531 F.2d 1071, 1079-82 (Temp. Emerg. Ct. App. 1976), *cert. denied*, 96 S. Ct. 2662 (1976) (too much specificity should not be required in rulemaking notice); *Shell Oil Co. v. FPC*, 520 F.2d 1061, 1076 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 2661 (1976) (notice was not insufficient because it did not say that the order might extend to flowing gas).

The notice and comment procedure might be enhanced by a requirement that, at least in major rulemaking efforts, the agency investigative staff publish with the notice a preliminary "statement of basis and purpose" based on the initial findings, theories and conclusions which went into the proposed rule. This requirement would not be as burdensome as it first would appear, because the staff will probably have drafted some form of document to present to the agency head or ultimate decision-maker in order to support issuance of a proposed rule.

agency has already accumulated and upon which it is basing its proposed rule.²⁰⁵ Obviously, the notice cannot reiterate all the information supporting a proposed rule. But the information can be placed immediately on the public record, and the notice can explain how to obtain access to that record. In addition, any information acquired by the agency after issuance of the proposed rule should be promptly added to the public record.

Again, the conceptual difference between the agency staff in rulemaking and in adjudication becomes significant. In adjudication, the staff may be justified in acting as advocates and in controlling information which it intends to use. But in rulemaking it is responsible for developing a complete record, and disclosure of all the information which is needed to enable participants to question contrary information is essential to that task.²⁰⁶ The staff cannot withhold information from the public record merely because it does not support the rule. In short, its job is not to "prove the rule" but to insure that the agency makes the right decision, even if that decision is contrary to the staff's preliminary position.

The Environmental Protection Agency has increased the extent of its notice in response to judicial pressure. In *Portland Cement Association v. Ruckelshaus*,²⁰⁷ the District of Columbia Circuit found that the agency had failed to disclose in a timely fashion the test methodology and results used in promulgating a "standard of performance" for Portland cement plants under the Clean Air Act.²⁰⁸ As a result, the court ordered that the record be reopened so that the agency could receive written comments concerning this information.²⁰⁹ In reaching the decision, the court expressed the important proposition that making information publicly available is a necessary element of an efficient and fair rulemaking: "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."²¹⁰ The court favored disclosure of information as it was compiled in the on-going rulemaking process:

In order that rule-making proceedings to determine standards be conducted in orderly fashion, information should generally be disclosed as to the basis of a proposed rule at the time of issuance. If this

205. See Hamilton, *supra* note 73, at 63; Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1244 (1966); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 379-81, 395 (1975).

206. See *Home Box Office, Inc. v. FCC*, No. 75-1280 (D.C. Cir. Mar. 25, 1977). The decision is carefully limited to assuring the disclosure of all information used by the agency and should not be read to impose on informal rulemaking the judicial concepts of *ex parte* communication and separation of function.

207. 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

208. 486 F.2d at 392.

209. *Id.* at 393.

210. *Id.*

is not feasible, as in case of statutory time constraints, information that is material to the subject at hand should be disclosed as it becomes available, and comments received, even though subsequent to issuance of the rule—with court authorization, where necessary.²¹¹

Largely because of this case, the EPA has established a procedure whereby the proposed methodology is made public well in advance of a rulemaking in order to encourage comment.²¹²

Since the right to participate effectively compels the establishment of a right of ready access to the information which the agency intends to use in reaching a regulatory decision, several courts have held that failure to disclose information important to effective participation will taint the entire procedure.²¹³ *National Cable Television Association v. FCC*²¹⁴ involved the production of documents under the FOIA but the case is instructive on the issue of disclosure in rulemaking. The FCC had promulgated a new licensing fee schedule which would make the agency self-supporting. The key issue involved the allocation of costs among industries. The court found that the agency had not made disclosure adequate to enable the interested parties to contest the rule:

After setting forth this generalized explanation of its approach, however, the Commission failed to supply specifics, either as to the facts from which it had reasoned or as to the mechanical steps it had taken in deriving the final schedule.

Without data concerning the Commission's costs, it is not possible to determine the basis upon which the Commission allocated its direct and indirect costs among the regulated industries. Without disclosure of the final amount the Commission intended to recover from each industry, it is not possible to determine what, if any, noncost adjustments were made and whether the final schedule had any relation to the cost allocation. And without a definition and quantification of "value to the recipient" it is not possible to determine why and how the Commission might be deviating from a pure system of cost allocation. Thus, the Commission insulated itself from external criticism of its

211. *Id.* at 394. See *Virgin Islands Hotel Ass'n, Inc. v. Virgin Islands Water and Power Auth.*, 465 F.2d 1272, 1276 (3d Cir. 1972), *cert. denied*, 414 U.S. 1067 (1973) ("Concomitant with [a meaningful hearing] are the essential requirements of adequate notice, dissemination to the public of the facts and figures on which the Authority relies, and opportunity afforded to those attending the hearing to rebut such facts and figures"); Hamilton, *supra* note 24, at 1333; Pedersen, *supra* note 24, at 75.

212. See Williams, *supra* note 28, at 448-51.

213. See, e.g., *Hoffman-La Roche, Inc. v. Kliendienst*, 478 F.2d 1, 19-25 (3d Cir. 1973) (failure to disclose an advisory committee report was "so egregious as to have tainted the entire procedure" because the interested party may have made substantial use of the report). But insignificant nondisclosure, though inexcusable, is not reversible error. *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 489 (2d Cir. 1971).

214. 479 F.2d 183 (D.C. Cir. 1973).

method and rationale, leaving nothing open to challenge except the legality of its result.²¹⁵

This "opaque notice," the court stated, led to the Association's request for documents under the FOIA.²¹⁶ The decision implied that notice, not access to documents, should have solved the problem of arming participants with the means for questioning a rule. The term "adequate notice" must be viewed as commanding the disclosure of all information necessary to permit effective private participation in the rulemaking.²¹⁷

Finally, in *Long Island Ry. v. United States*²¹⁸ the plaintiff railroads alleged, among other things, that the ICC should have disclosed 32,420 data sheets. Judge Friendly, writing for a three-judge court, suggested that the agency might have improved its procedure by serving on the carriers a detailed summary of the data relied on, but that the failure to do so was not fatal to the proceeding because the carriers had sufficient notice of the documents which might have formed the bases of the rule and could have obtained all the information with little effort on their part.²¹⁹ The court was obviously swayed by the absence of any showing that the lack of disclosure had hindered the carriers from making an effective argument against the Commission's proposal.²²⁰ Although this conclusion may reflect proper judicial restraint in review of harmless procedural defects, a rulemaking agency should endeavor to disclose everything available to it which may be used in considering a proposed rule.²²¹ The primary issue here is not merely

215. *Id.* at 187.

216. *Id.* As to the merits of the FOIA request, the court suggested that the scope of the request "was coextensive with the scope of the Commission's documentary basis for its rules." *Id.* at 195. The documents were ones which the agency should have been able to identify, since it relied on them, and the court therefore ordered disclosure except where one of the exemptions in the FOIA applied. *Id.* at 194.

217. See *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) (FTC was required to disclose the basis for the "reasons to believe" upon which it determined to issue a proposed rule); *South Terminal Corp. v. EPA*, 504 F.2d 646, 659-60 (1st Cir. 1974) (court denied petitioners' claims that the EPA had given inadequate notice of the technical documents which would be relied upon, noting with approval that the EPA published notice that technical support documents were available).

218. 318 F. Supp. 490 (E.D.N.Y. 1970), *rev'd on other grounds*, *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224 (1973).

219. *Id.* at 498-99.

220. *Id.* at 499. Similarly, in *South Terminal Corp. v. EPA*, 504 F.2d 646, 660 (1st Cir. 1974), the First Circuit found that document disclosed after the hearing did not contain any information petitioners needed. See *Chrysler Corp. v. Department of Transp.*, 472 F.2d 659, 681 (6th Cir. 1972) (failure to disclose certain materials in a more timely fashion was cured by the opportunity for comment after the materials were made available); *accord*, *District of Columbia v. Train*, 521 F.2d 971, 997 (D.C. Cir. 1975).

221. One commentator has suggested that an agency should make timely voluntary disclosure of all information to which a person could obtain access under the FOIA. See Pedersen, *supra* note 24, at 83. This does not go far enough, however. It is urged that agencies place in a readily accessible public record (and give notice of how to obtain access) to all information

the ability of an interested person to dispute the rule, but the extent to which openness will facilitate and stimulate effective comment.²²² Thus, the notice of disclosure must also provide sufficient time to permit preparation of effective comment.²²³

CONCLUSION

In rulemaking, as well as formal adjudication, adequate sources of information are essential to effective participation. Therefore, the development of improved rulemaking procedures should include the incorporation of the various information gathering mechanisms traditionally available in adjudication. The investigative nature of rulemaking dictates that any improvement in the information gathering process will enhance the policy decision expressed in the rule.

The nature of the rulemaking process may affect the application of traditional discovery devices. Prehearing conferences can solve many of the problems inherent in the movement to engraft some trial procedures onto the rulemaking process. Compulsory process may enhance the opportunity to participate by permitting the accumulation of information favorable to an interest and by fostering the confrontation of adverse information. But the broad scope of many rulemaking efforts compels substantial control of compulsory process with respect to private information. Little control, however, need be imposed on the opportunity to obtain documentary information in government files. Here the Freedom of Information Act becomes an essential tool to anyone participating in an informal agency proceeding. The traditional discovery device of written interrogatories meshes well with notice and comment rulemaking because it offers the opportunity for interested persons to rebut or bolster information in written form and diminishes the need for the testimonial devices normally used at trial. Other traditional devices, such as depositions and admissions, do not appear generally appropriate to rulemaking but in rare situations may also enhance the information gathering process. And no discovery system is complete

disclosable under the Act as well as other information which they are not required to disclose but which they may use in the rulemaking. *See id.* at 78-79. Pedersen's suggestion reflects far more concern for a useful record in review than for assuring effective participation. *See id.* at 78-79.

222. *See FCC v. Schreiber*, 381 U.S. 279 (1965). "Publicity tends to stimulate the flow of information and public preferences which may significantly influence administrative and legislative views as to the necessity and character of prospective action." *Id.* at 294. *See also* S. Doc. No. 248, 79th Cong., 2d Sess. 258 (1946).

223. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 990 (D.C. Cir. 1976). In *Frizzell*, the court was skeptical, but upheld the rule despite the very short period between notice and the end of the comment period. Ordinarily, the court suggested, notice should be given at the time a decision that a new regulation is being considered becomes concrete. *See Pedersen, supra* note 24, at 85.

without some devices in the nature of protective orders for maintaining the confidentiality of information.

Complementary to a discovery system is a strict requirement of agency disclosure of the information on which its proposed rule has been based and which may be used to reach a final regulatory determination. The notion of adequate notice should be interpreted as requiring the agency to disclose and make readily accessible all the information it has relative to the rule. Complementing this full notice could be a requirement that the agency or its investigative staff publish with the proposed rule a preliminary "statement of basis and purpose."

Discovery and disclosure thus become not only matters of fairness but means by which the agency can attract more information and purify that which it attracts. In sum, adequate access to information is an important element in fair and efficacious rulemaking.