Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy

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INTRODUCTION

Federal, state, and local administrative agencies produce increasing numbers of policies that spread into every recess of modern life. So much so that what Justice Jackson called the "fourth branch" creates much of the "law" that controls many of the intimate details of our lives. This law finds expression more often through administrative rulemaking than through agency adjudication. This increasing emphasis on rulemaking has intensified the study of rules. Of the various types

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3. Recently courts and commentators have expressed some doubt as to the validity or utility of the distinction between rules and orders, or between rulemaking and adjudication. See, e.g., Appalachian Power Co. v. EPA, 477 F.2d 495, 500-01 (4th Cir. 1973) (court should look to issue of proceedings rather than classification to determine procedures necessary); Chicago v. FPC, 468 F.2d 731, 739 (D.C. Cir. 1971) (dictum), cert. denied, 405 U.S. 1074 (1973) (in many cases there is a fine line between adjudicatory and rulemaking proceedings); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.01, at 286 (1958) (particular activity, not label, should determine procedural needs). The Supreme Court's opinion in United States v. Florida East Coast Railway, however, demonstrates the continued validity of the distinction. 410 U.S. 224 (1973). The Court noted, in distinguishing between the promulgation of rules and the adjudication of disputed facts, that the two salient characteristics of rules are their general applicability and legislative nature. Id. at 234-46; see Hoffman-LaRoche, Inc. v. Kleindienst, 478 F.2d 1, 15 (3d Cir. 1973) (agency finding had characteristics of rules; proceeding was rulemaking). Courts have utilized general application as a characteristic of a rule even though the Administrative Procedure Act (APA) defines rules as covering actions of "particular applicability." Administrative Procedure Act § 2(c), 5 U.S.C. § 551(4) (1970). A rule may have general effect, but apply directly only to one or a few specific individual interests. See, e.g., Associated Electric Coop., Inc. v. Morton, 507 F.2d 1167, 1177 (D.C. Cir. 1974), cert. denied, 423 U.S. 830 (1975) (FPC rulemaking power includes setting rates for one customer); PBW Stock Exchange, Inc. v. SEC, 495 F.2d 718, 732 (3d Cir. 1973), cert. denied, 419 U.S. 898 (1974) (SEC has discretion to utilize rules or orders in dealing with specific individuals or situations); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1303, 1306 (10th Cir. 1973) (proposed EPA regulation, although a general rule, only affected one company). Agency action has the second characteristic, legislative nature, if it contemplates policymaking for the future. However, retroactive rules may be valid if their retrospective applicability is reasonable. See, e.g., SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (retroactive effect must be balanced against harm produced contrary to statutory design); Maceran v. District Dir., Immigration & Naturalization Serv., 609 F.2d 934, 959-50 (9th Cir. 1979) (retroactive application of rule invalidated due to undue hardship and lack of sufficient statutory interest); General Tel. Co. v. United States, 449 F.2d 946, 963-64 (5th Cir. 1971) (rule with retroactive effects not unreasonable or invalid). Thus, generalized application and prospective policy formulation serve as the best indications that agency action is a rule.
of substantive rules, legislative rules have been the most closely studied. By experimentation and analysis, we are beginning to understand legislative rulemaking, but our understanding of the substantive rules that do not fit easily into that category, such as interpretative rules and general statements of policy, remains primitive. Because even a brief survey of agency policy announcements suggests that nonlegislative rules predominate, the need to explore some of the characteristics and problems unique to these "lesser rules" is obvious.

Distinctions among legislative rules, interpretative rules, and general statements of policy have long been recognized. Legislative rules are those policy pronouncements that are made pursuant to legislative authority, that normally must be made through the procedures prescribed by the Administrative Procedure Act (APA), and that are subject to limited judicial review. An agency with such authority

4. The term "substantive rules" is used in this article to distinguish these rules from procedural rules. The term is often used to refer to legislative rules. See United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947) (hereinafter cited as ATT'Y GEN.'S MANUAL); Note, Administrative Law—FTC Denied Substantive Rulemaking Power, 21 Fla. L. Rev. 189, 199-200 (1973). Nonlegislative rules, however, may also be substantive; thus, the term "legislative rules" in this article means rules promulgated under legislative authority and in compliance with the notice and comment requirements of the APA. See Administrative Procedure Act §§ 4(a)(1)-(3), (b), 5 U.S.C. §§ 553(b)(1)-(3), (c) (1970); notes 7-9 infra and accompanying text.


7. See K. Davis, supra note 5, § 5.03, at 299. While the term "legislative rules" is not always used, the concept of legislative rules, rules made pursuant to delegated power, has become firmly established. See, e.g., Morton v. Ruiz, 415 U.S. 199, 235-36 (1974) (legislative rules promulgated under legislative power through requisite procedures); Mourning v. Family Publication Serv., Inc., 411 U.S. 356, 369 (1973) (Federal Reserve Board has rulemaking power to promote purposes of enabling legislation); National Nutritional Foods Ass'n v. Weinberger, 376 F. Supp. 142, 147-48 (S.D.N.Y. 1974) (legislative rulemaking power necessary to interpret statutes). Compliance with legislative rules can be enforced with legal sanctions. See Lee, supra note 6, at 3.

8. Administrative Procedure Act §§ 4(a)-(d), 5 U.S.C. §§ 553(b)-(e) (1970) (notice and comment procedures). If the "rules are required by statute to be made on the record after opportunity for an agency hearing," then sections 556 and 557 prescribe the appropriate trial-type procedures. See id. §§ 7, 8, 5 U.S.C. §§ 556, 557; cf. United States v. Florida East Coast Ry., 410 U.S. 284, 298-99 (1973) (most legislative rulemaking requires section 553 procedures; adjudication of disputed facts requires procedures of sections 556 and 557).

9. See, e.g., Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 485, 488 (D.C. Cir. 1974) (Secretary's decision nonarbitrary; judicial review presents the risk of arbitrary supervision and revision of efforts to implement that statute's purposes); Charmlite, Inc. v. FPC, 479 F.2d 684, 697 (5th Cir. 1973) (regulation consistent with legislative purpose will not be overturned); Superior Oil Co. v. FPC, 322 F.2d 601, 619 (9th Cir. 1963), cert. denied, 377 U.S. 922 (1964) (review of rules of general application presents only legal
initially designates a rule to be legislative by promulgating it pursuant to delegated authority or by acting so that it can be inferred that the rule is so promulgated. Interpretative rules are conceptually distinct from legislative rules. Contrary to some opinions, interpretative rules do not necessarily interpret either a statute or another rule.

question—whether factual premise is arbitrary or capricious). This limitation on judicial review should not be carried too far because agencies are not directly subject to control by the electorate. See Chicago v. FPC, 458 F.2d 791, 738-45 (D.C. Cir. 1971), cert. denied, 415 U.S. 1074 (1972) (factual basis of rule subject to review, but court may not substitute its judgment for the agency’s); Report of the Attorney General’s Comm. on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 101-02 (1941) (administrative agency not a representative body; members not subject to direct political control like legislators) [hereinafter cited as S. Doc. No. 8]. Legislative rules should be considered as “quasi-legislative,” not as legislation per se. See Chicago v. FPC, supra at 742 (rulemaking is not totally equivalent to legislative action), But cf. Pacific State Bank & Trust Co. v. White, 296 U.S. 176, 176-88 (1935) (rebuttable presumption that facts exist to justify exercise of police power attaches to state regulation with legally delegated authority just as well as to statute).


11. A distinguished judge, knowledgeable in the field of administrative law, has written that “[i]n this Court accepts with alacrity the authoritative view that it is not profitable to explore the asserted distinction between legislative rules and interpretative rules] which is ‘fuzzy at best.’ “[National Nutritional Foods Ass’n v. Weinberger, 373 F. Supp. 142, 146 n.6 (S.D.N.Y. 1974) (Frankel, J.).] See Shapiro, supra note 10, at 930. One can quarrel with Judge Frankel’s statement on several points. The distinction is not “fuzzy” but clear: a legislative rule must be promulgated pursuant to a legislative grant of authority. The distinction is troublesome not because it is unclear, but because it is not always easy to determine whether there was congressional intent to confer legislative rulemaking authority and if that authority is clear, whether the agency intended to promulgate the rule pursuant to that authority. Secondly, the distinction is indeed “profitable” since both the scope of review and the required procedure depend on the distinction. Lastly, Judge Frankel might have difficulty demonstrating that he has recited the “authoritative view.” See note 8-7 supra.

Philbeck v. Timmers Chevrolet, Inc. illustrates the distinction between legislative and interpretative rules. 499 F.2d 971 (5th Cir. 1974). The Fifth Circuit relied on four sources in applying the Truth in Lending Act: the Act, Regulation Z, the agency’s interpretative rules under Regulation Z, and staff opinion letters. Id. at 976. Unfortunately, the court lumped all the agency pronouncements, including Regulation Z, together and found that they were not binding on the court, but were only entitled to “great weight.” Id. Clearly, Regulation Z is a legislative rule, which can be distinguished from either the interpretative rules or the opinion letters, and is binding unless arbitrary or capricious. See note 9 supra. Contrary to the opinion, the court was free to substitute its judgment for the interpretative rules and the staff opinion letters but not for Regulation Z. See notes 15-16 infra and accompanying text.

12. See, e.g., American Bancorporation, Inc. v. Federal Reserve System, 509 F.2d 29, 34 (8th Cir. 1974) (amended regulation expressing agency’s view of original regulation an interpretative rule); Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974) (interpretative rules are the agency’s construction of a statutory provision); Reeves v. Simon, 607 F.2d 455, 458 (Temp. Emerg. Ct. App. 1974), cert. denied, 420 U.S. 831 (1975) (same); Agency Gen’s Manual, supra note 4, at 30 n.3 (interpretative rules are “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules that it administers”).

13. See K. Davis, supra note 3, § 5.03, at 304 (interpretative rules may also interpret another interpretative rule, judicial decisions, administrative decisions, administrative rulings, any other law or interpretation, any combination of these, or nothing at all).

It is sometimes difficult to determine whether an announcement changing a legislative rule is an amendment of the rule or merely an interpretative rule based on the legislative
The authority to develop interpretative rules rarely emanates from a specific legislative grant; the power is most often derived from the establishment of an administrative agency and the nature of its expertise. Because interpretative rulemaking is usually an assumed power, it is appropriate that interpretative rules do not bind, but may persuade, a court in its exercise of judicial review. Thus, interpretative rules are advisory and subject to challenge and review.

After over thirty years, no court has been able to improve on Justice Jackson’s authoritative statement in Skidmore that while interpretative rules are not controlling upon courts, they “do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” 233 U.S. at 140. The weight given to the agency’s judgment will depend upon the thoroughness of consideration, the validity of reasoning, consistency with prior and subsequent pronouncements, and other factors which make the agency’s opinion persuasive, even if not controlling. Id. Extra weight may be given to an interpretative rule because of such factors as agency specialization, statutory reenactment, contemporaneous construction of a statute by the agency charged with its enforcement, and longstanding effectiveness. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974) (great weight given longstanding interpretation where Congress reenacted statute without relevant change); NLRB v. Boeing Co., 412 U.S. 67, 74-76 (1973) (great weight afforded longstanding, contemporaneously construed agency interpretation); Davis, supra note 14, at 934-45 (contemporaneous construction, longstanding interpretation, reenactment are factors in courts’ determinations of authority to give interpretative rules). But cf. Wilderness Society v. Morton, 475 F.2d 842, 864-65 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973) (interpretations contrary to legislative intent...
rules may be subject to de novo review, and courts are usually free to substitute their judgment for that of the agency. General statements of policy are not easily distinguished from interpretative rules, but the terms themselves may provide a distinction: rules are fairly concrete standards of conduct; statements are mere expressions of policy. A general statement of policy may be a vehicle for disclosure of less formal, tentative policy that exists in the agency and that has reached a threshold level of concreteness sufficient to make disclosure of some value. Although attempts have been made to distinguish the two, may be overturned no matter how longstanding. These factors will affect the court's decision and push the court in the direction of giving more weight to an interpretative rule except where the court feels confident in its own expertise over the subject matter.

By far the most consistent judicial approach is to give deference to the pronouncement embodied in an interpretative rule. See Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973) (interpretative rule entitled to great deference unless inconsistent with congressional intent); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (where enabling act and legislative history support interpretative rule, guidelines treated as expressing the will of Congress). Although a court may give a rule great weight, it is not properly "bound" by an interpretative rule. Nevertheless, courts sometimes use language indicating that they felt bound by an interpretative rule. See, e.g., Douglas v. Beneficial Finance Co., 469 F.2d 453, 456 n.2 (9th Cir. 1972) (court bound where agency's interpretation not outside its authority); CIBA-GEIGY Corp. v. Richardson, 445 F.2d 466, 467-68 (2d Cir. 1971) (agency has power to issue binding interpretative regulations); Garza v. Chicago Health Clubs, Inc., 329 F. Supp. 936, 939 (N.D. Ill. 1971) (agency's interpretations consistent with act and not plainly erroneous entitled to great weight or binding). An egregious example is found in Morris v. Richardson, where the court accepted HEW's interpretation that the phrase "public child-placement agency" in a statute governing benefits for adopted children did not include a county court, even though there was no adoption agency in the county, and state law required that adoptions be decreed in the county where the adoptive parents reside. 455 F.2d 775, 777-78 (4th Cir. 1972) (per curiam), cert. dismissed, 410 U.S. 422 (1973).


17. Administrative Procedure Act §4, 5 U.S.C. § 553 (1970). Although section 553 expressly exempts "general statements of policy" from the notice provision, and thereby the comment provision, and "statements of policy" from the timing requirements, it is unlikely that the drafters intended to establish a distinction between the two terms. See id. §§ 4(a), (c), 5 U.S.C. §§ 553(b)(A), (d) (2). A distinction would exempt general statements of policy from the notice and comment provision but not individualized or specific statements of policy. Notice and comment is even less suitable for specific statements of policy than it would be for general statements of policy. The drafters of the APA could not have intended this result, and hence, it seems proper to consider the terms in sections 553(b)(A) and 553(c)(3) as covering the same subject matter. On the other hand, section 552(a)(1) (D) requires publication of "statements of general policy," while section 552(a)(2)(B) requires that "statements of policy" be made available for public inspection and copying. See id. §§ 3(a), (3), (c), 5 U.S.C. §§ 552 (a) (1), (D), (2) (B). In this provision a distinction makes sense. Expressions of general policy should be made generally available through publication, whereas expressions of policy of special interest need only be available to those with interest enough to make an effort to elicit the information. The rationale of having only material of general interest in the Federal Register is supported by the view, urged for many years, that the Federal Register contains too much and not too little.

there appears to be no analytical purpose served by such a distinction because the concepts that relate to these and other nonlegislative rules are the same. The rules are exempt from the notice and comment procedures of the APA, codified in section 553 of title 5 of the United States Code. They each have the same persuasive effect on judicial review, and they bind the agency where necessary to ensure fairness.

It has been suggested that general statements of policy are rules directed primarily at the staff of an agency and intended to guide the staff in conducting discretionary functions, while other rules are directed primarily at the public in an effort to impose obligations on them. See Bonfield, Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the A.P.A., 23 ADMIN. L. REV. 101, 115 (1971). The Attorney General's Manual distinguishes the two differently:

General Statements of Policy—statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power, Interpretative Rules—rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.

ATTY GEN.'S MANUAL, supra note 4, at 30 n.3. It is questionable whether either distinction is very meaningful. Every expression of policy, whether made through adjudication, legislative rulemaking, or otherwise, deals with and limits agency discretion. It is naive to think that an interpretation of a statute or rule can divorce itself from the discretion of the agency. A general statement of policy may disclose the agency's policy in exercising its discretion, but so do interpretative rules, legislative rules, and precedent gleaned from adjudicative orders. A distinction based on the difference between interpretation and the disclosure of how such discretion will be exercised is neither meaningful nor helpful.

Subsection 553(e), conferring the right to petition, does not contain any exceptions; thus, all rules, except those listed in subsections 553 (a) (1) and (2), are subject to petition for issuance, repeal, or amendment by an interested person. Id. §§ 4(1)-2), (4), 5 U.S.C. §§ 553(a) (1)-2), (e).

Some courts have attempted to distinguish the effects of the two suggesting that interpretative rules are entitled to "great weight" while general statements of policy are only entitled to "weight." Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 40 (D.C. Cir. 1974) (general statement of policy entitled to less deference than a rule or adjudicative order); cf. Helton v. Mercury Freight Lines, Inc., 444 F.2d 365, 368 n.4 (5th Cir. 1971) (guides and handbooks have some weight, but not that of interpretative rules); Futrell v. Columbia Club, Inc., 338 F. Supp. 566, 571 (S.D. Ind. 1971) (interpretative rules entitled to "considerable weight;" opinion letters entitled to "weight"). This distinction is of little value; the court should ignore labels and look instead to the factors bearing on the persuasiveness of the particular rule or policy. See note 18 supra.

Because the APA allows judicial review of final agency action only, the District of Columbia Circuit, in Independent Broker-Dealers' Trade Ass'n v. SEC, was compelled to deal with the scope of review of certain general statements of policy. 442 F.2d 132 (D.C. Cir.), cert. denied, 404 U.S. 828 (1971); see Administrative Procedure Act §§ 10(a), (c), 5 U.S.C. §§ 702, 704 (1970). The court held that where general statements of policy are intended to and do result in action on the part of regulated businesses, the statements will be subject to judicial review. 442 F.2d at 142; see notes 47-53 infra and accompanying text; cf. Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38-39 (9th Cir. 1975) (judicial review, under the Natural Gas Act, of general statements of policy limited to instances in which the statements have an immediate and significant impact and there is a record suitable for review). The court will limit the scope of its review to the questions whether the general statement of policy was ultra vires and whether some factual basis for the agency action existed. Independent Broker-Dealers' Trade Ass'n v. SEC, supra at 142, 145. The factual basis is "presumed to exist unless negatived by the challenger." Id. at 146.
to an adversely affected party.21

Broad procedural discretion is a major advantage for agencies that make policy through interpretative rules and general statements of policy, but the complete absence of procedures for the promulgation of these rules has existed too long. The public deserves a role in the making of many such rules, and the lack of any public role has undoubtedly resulted in the reluctance of courts to give agencies total discretion in choosing the type of rule to issue.22 The exemption of these two types of rules from the procedural requirements of the APA has been criticized, and legislative proposals to amend the APA have included the deletion of these exemptions.23 The legislative history of the APA, however, evidences careful consideration of the exemptions and leaves no doubt that the drafters felt that procedural flexibility for

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such rules is essential to sound administrative process. Agencies faced with the necessity of full section 553 compliance might simply choose not to promulgate many interpretative rules and general statements of policy. The requirements of section 553 would bring benefits, but they would also bring disadvantages.

The solution to this dilemma is the recognition that agencies should promulgate many interpretative rules and general statements of policy after abbreviated public procedures tailored to particular situations, that full section 553 procedures are not always necessary, and that procedural requirements cannot be applied equally to all types of rules. One possibility for imposing abbreviated procedures on these rules is the repeal of the categorical exemptions of interpretative rules and general statements of policy from section 553 and the development of a flexible approach to the "good cause" exemptions of section 553. A better approach, however, would be the evolution of a broad range of abbreviated public procedures through judicial review of agencies' promulgation procedures to ensure that the choice of procedures comports with basic notions of fairness and does not abuse the agencies' discretion.

DEVELOPMENT OF THE "GOOD CAUSE" EXEMPTIONS IN LIEU OF CATEGORICAL EXEMPTIONS

A means already exists for moderating and rationalizing the elimination of the categorical exemptions: two provisions of section 553 allow agencies to dispense with public procedures when there is good cause for doing so. Section 553(b)(B) exempts rules from the notice and comment procedures if such procedures would be "impracticable, unnecessary, or contrary to the public interest," and section

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24. See S. Doc. No. 248, supra note 16, at 18 (Senate Judiciary Committee Report) (non-legislative rulemaking should be encouraged by giving agencies procedural discretion with safeguards of plenary judicial review and petitions for reconsideration).

Retention of the procedural exemptions for interpretative rules and general statements of policy has been supported by the Administrative Conference of the United States. See Recommendation 72-5: Procedures for Adoption of Rules of General Applicability, 2 Recommendations and Reports of the Administrative Conference of the United States 66 (1972).


26. See Administrative Procedure Act §§ 4(a), (c), 5 U.S.C. §§ 553 (b) (B), (d) (3) (1970).

27. Id. § 4(a), 5 U.S.C. § 553 (b) (B). Although the exemptions in section 553(b) refer only to the notice requirement, it is obvious that they are also incorporated into the public participation and statement provisions of section 553(c). Id. §§ 4(a), (b), 5 U.S.C. §§ 553(b), (c); see S. Doc. No. 248, supra note 16, at 201, 208 (Report of House and Senate
553(d)(3) provides that a rule may become effective immediately upon publication where good cause is found. Section 553(b)(B) requires the agency to incorporate the finding of good cause and the supporting reasons in any rule issued without notice and comment, and the agency must publish its finding of good cause with the rule intended to be effective immediately. Although these sections do not contain the same language, they most likely will be considered virtually identical. Thus, the good cause exemption of section 553(d)(3) can be dealt with as if it had the “impracticable, unnecessary, or contrary to the public interest” language of section 553(b)(B).

Although the terms “impracticable, unnecessary, or contrary to the public interest” necessarily overlap, the legislative history of the APA indicates that they were intended to cover different problems. Several cases have dealt in a very cursory manner with each of these justifications for claiming the “good cause” exemption from notice and comment procedures. Courts limit the exemption for impracticability to situations in which notice and participation would be unreasonable, such as where emergency action is required to avoid injury or where full notice and comment procedures would frustrate the rule’s objectives. Notice and comment procedures may be found unnecessary where the rulemaking involves minor matters or refinements in an existing rule, but not where the rule may have substantial impact. Rules for which

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29. Id. §§ 4(a), (c), 5 U.S.C. §§ 553 (b)(B), (d)(3); see Kelly v. Department of Interior, 339 F. Supp. 1095, 1100-02 (E.D. Cal. 1972) (good cause not shown for exempting section 553(b)(B) rule from publication).
30. See Bonfield, Military and Foreign Affairs Function Rule-Making Under the APA, 71 MICH. L. REV. 221, 308-09 (1972) (sections 553(b)(B) and (d)(3) should be treated alike).
32. See Arizona Dep’t of Pub. Welfare v. HEW, 449 F.2d 456, 481 (9th Cir. 1971) (hearing procedures regulations exempted from notice and comment requirements because little time before hearings and participants need to know applicable rules of procedure); United States v. Great Atlantic & Pacific Tea Co., 342 F. Supp. 272, 277 (D. Md. 1972) (unexplained statement that notice and comment procedures impracticable for determining wage increase ceiling upheld); S. Doc. No. 248, supra note 16, at 200 (impracticable means public procedures would prevent due and required execution of agency functions).
33. See United States v. United States Trucking Corp., 317 F. Supp. 69, 70-71 (S.D.N.Y. 1970) (procedures unnecessary where regulations reflected internal change in regulatory agency); S. Doc. No. 248, supra note 16, at 200 (unnecessary means minor or technical amendments in which the public has no interest).
notice and comment are unnecessary are those in which the public has
so little interest that an agency would not expect outside participation;
such rules involve simple mathematical computations and technical or
grammatical changes in an existing rule. In addition, notice and
comment procedures may be considered unnecessary where another
related proceeding afforded the opportunity for participation.\textsuperscript{35} Full
notice and comment procedures may be contrary to the public interest
where procedures will defeat the purpose of the rule or seriously impair
its effectiveness.\textsuperscript{36}

Repeal of the exemptions for interpretative rules and general
statements of policy would not necessarily impose notice and comment
procedures on all such rules. The nature and usefulness of such rules
depends to a certain extent on the absence of a public input
requirement, and hence the good cause justification for eliminating the
public role in the rule’s formulation may be available. The value of the
good cause exemptions approach lies in the requirement that an agency
provide written justification for not using section 553 notice and
comment procedures;\textsuperscript{37} the categorical exemptions for interpretative
rules and general statements of policy require no such justification, and
their exercise hinges only on resolution of the definitional question.
Controversy over definitions diverts attention from the reasons for not
using public procedures and focuses instead on the theoretical
boundaries of the categories. Repeal of the categorical exemptions
would not necessarily lead to the imposition of an inflexible require­
ment of notice and comment procedures on all interpretative rule­
making and general policy statement formulation, but it would have the
beneficial effect of requiring written justification where an agency
desires to forego procedural requirements.\textsuperscript{38}

A preliminary study of interpretative rules and general statements of
policy presented two reasons against replacing the categorical exemp­
tions with the good cause approach: uncertainty whether an action

\textsuperscript{35} See Duquesne Light Co. v. EPA, 481 F.2d 1, 8-10 (3d Cir. 1973) (dictum) (hearings
on state regulations normally sufficient for federal approval, but change in circumstances
in this case required new hearings); Appalachian Power Co. v. EPA, 477 F.2d 495, 502-03
(4th Cir. 1973) (hearings on state regulations sufficient).

\textsuperscript{36} See Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1085 (D.C. Cir. 1974)
(delay in licensing nuclear power plant against public interest); cf. S. Doc. No. 248, supra
note 16, at 220 (Report of Senate Judiciary Committee) (contrary to the public interest
exemption supplements the terms impracticable or unnecessary).

\textsuperscript{37} See Administrative Procedure Act § 4(a), 5 U.S.C. § 553(b)(B) (1970) (must
incorporate finding of good cause and brief statement of supporting reasons in rules
issued).

\textsuperscript{38} Unfortunately, courts are not always as firm as they should be in requiring written
(although no written justification, court found good cause existed for exemption from
procedural requirements); California v. Simon, 594 F.2d 439, 439 (Temp. Emer. Ct. App.),
qualifies for a good cause exemption may lead an agency to use section 553 procedures unnecessarily, and the discretion granted the agency under the good cause exemptions may increase litigation on procedural issues. The first objection, that uncertainty will cause agencies to use notice and comment procedures unnecessarily, is a danger, but will not likely result in a serious problem. Where notice and comment procedures are impracticable, the realities of the situation will compel the agency to avoid the procedures. Where they are unnecessary, the use of procedures will result in little additional delay or expense because public participation will be insubstantial. Where notice and comment would be contrary to the public interest, conscientious agency officials will avoid section 553 procedures. The second argument, that use of the good cause exemptions will result in increased litigation, is more substantial. Vague rights do lead to increased judicial challenge, and the three good cause standards are vague. Nonetheless, such procedural challenges will most often come before the courts as part of a broader challenge to a rule. Thus, resort to the good cause exemptions may increase the number of charges in each challenge but not the overall number of challenges.

If the amount of litigation created by unclear legislative standards for rulemaking becomes too great, the agency may, through procedural rules, make categorical findings of good cause for exempting specific groups of rules and carefully define the instances in which it will apply those exemptions. The procedural rules might require limited participation where good cause will support abbreviation, but not


As part of his work on the Administrative Conference study of the categorical exemptions, Bonfield urged that the absolute exemptions of section 553(a) be replaced with reliance on the good cause exemptions. See Bonfield, supra note 30, at 309, 365-67 (use of good cause exemptions in military or foreign affairs rulemaking); Bonfield, Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts, 118 U. Pa. L. Rev. 540, 608-11 (1970). Section 553(a) exempts rulemaking relating to military and foreign affairs, agency management and personnel, public property, loans, grants, benefits, and contracts from notice and comment requirements. Administrative Procedure Act § 4, 5 U.S.C. § 553(a) (1970). In defending these recommendations against attacks similar to the ones he had leveled against removing the categorical exemptions for interpretative rules and general statements of policy, Bonfield made two general arguments: First, he noted that the rationales behind the attacks apply to rulemaking in general and not to the exempted categories in particular; second, he argued that since uncertainty and increased burden apply to only some of the exempted rules, not the categories as a whole, the use of the good cause exemptions can solve most problems. See Bonfield, supra note 30, at 271-75; Bonfield, Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts, supra at 676-82. These defenses apply with equal force to the proposal to remove the exemptions of interpretative rules and general statements of policy.

40. But see Bonfield, supra note 18, at 126-27 (use of good cause exemptions in place of categorical interpretative rules and general statements of policy exemptions would subvert purpose of good cause exemptions as qualified exemptions to be used in case-by-case analysis rather than as wholesale exemptions).
complete elimination of public procedures. An objection to the procedural rule approach is that agencies would place all presently exempt rulemaking in the good cause categories. Such action by an agency, however, would certainly be subject to judicial review for abuse of discretion, and such review would be facilitated by the written justification that must accompany a good cause determination. Categorical good cause exclusions, accompanied by the reasons for exemption from notice and comment, would permit both judicial review and public scrutiny of the good cause determination.

Judicial Imposition of Flexible Public Procedures for Interpretative Rules and General Statements of Policy

Absent repeal of the categorical exemptions, neither the APA nor, in most cases, the Constitution requires notice and comment procedures for nonlegislative rules. Judicial examination of the procedures for promulgating interpretative rules and general statements of policy, however, should not end with such a determination. The trend in administrative law is toward a closer scrutiny of the processes for making informal decisions. Several cases have suggested that the APA notice and comment procedures for legislative rules constitute only a minimum standard upon which a court can require further particu-

41. Id.
42. See, e.g., Shell Oil Co. v. FPC, 491 F.2d 82, 87 (5th Cir. 1974) (interpretation of existing regulations permissible unless fails to fit within language of the regulations); Garelick Mfg. Co. v. Dillon, 313 F.2d 899, 900 (D.C. Cir. 1963) (per curiam) (regulation interpreting a prior regulation may be issued without notice or comment); Gibson Wine Co. v. Snyder, 194 F.2d 329, 331-32 (D.C. Cir. 1952) (ruling explaining prior regulation is interpretative and notice and comment not required).
43. See Bowles v. Willingham, 321 U.S. 503, 519 (1944) (hearing not constitutionally required for rent control regulation); Willa Point Oysters, Inc. v. Ewing, 174 F.2d 676, 694 (9th Cir.), cert. denied, 338 U.S. 860 (1949) (no constitutional right to hearing on interpretative regulation). The Second Circuit in Burr v. New Rochelle Municipal Housing Authority did suggest that due process might require notice and comment procedures in the proper circumstances. 479 F.2d 1165, 1169-70 (2d Cir. 1973). A better approach to rulemaking would be to avoid an abstract constitutional discussion and concentrate on a pragmatic determination of the benefits to be derived from public procedures. Under the modern approach to due process, a strong pragmatic argument for public procedures may result in a determination that some procedures are required by the due process clause if there is a significant impact on a sufficiently important private interest. See Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1278 (1975) (degree of procedural safeguards required for due process varies directly with importance of private interest and need for and usefulness of particular safeguard in given circumstances and inversely with burden and adverse consequences of the safeguard).
larized procedures. 45 In the area of interpretative rules and general statements of policy, where the APA requires no public procedures, a judicial examination of the desirability of additional procedures would be appropriate. As a practical matter, many interpretative rules and general statements of policy have a substantial effect on the public; and although such rules do not have the force of legislative rules, most of the affected persons will have no forum, other than the agency, in which to challenge the rule. The practical unavailability of substantive review makes the need for participation in the policymaking process even more critical. 46

THE REQUIREMENT OF FAIRNESS

Even though an agency's interpretative rule or general statement of policy falls within an exemption from section 553 procedures, judicial notions of fairness to those affected by such a rule may require that some sort of public procedures be employed. Two opinions by Judge Leventhal of the United States Court of Appeals for the District of Columbia Circuit suggest the development of an expanded, but pragmatic, view of procedural requirements for nonlegislative rules, based on the concept of fairness. A similar motivation underlies opinions applying the "substantial impact" test in their determination of whether public procedures are necessary.

In Independent Broker- Dealers' Trade Association v. SEC 47 appellants, an unincorporated association of securities brokers and dealers and several of its members, brought an action alleging that requests by the Securities and Exchange Commission (SEC) that the New York Stock Exchange "voluntarily" abolish customer-directed "give-ups" were, in fact, orders and not mere requests. 48 Judge Leventhal, writing for the majority, found that because the requests were general statements of policy, neither the Securities Exchange Act of 1934 49 nor

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45. See, e.g., O'Donnell v. Shaffer, 491 F.2d 59, 62 (D.C. Cir. 1974) (procedures required will depend on rule in question); Mobil Oil Co. v. FPC, 483 F.2d 1238, 1251-54 (D.C. Cir. 1973) (APA provides minimum protection); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 629-30 (D.C. Cir. 1973) (issue presented will dictate procedures required). The need for procedures in addition to notice and comment in legislative rulemaking has also been advocated by commentators. See, e.g., Friendly, supra note 43, at 1314-15.

46. But cf. Bonfield, supra note 18, at 122 (less need for public participation in formulation of interpretative rules and general statements of policy than in legislative rules).


48. Id. at 134. Give-ups are fees directed by large investors, especially institutional investors, as payments to brokers not actually concerned with the sale for services rendered, such as research. Id. By means of its informal written request process, the SEC encouraged the Exchange to voluntarily change its minimum fee schedule for large investors and to abolish customer-directed give-ups. Id. at 137.

the APA could be read to require notice and participation.\textsuperscript{50} Although the SEC's request was not subject to the general requirement of notice and opportunity for hearing, the court considered whether in certain instances "it was incumbent on the Commission to provide such notice as a matter of elementary fairness"\textsuperscript{51} and concluded that fairness may require that those materially affected have a reasonable opportunity for comment.\textsuperscript{52} In the case before it the court found that ample opportunity for comment was available because the parties had notice that the Commission was considering action in this area and because prior proposed rulemaking gave the parties opportunity to submit their views to the Commission.\textsuperscript{53}

Judge Leventhal further developed the fairness requirement in \textit{Thompson v. Washington}.\textsuperscript{54} Although the case did not involve rulemaking, the opinion helps define the role of judicial review in determining when fairness may require additional procedures not prescribed by statute. \textit{Thompson} involved the rights of public housing tenants to challenge HUD approval of a rent increase for a privately operated, but federally assisted, housing project.\textsuperscript{55} As in \textit{Independent Broker-Dealers}, the court was not deterred by the absence of statutory procedures and found that fairness alone may require notice and an opportunity to submit comments.\textsuperscript{56} The court in \textit{Thompson} did not engage in an abstract constitutional analysis, but instead struck a careful balance between the practical considerations involved in the need for additional procedures. In striking this balance, the court stated that fairness requires additional procedures where a person denied notice and comment faces the likelihood that an interest will be injured by government action.\textsuperscript{57} Notwithstanding the substantiality of the

\textsuperscript{50} 442 F.2d at 144.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 144-45. The Seventh Circuit in \textit{Stearns Electric Paste Co. v. EPA} utilized the same examination of the need for additional procedures for the formulation of an interpretative rule. 461 F.2d 293, 304 (7th Cir. 1972). While the APA did not require the agency to solicit comments, the court found the agency's solicitation proper and appropriate in order to give industry-wide notice of its proposed position. Id. Thus, the court found that the agency had done all that was necessary in the interest of fairness. \textit{Id}.
\textsuperscript{54} 497 F.2d 626 (D.C. Cir. 1973).
\textsuperscript{55} Id. at 638. \textit{Thompson} is also significant in that it provides a right to some kind of hearing where there was no direct government action. Id. at 637. The law seemed to be to the contrary. See \textit{Langenau v. Chicago Court, Inc.}, 447 F.2d 296, 301 (2d Cir. 1971) (insufficient FHA involvement in approval of rent increase).
\textsuperscript{57} 497 F.2d at 638. In \textit{Marine Space Enclosure, Inc. v. Federal Maritime Comm'n} the court seemed to place the burden of justifying the absence of a hearing in legislative rulemaking on the agency rather than having the person desiring a hearing prove its necessity, 490 F.2d 577, 586-87 n.26 (D.C. Cir. 1969). Since the additional procedures are not required by statute for interpretative rules and general statements of policy, the burden should be on the party urging their use.
interest or the likelihood of deprivation, the court would not compel an opportunity to participate if the "tenants could make no contribution relevant to the decisionmaking." Though the court's decision in Thompson may be interpreted as employing a due process analysis, the court's constitutional discussion of the tenants' affected interests only served to guide the practical analysis which led to its decision. The court explicitly refused to base its decision on constitutional grounds, and stated that it was interpreting the National Housing Act of 1937 to reach a conclusion that would avoid serious doubt as to the Act's constitutionality. The court relied on "basic fairness, discerned in the light of the contemporary regulatory climate." Nothing is more within the competence of a court than the exploration of procedural requirements to guarantee fairness. Similar attention to the realistic, practical requirements of fairness must guide courts in prescribing additional procedures for the formulation of interpretative rules and general statements of policy.

The decision to require notice and comment procedures involves practical considerations; a sound general principle is that fairness requires procedures in addition to those explicitly imposed by Congress where a court finds that the increased validity of the agency decisionmaking process outweighs the procedural burden. This general principle should guide the decision concerning what additional procedures are required as well as the decision whether or not to impose additional procedures.

One of the factors in making this determination is the degree of impact that an agency decision would have on the interests of the public or of private individuals. A number of decisions have focused solely on this factor by applying a "substantial impact" test in determining whether to require public procedures. Under the substantial impact test, the agency must follow public procedures where rules would have a substantial impact on the affected parties. Employing analysis similar to the fairness approach, two leading cases indicate that the test may aid the determination of whether additional procedures would be appropriate for substantive rules exempt from section 553 procedural requirements. Other courts, however, use the test as a definitional tool to determine whether a rule is subject to section 553

58. 497 F.2d at 638.
60. 497 F.2d at 633, 639.
61. Id.
procedures. This second approach is incorrect because not all rules can be said to be legislative and because nowhere in the language or history of the APA is the degree of impact used to define legislative rules and thereby the coverage of section 553. The distinction between the two approaches is not merely academic: defining a rule as legislative means that the court must limit itself to the arbitrary or capricious standard of review and must inflexibly require full section 553 compliance.

Pharmaceutical Manufacturers Association v. Finch,63 which involved the FDA’s effort to promulgate drug effectiveness regulations, is one of the foundation cases in the development of the substantial impact test. The challenged regulation required adequate and well-controlled clinical investigation by the manufacturer to prove the effectiveness of a drug.64 The court expressly avoided an attempt to label the regulation legislative or interpretative under section 553 despite the agency’s categorical determination that the rule was procedural and interpretative.65 In holding that notice and comment procedures were required, the court did not use the substantial impact test to categorize the regulation under section 553, but instead relied on the basic policy of that section.66 The court in Pharmaceutical Manufacturers recognized that section 553 is but a statutory reflection of the fairness requirement “that when a proposed regulation of general applicability has a substantial impact on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided.”67 Applying this standard, the court examined the pervasiveness of the regulation and the complexity of the subject matter and determined that notice and comment procedures were necessary.68

The Pharmaceutical Manufacturers opinion relied on two cases to support its use of the substantial impact test. In Texaco, Inc. v. FPC69 the United States Court of Appeals for the Third Circuit held that the good cause exemption of section 553 was not applicable to an FPC order amending a regulation governing the computation of interest on

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64. Id. at 859-60. The regulations provided that the FDA could remove a drug from the market for lack of substantial evidence of effectiveness and that a hearing on that removal would be granted only where the manufacturer had shown an ability to produce substantial evidence of the drug’s effectiveness. Id.
65. Id. at 869.
66. See id.
67. Id.
68. Id. at 864-68. The court noted contradictions in the standards of evidence required to establish efficacy, the uncertain relationship of drug studies by the National Academy of Sciences-National Research Council (NAS-NRC) to the enacted FDA standards and procedures, and the backlog of unreleased NAS-NRC drug study reports. Id.
69. 412 F.2d 740 (3d Cir. 1969).
refunds ordered by the agency. The FPC did not contend that the form of rule employed was exempt from section 553; rather, the agency argued that notice and comment procedures were unnecessary and could be dispensed with for good cause. The court correctly stated that where there is a substantial impact, notice and comment procedures cannot be called unnecessary. Although the court mentioned that section 553 procedures will cover rules with a substantial impact, its holding relied upon the traditional definitions of legislative rules and of the coverage of section 553. In National Motor Freight Traffic Association v. United States, however, the three judge district court used the substantial impact test to determine that a rule was not an interpretative rule exempt from section 553. Stating that section 553 notice and comment is necessary whenever an agency takes regulatory action of general importance to the regulated industry and the public, the court nullified an ICC regulation that established procedures for the restoration to shippers of previously declared illegal charges because the ICC was taking a significant step in the implementation of a newly created remedy. Perhaps National Motor Freight, like Pharmaceutical Manufacturers, can be said to have used the substantial impact test merely to establish the need for procedures; if not, the opinion incorrectly applied the test. The test is not a valid method for determining whether section 553 applies, nor is it appropriate for distinguishing legislative rules from interpretative rules and general statements of policy. Section 553

70. Id. at 741-42.
71. Id. at 743.
72. Id. The court found the amendment was neither minor nor issued in an emergency situation. Id.
73. Id. at 744-45. The court concluded that “procedures must be followed when an agency is exercising its legislative function in order that its rules have the force of law.” Id. at 744.
75. Id. at 95-97. Several courts have incorrectly relied on the substantial impact test to determine whether specific rulemaking is subject to the notice and comment requirements of section 553. See, e.g., American Bancorporation, Inc. v. Federal Reserve System, 509 F.2d 29, 33-36 (6th Cir. 1974) (notice and comment procedures not required where rule amendment had no substantial impact); Pickus v. Board of Parole, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974) (parole qualification regulations having a substantial impact on parole decisions not interpretative rules); Noel v. Green, 376 F. Supp. 1075, 1079 (S.D.N.Y. 1974), aff’d, 508 F.2d 1023 (2d Cir.), cert. denied, 96 S. Ct. 37 (1975) (notice and comment procedures not required where no substantial impact on rights of parties challenging rule); Akron, C. & Y. R.R. v. United States, 370 F. Supp. 1231, 1240 (D. Md. 1974) (section 553 procedures required where rule arguably had substantial impact). The Fourth Circuit recently held that compliance with the notice and publication requirements of section 553 is necessary when the regulations have a “drastic impact.” See Maryland v. EPA, 530 F.2d 215, 222 (4th Cir. 1975).
76. 268 F. Supp. at 97.
specifically exempts interpretative rules and general statements of policy. The court in National Motor Freight did not explain the relevance of the substantial impact test in defining these categories. Eastern Kentucky Welfare Rights Organization v. Simon demonstrates that an interpretative rule may have an enormous impact and still be validly issued without notice and comment. The Internal Revenue Service (IRS) had followed a policy of qualifying hospitals as charitable organizations only if they provided free or low cost service to the poor. The IRS, without notice and comment, changed the policy in 1969 by issuing a new revenue ruling that allowed hospitals to qualify as charitable organizations without providing such free or below cost service. The District of Columbia Circuit held, with no mention of the substantial impact test, that the ruling was interpretative and not subject to the procedural requirements of section 553.

Dissenting to the denial of rehearing en bane, Chief Judge Bazelon argued that a court should consider whether it would be bound by the rule and that since courts give special deference to revenue rulings, thus precluding meaningful judicial review, notice and comment procedures should be required. Chief Judge Bazelon's view of the requirements of section 553 is incorrect; the potential deference that a court may give an interpretative rule does not overturn the explicit

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77. Administrative Procedure Act § 4(a), 5 U.S.C. § 553 (b) (A) (1970); see ATTY GEN.'S MANUAL, supra note 4, at 30 & n.3 (procedures required for rules "issued by an agency pursuant to statutory authority").

78. 506 F.2d 1278 (D.C. Cir. 1974), vacated and remanded on other grounds, 44 U.S.L.W. 4724 (U.S. June 1, 1976).

79. Id. at 1280 & n.5.

80. Id. at 1280-81.

81. Id. at 1290.

82. Id. at 1292-93 (Bazelon, C.J., with Wright & Robinson, JJ., dissenting to denial of rehearing en bane). Judge Wright also dissented to the denial of rehearing en banc and argued that because the ruling substantially changed the availability of hospital services for the poor, it must comply with the public rulemaking procedures required by section 553. Id. (Wright, J., with Bazelon, C.J. & Robinson, J., dissenting to denial of rehearing en banc). Judge Wright asserted that millions of poor people would be denied needed medical care without the procedural protections provided by law. Id.
statutory language. On the other hand, his analysis is consistent with the defensible view that, because of the special deference, notions of fairness may require some public participation. One factor to consider in determining whether fairness requires judicially imposed procedures may be the weight given particular exempt rules on review, but this one factor does not transform an interpretative rule into a legislative rule.

A major weakness of contrived definitions such as the substantial impact test or Chief Judge Bazelon's substantial deference analysis is that, in manipulating the definitions of interpretative rules and general statements of policy for the purpose of imposing public procedures, a court subjects the rule to a more limited scope of review. *Pickus v. Board of Parole* illustrates the impact that the definitional approach may have on the scope of review. *Pickus* involved rules promulgated by the Parole Board for use in determining eligibility for parole. The court required section 553 procedures by distinguishing the parole rules from general statements of policy, interpretative rules, and procedural rules. The rules could not be classified as general statements of policy because they were designed to have a substantial effect on parole decisions; the rules were not interpretative because they did not construe the statute, but operated instead as controls over the exercise of the Board's discretion. The court held that because the rules had the force of law and could be reviewed only for arbitrariness, they were not the kind of rules that Congress meant to exempt from the notice and comment requirements of section 553. The court's analysis was backwards; it failed to make an initial determination whether Congress had granted legislative rulemaking authority to the Board. Had it made such an inquiry, the court would have found that the Board had no authority to make legislative rules in this area; thus, the rules were either interpretative rules or general statements of policy. Since the Board had no legislative rulemaking power, the court was not justified in holding that section 553 procedures were required.

By making the determination that the rules were legislative, the court in *Pickus* ironically limited the scope of its review of the substance of

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83. 507 F.2d 1107 (D.C. Cir. 1974).
84. Id. at 1108.
85. Id. at 1112-13.
86. See id. at 1112-13. Individual parole decisions are within the absolute, unreviewable discretion of the Board. Nothing prevents courts, however, from reviewing the means by which parole criteria are promulgated and, in the case of interpretative rules, substituting their judgment. Instead, the court in *Pickus* stated that it could review the substance of the parole criteria for "arbitrariness," which would be the appropriate scope of review were the criteria legislative rules. Id.
87. The Board's enabling legislation only authorizes limited rulemaking power. See 18 U.S.C. § 4208(d) (1970) (supervision of paroled prisoners); id. § 5009 (procedures for Youth Correction Division of Board).
the rules to whether the rules were arbitrary or capricious, the standard of review for legislative rules. 88 In defining the rules as legislative, the court achieved the beneficial effect of requiring public participation at the cost of unnecessarily limiting broad review of the substance of the parole criteria. Consistent with its expressed aims, the court could have found that the parole criteria were interpretative rules having only persuasive effect and subject to de novo judicial review. 89 The court then could have found that the substantial impact of the rules and fairness to the affected parties required public procedures. Thus, the court could have imposed procedures on the rulemaking process without violating the APA and also could have retained the power to review the substance of the rules.

A second weakness with the courts’ use of the substantial impact test to define which rules must comply with section 553 is that it needlessly eliminates flexibility in the type of procedures required. Under this approach, once a substantial impact is shown, the agency must fully comply with the notice and comment requirements of section 553. Under the fairness approach, the court can apply a practical analysis not only to the decision to require additional procedures, but also to the choice of the type of procedures to require. An almost unlimited choice of procedures can be matched to the variety of situations for nonlegislative rulemaking. 90 A court need not always require full compliance with section 553; in some instances only a written

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88. See note 9 supra.
89. See note 15 supra.
90. But cf. Morton v. Ruiz, 415 U.S. 199, 235-36 (1974) (dictum) (interpretative rule invalid unless published in the Federal Register); Posiloff v. Secretary of Labor, 601 F.2d 767, 769-64 n.12 (D.C. Cir.), cert. denied, 441 U.S. 1038 (1974) (same); Bone v. Hibernia Bank, 493 F.2d 135, 139-40 (9th Cir. 1974) (same). Contrary to these cases, however, section 552(a) may not require Federal Register publication for interpretative rules. Section 552(a) (1) (D) requires publication of “substantive rules of general applicability adopted as authorized by law and statements of general policy or interpretations of general applicability formulated and adopted by the agency.” Administrative Procedure Act § 3, 5 U.S.C. § 552(a)(1)(D) (1970). The phrase “substantive rules of general applicability adopted as authorized by law” is a good definition of legislative rules. See notes 4, 7 supra. The drafters must have intended to exclude interpretative rules by the term “adopted as authorized by law” or that term has no purpose; it would be absurd for a statute to specify that illegally adopted legislative rules need not be published. The term therefore must distinguish interpretative rules from legislative rules. See ATT’Y GEN’S MANUAL, supra note 4, at 30 n.3 (substantive rules defined as legislative rules). The second phrase “statements of general policy or interpretations of general applicability” seems to refer to a distinct class. The word “rule” is not used; thus the “interpretations” do not seem to include interpretative rules for the drafters used the specific term “interpretative rules” in section 553.
statement justifying an exempt action would be adequate. A rule sometimes could be made effective immediately without notice or comment, but the agency would have to accept comments on the final rule and consider amendments in light of those comments. An agency also might promulgate an exempt rule without public procedures, but a section 553 proceeding for amendment or reconsideration could be required at some later date. The numerous types of public procedures make it likely that in a given situation some combination should adequately accommodate the competing values of efficiency, sound decisionmaking, and fairness. Professor Davis wrote in another context that "when we are limited to choosing between all and none, we sometimes choose none; if we had a choice among all, some, and none, we might sometimes choose some instead of none." Judges must always remember, however, that in some cases, the best alternative may be no public procedures at all.

Although an agency's rule or statement falls within an exemption to the procedural requirements of section 553, fairness may in certain cases require public participation. The substantial impact test may represent a movement toward the application of the fairness approach. Where an exempt, or possibly exempt, rule has a substantial impact on

91. Public participation causes most of the problems which justify exempting interpretative rules and general statements of policy from section 553. The requirement of an adequate statement of basis and purpose does not seem to present nearly the same problems, and findings and reasons should be required even when other procedures are not appropriate. This approach is consistent with the trend towards requiring written justification for informal action. See Camp v. Pitts, 411 U.S. 138, 142-43 (1973) (per curiam) (reviewing court should obtain affidavits or testimony from agency if failure to explain administrative action frustrates effective judicial review); cf. Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 805-06, 817 (1973) (to support an order varying from past policy, ICC must make its reasons clear to reviewing court). But cf. Renegotiation Bd. v. Grumman Aircraft Eng'r Corp., 421 U.S. 168, 191-92 (1975) (because Congress exempted Board from most provisions of APA, need not disclose reasons for decisions). A written justification statement provides an internal check on agency action and permits informal criticism. See Dry Color Mfrs. Ass'n v. Department of Labor, 486 F.2d 98, 105-06 (3d Cir. 1973). See generally Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 Cal. L. Rev. 1276, 1333-36 (1972).

92. See S. Doc. No. 5, supra note 9, at 103-05 (consultations and conferences with interested private parties may be as adequate as formal hearing). See S. Doc. No. 248, supra note 16, at 200 (where agency action beneficial to the public does not become effective until issuance of a rule, the rule may be immediately issued and supplemental proceedings and reconsideration will satisfy the procedural requirements).

93. K. Davis, ADMINISTRATIVE LAW TEXT § 7.07, at 169 (1972) (discussing the imposition of trial-type procedures for legislative rulemaking).
the rights or obligations of those affected, fairness justifies consideration of imposing public procedures, but exempt substantive rules may have a substantial impact and still properly be promulgated without public procedures or at least without full section 553 compliance. The fairness of the procedural process employed in formulating interpretative rules and general statements of policy should be considered where public participation would contribute to reasoned decisionmaking and where the benefits of a public procedure outweigh its potential detriments.

Although the value of the fairness approach is demonstrable, a court should apply the concept cautiously and thoughtfully. The exemptions to the APA were selected for sound reasons, and a court should consider these reasons before imposing procedures. Agencies should be able to promulgate rules with some confidence that they have chosen procedures that will survive judicial review. Courts should avoid burdening the administration of government by creating unnecessary confusion as to procedural requirements. Since too much procedure may be as harmful as too little, notice and comment procedures should not be required where participation would serve no practical purpose.95 By focusing on the practical need to protect affected persons through participation in the rulemaking process, courts need not rely on strained definitions and abstract labels.

THE REQUIREMENT OF AN ADEQUATE INFORMATION-GATHERING PROCESS

In addition to notions of fairness, courts should also examine whether additional public procedures for the promulgation of exempt rules will significantly increase the information upon which the agency bases its decision. A fairness determination weighs the effect of the agency's failure to solicit and consider the views of those members of the public potentially harmed, but that determination may not be enough. Agencies also have a duty to educate themselves fully before issuing an interpretative rule or a general statement of policy. Fairness requires that all substantially affected parties have some procedure for participation, but only the best possible decision on the merits can protect the vaguer interests of the public in general. Such a decision can best be ensured by employing the most effective information-gathering process that is practical under the circumstances. Consequently, the multifaceted issues confronted in most policy decisions compel

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consideration of whether the agency abused its discretion in the choice of procedures used to gather relevant information. The District of Columbia Circuit has declared that an agency must "realistically tailor the proceedings to fit the issues before it, the information it needs to illuminate the issues and the manner of presentation . . . ." 

The Supreme Court in essence conducted such a review in NLRB v. Bell Aerospace Co. Dealing with the Second Circuit's efforts to require notice and comment procedures in National Labor Relations Board (NLRB) policymaking, the Court disagreed with the Board's interpretation of a key term, "managerial employees," but would not require that the Board undertake legislative rulemaking as the only means of defining the term. The Second Circuit had held that the Board must conduct legislative rulemaking because any new exclusion from the term would be a "general rule" which affected a substantial change in the law designed to apply to all cases. The Supreme Court noted that in SEC v. Chenery (Chenery II) and NLRB v. Wyman-Gordon Co. it had permitted the formulation of general policy in the context of an adjudicative process. Though the Court treated the conflict as one between "rules" and adjudicative "rules of law," its decision effectively sanctioned the formulation of prospective general policy, "rules," without notice and comment procedures. The rationale for permitting the Board the choice between rulemaking and adjudicative procedures rested on the Board's discretion to determine whether it had sufficient information to make an informed policy judgment. The Court's review of the exercise of that discretion suggests that courts should inquire into the adequacy of the information-gathering process regardless of the type of rule. The Court focused on whether rulemaking without notice and comment procedures can adequately inform the agency so as to constitute a reasonable exercise of administrative policymaking. The Court reasoned that although section 553 procedures would provide the Board with a forum for soliciting the informed views of those affected, the Board reasonably

96. See generally Clagett, supra note 44.
99. Id. at 294-95.
100. Id. at 292.
103. 416 U.S. at 292-94.
104. Id. at 292-95.
105. Id. at 294-95.
106. Id.
could conclude that "adjudicative procedures may also produce the relevant information necessary to mature and fair consideration of the issues." 107 Because the Board had not abused its discretion in determining that adequate information could be and had been acquired through adjudication, the Court permitted the agency to formulate policy in an adjudicative context. Under this reasoning, courts must review for abuse of discretion the information-gathering processes used by agencies in formulating nonlegislative rules, including those made in the course of agency adjudication, and this review must include a determination of the adequacy of the information upon which the agency relied.

Recognition in the legislative history of the APA that agency discretion in the choice of procedure should be limited to processes that are "useful to them or helpful to the public" supports judicial review of information-gathering procedures for abuse of discretion. 108 Although section 553 procedures were intended to enable an agency to educate itself and to assure the public an opportunity to participate, 109 the exemption of certain types of rules from section 553's coverage does not indicate that Congress intended that agencies ignore the values of education and public participation gained from the information-gathering necessary in making such rules. The stringency of the information-gathering requirement should vary with the importance of the rule and the practicalities of the situation. Rules with substantial impact, for example, may give rise to judicial imposition of public procedures because the agency developing such rules should obtain all realistically available information. 110 The impact of a rule may be one factor dictating the relative need for information, but both agencies and courts should scrutinize every process employed in making interpretative rules and general statements of policy to ensure that the process is capable of producing and did produce sufficient information. The ideal of fully informed policymaking, however, should not be adhered to blindly; the proper amount of information is a function of the needs of the policy decision, and the ideal must be tempered by a great many practical considerations.

A procedure that would result in the largest accumulation of accurate information may not be necessary or realistic for many policy

107. Id. at 295.
109. See 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).
pronouncements. An attempt to amass perfectly complete information in many instances would interfere with the efficient operation of the Government and would cost more than the value of any benefit from improved decisionmaking. In determining the adequacy of the information-gathering that must support a decision, therefore, the cost of obtaining information should be balanced against the significance of the rule and the potential utility of additional information. The agency must be primarily responsible for striking this balance; the reviewing court should accord great weight to an agency's determination. Nonetheless, in reviewing for abuse of discretion, the court may provide needed guidance as to the minimum standards of agency education necessary for identifiable categories of interpretative rules and general statements of policy.

**OBJECTIONS TO THE IMPOSITION OF ADDITIONAL PROCEDURES**

There are three major objections to imposing public participation in the promulgation of interpretative rules and general statements of policy: the burden of public procedure will encourage "secret policy"; the APA specifically excludes these two rules from procedural requirements; and ad hoc imposition of procedures will cause agency uncertainty as to the type of procedures that will satisfy reviewing courts. Although these are strong arguments, they do not compel the conclusion that courts should not, or cannot, impose some procedures on interpretative rules and general statements of policy.

**SECRET POLICY**

The recommendation of additional procedures for interpretative rules and general statements of policy must overcome the danger that the procedural burden will discourage administrative efforts to develop and disclose policy. Professor Davis has called notice and comment


112. Decisions interpreting the Freedom of Information Act require that agencies disclose any documents that contain "secret law." See Schwartz v. IRS, 511 F.2d 1303, 1305 (D.C. Cir. 1975) (no exemption where internal memoranda represent policies, statements, or interpretations of adopted agency law); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971) (orders and interpretations that actually apply in cases before agency must be disclosed); Freedom of Information Act § 3, 5 U.S.C. § 552 (1970); Davis, The Information Act: A Preliminary Analysis, 34 U. CHI. L. Rev. 761, 797 (1967). The Act does not require the formulation or consolidation of policy. Much policy exists in the minds of the decisionmakers or in numerous internal documents. Rulemaking will disclose this policy; the Freedom of Information Act cannot. Although a hard-working
rulemaking one of the greatest inventions of modern government,113 but even this highly efficient procedure may be excessively burdensome for much of the rulemaking that agencies undertake. To avoid such a burden, an agency may simply choose to avoid promulgating an interpretative rule or general statement of policy. Any procedure that may encourage secret policy should be suspect; open agency policy has been an important trend in recent administrative law theory, and interpretative rules and general statements of policy are often the best and most efficient means for publicly announcing agency policy.

The District of Columbia Circuit, in Pacific Gas and Electric Co. v. FPC,114 recently recognized that the desire for open policy may justify excepting general statements of policy from procedural requirements.115 The statements of policy in Pacific Gas contained the FPC's suggested means for establishing natural gas curtailment priorities in the event of a shortage.116 Although the statements had the potential to revise outstanding natural gas contracts, the court feared that the imposition of public procedures would inhibit the disclosure, rather than improve the formulation, of curtailment policy. The court noted that the Commission could have proceeded on an ad hoc basis and tentatively approved specific curtailment plans that were found to be just and reasonable instead of formulating a general policy statement.117 Had the Commission proceeded in an ad hoc manner, the only difference from promulgating the policy statement "would be that the Commission would be acting under a secret policy rather than under the publicized guidelines . . . ."118

The performance of routine administrative duties requires that agencies make numerous policy pronouncements, which often take the form of interpretative rules or general statements of policy. An active agency will formulate hundreds of policies in such forms as internal

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114. 506 F.2d 33 (D.C. Cir. 1974).
115. Id. at 41.
116. Id. at 35-36.
117. Id. at 41.
118. Id.
staff guidelines and policy instructions. Requiring additional procedures for this mass of pronouncements would overburden the agency process, increase the expense of government, and greatly lengthen the time necessary for the Government to respond to public problems. The public suffers when administrative agency action is unduly inhibited or made overly expensive. Public participation will not always improve agency decisionmaking enough to offset the costs of imposing the procedure.

The inherent friction between the desirability of public input and the need for policy formulation and disclosure becomes particularly acute in light of the modern trend to require rules and rulemaking. Required rulemaking serves two values: disclosure of general agency policy, and the opportunity for public participation in the formulation of the policy. Efforts to increase public participation in policy formulation cannot be permitted to unduly interfere with judicial efforts to nurture the consolidation and disclosure of general agency policy. Commentators, for example, have vehemently criticized the NLRB for its reluctance to use rulemaking. Though critics attack the Board for its efforts to avoid public procedures by not promulgating legislative rules through notice and comment procedures, one cannot ignore the Board's numerous efforts to formulate and disclose policy through other types of rules. Legislative rulemaking through section 553 procedures is a valuable technique and is preferable in many situations, but the role of interpretative rules and general statements of policy in the Board's policymaking arsenal is equally clear. The NLRB's nonlegislative rule requiring that employers furnish unions with a list of employees before an election to select a bargaining representative,

121. Bonfield, supra note 18, at 118 (adverse effects of imposing section 553 procedures on policy issuances and statutory constructions).
122. Id. at 118-19.
124. One reason for the NLRB's reluctance to pursue section 553 rulemaking is the Board's unique political situation. The Board understandably seeks to avoid the titanic clash between big labor and big business in a public rulemaking. Case-by-case adjudication avoids turning the decisionmaking process into a political pressure cooker.
adopted in the process of the adjudication of *Excelsior Underwear, Inc.*,\(^{125}\) could have been a legislative rule. The Board could have discontinued the adjudicative proceeding and shifted to section 553 rulemaking or severed the general policymaking consideration from the specific adjudication.

The Supreme Court reviewed the rule adopted in *Excelsior* and the process employed in formulating the rule in *NLRB v. Wyman-Gordon Co.*\(^ {126}\) The plurality opinion severely criticized the Board for its reluctance to make rules through public procedures.\(^ {127}\) The majority holding, however, reversed the First Circuit’s decision that the Board acted improperly in promulgating the *Excelsior* rule without notice and comment.\(^ {128}\) The Court based its decision on the NLRB's reliance upon an adjudicative determination, independent of the *Excelsior* rule, that Wyman-Gordon should produce a list of employees.\(^ {129}\) The majority reasoned that the NLRB had the authority to make such an adjudicative determination in an individual case and that the existence of a rule relating to the same subject, whether legally promulgated or not, would not support reversal of the NLRB's action.\(^ {130}\)

An alternative ground for the decision in *Wyman-Gordon* could have been that the *Excelsior* rule was not intended to be a legislative rule. The Court might have found that the Board only intended to develop and disclose general policy by which to guide future action, and to this extent, it acted in conformity with the APA and the primary values of required rulemaking and public disclosure of agency policy. The systematic formulation and articulation of general policy in some form of rule is preferable to no policy development or disclosure at all. Because of the pervasive effect of the *Excelsior* policy statement, however, and the absence of a stated reason for not undertaking some form of general notice and comment procedure, the Court in *Wyman-Gordon* perhaps should have required the NLRB to employ procedures for public input even though the APA did not require such steps.\(^ {131}\)

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127. *Id.* at 764-66.
128. *Id.* at 766.
129. *Id.*
130. *Id.*
131. The Board did solicit comments from those who might have been affected by the rule but were not parties to the adjudication, but it did not give general notice and opportunity to participate. *Id.* at 763.
An example of the adverse effects of the failure to formulate and disclose policy is the NLRB’s refusal to openly articulate clear policy in its handling of discrimination by labor unions. The Board has refused to announce any policy in this area, even through a nonlegislative rule. The desirability of some form of rulemaking is clear: the absence of defined policy creates a substantial problem for labor unions attempting to comply with the law. A court inclined to require rulemaking for the purpose of disclosing agency policy may be working against itself by insisting on legislative rulemaking. A court should require the formulation and articulation of policy, but flexibly view the type of rule required and the form of agency procedure permitted. In many instances, either an interpretative rule or a general statement of policy will serve as well as a legislative rule to define terms or to consolidate and disclose policy. Efforts to encourage or require rulemaking must always recognize that any form of policy formulation may serve, in a specific context, to disclose agency policy and that too much procedure may have a greater negative impact on that goal than the additional procedures can offset with increased participation and greater information.

Careful consideration of the negative impact of additional procedures, such as the potential for secret policy formulation, should temper the enthusiasm for the imposition of procedural requirements. To state that a court considering imposition of additional procedures for exempt substantive rules should weigh these negative factors, however, is not to say that a court must avoid altogether the imposition of additional procedures. These countervailing considerations are important and a court cannot lightly disregard them in considering additional procedures. Courts can weigh the negative factors against the benefits that might accrue from additional procedures and strike a balance, which, if in favor of no procedures, will dictate against imposition. If the balance tips in favor of abbreviated procedures, a court should be free to order whatever public procedures appear necessary. The analysis that sees only two alternatives, no procedures or else section 553 procedures, should be replaced with a more flexible analysis, which, while weighing the negative factors, encourages courts to consider the positive aspects of a limited form of public participation. Thus, the secret policy objection to the imposition of additional procedural requirements loses force where the possible detriments of

imposed procedures are carefully considered and the additional procedures may be a modest accommodation to public participation and informed decisionmaking.

STATUTORY PROHIBITION

The fear that the burden of extra procedures would cause agencies to keep policies secret contributed to the legislative decision to exempt interpretative rules and general statements of policy from section 553. Because Congress specifically exempted such rules, critics of additional procedures can argue that the courts may not properly impose procedures where Congress did not. Nothing in the legislative history indicates that Congress intended to preclude the judicial imposition of public procedures. The House Judiciary Committee reported that:

Agencies are given discretion to dispense with notice (and consequently with public proceedings) in the case of interpretative rules, general statements of policy, or rules of agency organization, procedure or practice; but this does not mean that they should not undertake public procedures in connection with such rulemaking where useful to them or helpful to the public. The drafters of the Act did not preclude the courts from a role in this determination. Certainly the courts can examine agency action for abuse of discretion, and the APA provides for this review. Thus, where Congress granted the agency the discretion to forego procedures, it must have meant for the courts to review the exercise of that discretion.

Recent decisions refer to section 553 as setting minimum procedures for the promulgation of legislative rules. The approach suggested above, that courts sometimes require public procedures for interpretative rules and general statements of policy, is built on the same flexible view of the APA as a minimum upon which additional

133. S. Doc. No. 248, supra note 16, at 18. Several reasons were cited for the exemptions: a desire to encourage the promulgation of such rules; recognition that discretion is necessary given the diverse contents and times of issuance of such rules; acknowledgment of a procedure by which such rules could be reconsidered; and, the availability of plenary judicial review of such rules. Id.

134. Id. at 258. The Senate Committee Report contains virtually the same language. Id. at 290.


136. See, e.g., Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1251-52 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 630-31 (D.C. Cir. 1973); Chicago v. FPC, 468 F.2d 731, 743-44 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972).
procedures should be added where appropriate. This reflects the "new era" announced by the District of Columbia Circuit in *Environmental Defense Fund, Inc. v. Ruckelshaus*, in which courts should act to "ensure that the administrative process itself will confine and control the exercise of discretion." Part of this process involves assisting the agencies in developing a "framework for principled decision-making." An expansion of the procedural horizons for interpretative rules and general statements of policy clearly conforms to this modern view of the APA. Courts in the new era should recognize that agencies must have broad discretion in the choice of procedures and that the judiciary should not unduly interfere with the exercise of that discretion. Nevertheless, the new flexibility in interpreting the APA provisions leaves courts free to assume a role in the choice of procedures. Thus, consistent with the purposes of the APA, courts can compel agencies to consider whether additional procedures are necessary to ensure a fair and well-informed decision and can review the agencies' procedural choices so as to provide judicial guidance in the exercise of discretion.

**UNCERTAINTY**

The third objection to judicial imposition of additional procedures is that agencies would be uncertain, until after judicial review, as to what procedures to employ in promulgating interpretative rules or general statements of policy. Reviewing courts making ad hoc procedural determinations cannot ignore this problem. Judge Wright emphatically made this point in a recent article dealing with imposition of procedures in addition to the section 553 requirements for the promulgation of legislative rules. He objects to the possibility that "after an agency has fully completed its consideration and promulgation of a rule, the reviewing court may demand reconsideration under procedures which, in retrospect, strike the court as being appropriate to the issues raised." Thus, concludes Judge Wright, ad hoc and post facto judicial imposition of public procedures will waste agency time and effort.

Although the problem of agency uncertainty affects all post facto impositions of procedures, regardless of the type of rule, it is less

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137. 439 F.2d 584 (D.C. Cir. 1971).
138. Id. at 598.
139. Id.
141. Id.
142. Id. at 376.
serious where a court requires some public procedures for the promulgation of interpretative rules and general statements of policy than where a court adds the elements of a trial to notice and comment procedures for legislative rulemaking. Interpretative rules and general statements of policy express the view of the agency on a part of the law that it is charged with administering. Interpretative rules and general statements of policy, unlike legislative rules, still have nearly the same effect after a court directs an agency to follow additional procedures as they had before: the opinion of the agency still stands for the guidance of those affected, even if a court instructs the agency to provide for public participation. Consequently, the lack of predictability objection should affect the way courts guide agencies in their procedural decisions regarding interpretative rules or general statements of policy, but the objection does not militate against courts requiring some additional procedures. A conscientious agency, encouraged by judicial guidance, will be inclined to implement the necessary notice and comment procedures without ad hoc judicial imposition.

CONCLUSION

New understanding of the procedural possibilities for interpretative rules and general statements of policy must accompany sound choice of the use of these rules. Although not now required, the public should have some opportunity for participating in the formulation and promulgation of interpretative rules and general statements of policy. This goal, however, cannot be allowed to engulf the advantages of employing nonlegislative rules. The agencies should consider some form of public procedure when the need for public participation or for improvement in the information-gathering process outweighs the detriment that might result from additional procedures. The balancing process must also be utilized when considering the number and kind of procedures to be appended to the process.

Two possible methods of analysis exist for accomplishing this balancing. Congress could repeal the categorical exemptions in section 553, and the good cause exemptions could be developed to cover the realistic needs for abbreviated procedures for these two rules. A better approach, especially considering the unlikelihood of repeal of the categorical exemptions, would be the evolution of procedures specially tailored to the individual forms of exempt rulemaking through notions of fairness and judicial review for abuse of discretion in the agency’s choice of information-gathering technique.

None of the three major arguments against additional procedures carries enough force to foreclose consideration, in specific instances, of
the appropriateness of some public participation. The moderate, pragmatic approach recommended here will negate these arguments. A procedure likely to improve agency decisionmaking is worth the added judicial scrutiny necessary to prevent secret policy, is not contrary to the intent of the APA, and can be implemented without unnecessary uncertainty by a conscientious agency, assisted by judicial guidance. By following this approach, the administrative agencies can publicly promulgate the large proportion of bureaucratically created law that takes the form of interpretative rules and general statements of policy without greatly increasing the cost of government.