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THE POLITICS OF ADMINISTRATIVE RULEMAKING

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RICE UNIVERSITY

THE POLITICS OF ADMINISTRATIVE RULEMAKING

by

WILLIAM F. WEST

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE

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THE POLITICS OF ADMINISTRATIVE RULEMAKING
(Abstract)

by

WILLIAM F. WEST

Despite the importance of rulemaking, it has been virtually ignored as a separate topic of study by political scientists. This is unfortunate, for the use or non-use of rulemaking as an alternative means of carrying out statutory mandates is significant for several reasons. The Federal Trade Commission's experience indicates that rulemaking is a more forceful and expedient way of implementing policy than proceeding without standards via the case-by-case approach. It is also fairer to those potentially affected by government policy. In spite of these advantages, however, the FTC and other agencies have often been reluctant to issue rules. This has often been due to political resistance by those who do not wish to be regulated, or by those who otherwise wish to alter policy as it is implemented.

Given the use of rulemaking, the selection of specific rulemaking procedures can also be important. The FTC has been required by Congress to use trial-like procedures in arriving at final rules. This requirement was added to the Commission's enabling legislation in 1974 to ensure that agency decisions would be based on sound rationale. Whether or not the FTC's new procedures have achieved this goal, they have had other significant effects. They have forced the FTC to scrutinize rule premises more closely than in the past. If this has been a "good effect," however, the procedures have also imposed very considerable delay on agency decision making, and

have limited the scope of agency policy to alternatives that can be justified with factual evidence. There is little doubt that regulated industry, which was instrumental in persuading Congress to impose new requirements, perceived that trial-like procedures would limit the FTC in these ways.

Rulemaking and rulemaking procedure, as well as other administrative processes, can be usefully included in the study of policy making. The "causes" and "effects" of formal, institutional arrangements can be dealt with empirically. Indeed, they should be, for as alternative modes of implementation, they have important administrative and political effects.

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Chapter 1

INTRODUCTION

Students of government are devoting increased attention to what happens after bills become law. The premise behind such work is, of course, that the political process does not end with the congressional process-- that important influences often come to bear, and significant discretion is often exercised as statutes are being "implemented." The realization that policy making is not distinct from implementation is a central reason for the current interest in public policy as a separate field of inquiry within the political science discipline.

Despite the considerable attention given to post-congressional policy making, however, there has been a notable lack of concern with administrative processes. These are the formal "means" or "tools" by which agencies implement (and thus make) policy. The underlying rationale here is that the study of administrative processes can contribute to a better understanding of policy making. This work focuses on administrative rulemaking, which is one such process. It considers why agencies choose to use or not use rulemaking as an alternative means of implementation, as well as the policy significance of this choice. Given the use of rulemaking, the thesis also examines the "causes" and "effects" of alternative rulemaking procedures.

The Justification for Studying Rulemaking

Several decades ago rulemaking and other elements of the admini-

strative process were popular subjects for students of government. The discipline's neglect of rulemaking in more recent times can be attributed to disillusionment with descriptive, legalistic perspectives. The "institutional approach" was found deficient because it did not lend itself to analysis of the ways various participants in the governmental process interacted to produce policies. Thus, attention turned from formal structure to the empirical consideration of the "actual behavior" of political actors. A result of this was that the study of rulemaking and the administrative process in general was left to law scholars.

The purpose here is not to advocate a return to the Dark Ages. Rather, an underlying premise is that the study of formal processes may be usefully approached in an empirical way to add to the study of policy making. As James Anderson suggests:

... regularized patterns of behavior, which we often call rules, structures, and the like, can affect decision-making and the content of public policy. Rules and structural arrangements are usually not neutral in their impact; rather they tend to favor some interests in society over others.¹

If administrative processes and structures can be analyzed systematically in terms of causes and policy effects, their study should help in gaining a broader understanding of implementation. Most of the literature on policy implementation is either narrowly bound to specific cases, or is too vague to be of much explanatory value. This is due to the fact that many different types of agencies administer many different types of policy within many different environmental contexts. A useful way to approach the analytical problem posed by such diversity may be to focus on formal administrative processes, which are relatively few and which "cut-across" the federal bureaucracy.

Obviously, one study cannot rigorously deal with the entire

administrative process. The present work is concerned with rulemaking, which is the exercise of quasi-legislative authority delegated from Congress to an agency. As the promulgation of "administrative laws," rulemaking is the most direct way in which agencies make policy, and constitutes a very significant component of governmental output. For example, the pages of rules published in the Code of Federal Regulations far outnumber the pages of statutory law in the U.S. Code. Moreover, rulemaking is becoming relatively more important all the time. As a rough index of this, the yearly ratio of Federal Register pages to pages of public bills has increased in a fairly secular fashion from about 8.3 in 1948 to 34.3 in 1974.

Despite its apparent significance, however, rulemaking has been almost completely ignored by political scientists. As will be demonstrated in the chapters that follow, rulemaking and rulemaking procedures are important variables in the policy-making process. Both the use and non-use of rulemaking and the selection of specific rulemaking procedures have important systematic implications with regard to the efficiency as well as the substance of agency decision making. Given this, it is also not surprising that the use of these administrative tools often becomes a political issue and is subject to political influences.

Outline of the Thesis

The second and third chapters of this thesis are largely descriptive. Chapter 2 defines the terms "rule" and "rulemaking," discusses the basis of and reasons for rulemaking authority, describes different types of rules, and attempts to conceptualize rulemaking as a form of governmental output and its relationship to other types of output. Chapter 3 provides an overview of variation in rulemaking procedure in the federal bureaucracy.

Included is a discussion of the reasons for and substance of the Administrative Procedure Act of 1946, which dictates the rulemaking procedures used by many agencies, and which has served as a model for still others.

One reason for devoting so much space to the description of rulemaking and rulemaking procedure is that political scientists are unfamiliar with these subjects. Therefore, the first two chapters provide necessary background and understanding for the remainder of the thesis. Another justification for these chapters is that no one else (from any discipline) has provided a comprehensive overview of rulemaking and rulemaking procedure.

Chapter 4 is a literature review organized around the four main questions of the thesis:

- 1) Why is rulemaking used or not used as a means of implementing statutory directives?
- 2) What is the policy-making significance of the use or non-use of rulemaking?
- 3) Given rulemaking, what determines the choice of rulemaking procedure?
- 4) What is the policy-making significance of variation in rulemaking procedure?

Although these are logical concerns for a political scientist interested in rulemaking, they are not of primary interest to law scholars, who have done almost all of the writing on rulemaking and rulemaking procedure. As a result, existing literature is very sketchy, suggesting only a few tentative hypotheses and many questions. There is an especial lack of work reflecting on "political" as opposed to "administrative" considerations.

The remainder of the thesis is a case study of rulemaking and rulemaking procedure in one agency-- the Federal Trade Commission. This study attempts to answer some of the more important questions developed in

the literature review. Chapter 5 deals with the reasons for and significance of the Commission's use and non-use of rulemaking in different circumstances. Chapter 6 explains why the FTC uses the rule-making procedures it does and what the significance of these procedures has been. In both chapters, special attention is given to the FTC's political environment, both as it has influenced and been affected by the use of rulemaking and the choice of procedure.

Of course, the FTC is only one agency administering one type of policy in one environment. Contextual diversity makes generalization difficult, yet the FTC's experience yields some important general observations and hypotheses concerning rulemaking and rulemaking procedure in all agencies. These are developed in the conclusion.

FOOTNOTE

¹James Anderson, Public Policy-Making (New York: Praeger Publishers, 1975), p. 24.

Chapter 2

RULEMAKING DEFINED AND PLACED IN PERSPECTIVE

The purpose of this chapter is to define rulemaking and place it in perspective as a means of both implementing and creating policy. The first section defines the terms "rule" and "rulemaking" as they will be used here. The second section attempts to place rulemaking in conceptual perspective, discussing such subjects as the basis for rulemaking authority, types of rules, the place of rulemaking as an element of governmental discretion, and the functions performed by rules. The final section explores the scope and limits of rulemaking.

GENERAL DEFINITIONS

Rule

Although the term "rule" may seem straightforward, scholars have been unable to agree on its exact meaning. Definitions that have been proposed fall essentially into two categories. The more popular approach is to conceptualize a rule in terms of its substantive properties. Alternatively however, it has been argued that a rule should be thought of as the product of a given process. Each of these approaches has its advantages and shortcomings, but the former is clearly preferable for the purposes here.

Rules and orders are the two kinds of legally-binding directives issued by administrative agencies. As a substantive distinction, many

authors have been content to state merely that rules are administrative or executive "legislation," while orders are adjudicatory decisions reached by agencies. This definition has been offered explicitly,¹ as well as implicitly by the many writers who have referred to rulemaking authority as "quasi-legislative" power and to adjudication as "quasi-judicial."

In an effort to be more precise along these lines, Dickinson has distinguished a rule (legislation) from adjudication in the following manner:

What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a future proceeding before the legal position of any particular individual will be touched by it; while adjudication operates concretely on individuals in their individual capacity.²

Although Dickinson's basic substantive distinction is the one that will be used here, his statement points out the weakness of a definition that equates rules to legislation. It ignores the obvious facts that many of the laws enacted by Congress pertain to specific groups or individuals, and that courts regularly create policy of general and future effect through their decisions. The stubborn insistence of many on using the legislative-judicial analogy probably stems from a preoccupation with the notion of separation of powers, coupled with a desire for conceptual neatness.

The definition that will be used here is that a rule is a "statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." No attempt is made to draw a parallel with legislation. This definition has been extracted from the government's "official definition" of rule as offered in the Administrative Procedure Act.

rule means the whole or part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structure or reorganization thereof, process, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;³

The words "or particular" in the APA's definition have been a source of confusion. If a statement of particular applicability which interprets the law is a rule, then what is an order? "Or particular" was not included in early drafts of the APA, and it seems apparent from the work of leading scholars of the time that these words violated what was generally understood to be the meaning of the term "rule."⁴ Most probably the modification was added to ensure that such "marginal activities" as ratemaking and licensing be defined as rulemaking and thus subject to the APA's procedural requirements. It is difficult to say precisely what the effect of these words has been, but Professor Davis feels that they have not been interpreted in such a way "... as to change into rulemaking what before the APA was regarded as adjudication," and that, at any rate, the APA's definition in its entirety has not been taken very seriously.⁵ In recent years there has been a good deal of pressure from the legal profession to amend the APA's definition by deleting the words "or particular."⁶

The substantive definition used here is not without its shortcomings, for it does not always provide a straightforward guide for categorizing individual administrative actions. For example, Davis raises the point that the definition of a rule as an abstract statement means that the legal position of any particular individual cannot be absolutely determined without further adjudicatory action. He then asks the question, "If a rule so clearly applies to X that he obeys it without an enforcement

proceeding, and if an injunction is so unclear as applied to Y's activity that Y tests its application in an enforcement proceeding, is the rule or the injunction more abstract or concrete?"⁷ Likewise, Freund argues that rules and case-by-case actions merge into a gray area. As an illustration he poses a gradation of rate-making activities which fall on a general-particular continuum.

1) a rate for a particular person for a particular shipment; 2) a rate for a particular person for many shipments; 3) a rate for a particular class of merchandise between two specified places; 4) a mileage rate for a particular class of merchandise; 5) a tariff or charges for a particular road; and 6) a tariff or charges for many roads.⁸

Clearly 1) represents an instance of case-by-case decision making, while 6) is rulemaking. But where does one draw the line between these two extremes? Finally, another severe difficulty inherent in any substantive definition is that an adjudicatory order will often establish what is, in effect, a rule. Commenting on the definition of a rule as a statement of general applicability, Shapiro states that "... this is to define away the problem, for then all declarations of policy in any form of proceeding become "rulemaking."⁹

Because of problems such as these Davis has chosen the following distinction between rulemaking and adjudication:

A rule is the product of rulemaking, and rulemaking is the part of the administrative process that resembles the legislature's enactment of a statute. An order is the product of adjudication and adjudication is the part of the administrative process that resembles a court's decision of a case.¹⁰

As mentioned, however, it is far from clear what constitute legislative and judicial processes. Davis is no doubt aware of this, and admits that his definition, like the others, is "of little help in classifying borderline or mixed activities."¹¹ Although he does not offer any particular

justification for his approach over others, he does imply that a good definition (in terms of the law, at least) is one that allows for flexibility in individual circumstances.¹²

Of course, such vagueness is not desirable in social science, but a choice between an imperfect process-oriented definition of rulemaking and an imperfect substantive definition seems inevitable. I have chosen the latter course for two reasons. From a semantic standpoint, it seems illogical to define a rule as the product of rulemaking. Perhaps more importantly, variation in rulemaking procedure is one of the two major concerns of this thesis. Obviously therefore, it would be self-defeating to define a rule as the product of a given process.

Rulemaking

Rulemaking is defined here simply as any process that results in a rule, and will frequently be used to refer to the employment of rules by an agency as a means of carrying out statutory policy. This is certainly a conventional use of the term. It should be noted that students of government and administrative law sometimes speak of rulemaking as the promulgation of rules under the notice-and-comment guidelines established by the Administrative Procedure Act. As will be discussed later, this is a much narrower definition than the one used here, since the great majority of what are, in substance, rules are made outside the embrace of the APA's procedural requirements.

RULEMAKING IN PERSPECTIVE

The Basis for Rulemaking Authority

An agency's power to issue rules having the force and effect of law comes from Congress. Rulemaking always takes place pursuant to some

legislative goal, and is usually expressly authorized by statutory language which states that the agency shall, at its discretion, issue rules to achieve certain specified objectives. It is a function of the courts to review rules to ensure that they serve congressional intent.¹³

Having said this much, two qualifications must be added. First, the words "having the force and effect of law" are significant. What are termed "interpretive rules" are not, in themselves, legally binding, and because of this their issuance need not be authorized by Congress. They are, however, made pursuant to statutory objectives. Interpretive rules, which will be discussed more fully later in this chapter, are only of tangential concern in this thesis.

A second qualification is that rulemaking authority need not always be explicitly granted, but may sometimes be "inferred" from a statute. The determination of what constitutes an implicit grant of rulemaking authority is ultimately made by the courts. Judicial decisions that have been rendered on this subject form a confused and controversial body of precedent from which it is difficult to distill defining criteria.

In a number of instances, agencies authorized by statute to issue rules for certain purposes have sought to extend their rulemaking authority to other areas falling within their general jurisdiction, but with respect to which explicit rulemaking authority has not been conferred. The courts have been very liberal in upholding these assumptions.¹⁴ In so doing, judges have always attempted to justify their decisions in terms of legislative intent. This has been carried off most effectively perhaps in cases where an agency has issued a rule pursuant to some new development which was unforeseen at the time its enabling legislation was passed. For example, in upholding an extension of its rulemaking authority by the

Federal Power Commission, one judge stated:

All authority for the Commission need not be found in explicit language. Section 16 [the FPC's general statutory rulemaking provision] demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation. While the action of the Commission must conform to the terms, policies, and purposes of the Act, it may use means which are not in all respects spelled out in detail.¹⁵

At the same time, though, it is clear from such decisions that what the courts have construed as legislative intent has conveniently supported their notions of good policy. The quotation above illustrates this, as does the following excerpt from another important decision:

Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rulemaking powers, it has less reason to rely on ad hoc adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through the quasi-legislative promulgation of rules to be applied in the future.¹⁶

It seems likely, in fact, that policy considerations have often been of foremost importance to the courts in their decisions to uphold assumptions of rulemaking authority, and that justifications in terms of legislative intent have been added pro forma. A typical ploy has been to argue that, since rulemaking represents a more effective means of achieving a statute's objectives, then Congress must have meant for it to be used in appropriate situations.

The most dramatic affirmation of "implicit" rulemaking authority was the D.C. Circuit's 1973 decision to uphold Federal Trade Commission rulemaking under section 5 of the FTC Act. Unlike previous cases, in which agencies had sought to "extend" rulemaking authority granted for one purpose to other, related areas, the FTC had no express rulemaking authority

pursuant to its mission of preventing unfair or deceptive practices. The Court sought to justify its position partially upon the FTC Act's legislative history, and partially upon the theory that another section of the statute authorized rulemaking. These rather dubious attempts aside, however,¹⁷ the Court's remaining rationale was: 1) that rulemaking was a preferable means for implementing policy in some cases, and 2) that the FTC implicitly had rulemaking authority by virtue of the fact that it was expressly granted the power to adjudicate, and that adjudication ultimately produced what were, in effect, rules.¹⁸

As a brief summation, agencies derive their rulemaking authority from statutes. All rules having the force and effect of law are issued to further statutory objectives. The great majority of rules are issued pursuant to an explicit grant of rulemaking authority, although as discussed, agencies occasionally infer rulemaking authority from their authorizing legislation.

Types of Rules

Rules may be issued by the president or by agencies, and are commonly referred to by a variety of other names, including "regulation," "proclamation," "executive order," "instruction," "bulletin," "guideline," and "memorandum" (although it should be added that everything so designated is not necessarily a rule).¹⁹ Four general types of rules can be identified for conceptual purposes.

The type of rulemaking that shall be of central concern here can be described as "supplementary" or "legislative." To borrow from Comer,

This class [of rulemaking] involves discretion on the part of the Executive in framing legislation for perfecting or elaborating a policy stated in general terms. It may be defined as that class of delegated legislation which names, or adds to, the administrative law by which the more or less definitely stated purpose or policy of Congress is to be carried out.²⁰

Thus, supplementary rulemaking represents a true delegation of legislative authority from Congress to the President or an administrative official.

Supplementary rules can be better understood by distinguishing them from what are known as "interpretive rules." Interpretive rules are issued to clarify the meaning of statutes. As mere translations, they theoretically do not create new policy in the same sense that supplementary rules do. Of course, this formal distinction is as naive as the notion that judges "discover the law," and has given jurists and scholars a good deal of trouble.²¹ Nevertheless, interpretive rules, as distinguished from supplementary rules, are of practical importance for several reasons.

Interpretive rules do not have legal force. That is, agencies may not rely on them, per se, as bases for enforcement proceedings. Rather, they serve to advise potentially affected parties of how agencies will construe statutory language in future situations. Supplementary rules, on the other hand, do have legal force in themselves. The practical significance of this distinction is that, in regulatory policy at least, supplementary rules save agencies the trouble of demonstrating the validity of their constructions of what may be general or vague statutory language in individual cases, while interpretive rules do not. Also, it is probable that interpretive rules, because of their advisory nature, do not elicit the same degree of voluntary compliance as supplementary rules.

Relatedly, law scholars often contend that interpretive rules are more easily subject to be overturned by courts on substantive grounds, since the judiciary retains the constitutional role as final interpreter of the law. Supplementary rules-- which are the law-- are not as vulnerable in this way. Courts may review supplementary rules, but only to determine if they have been made within the scope of statutory delegation, or in some

circumstances, to determine if they have been promulgated in accordance with certain legislatively-prescribed procedures. As Justice Connor stated in one Supreme Court decision:

When administrative rulemaking is based on clear authority from the legislature to formulate policy in the adoption of regulations, the rule-making activity takes on a quasi-legislative aspect.... In the federal system, when an administrative agency is clearly acting in its quasi-legislative rule-making capacity, the United States Supreme Court has not substituted its judgement as to the content of the rule or regulation. On the other hand, when it appears that the adoption of a regulation concerns merely the interpretation of a statute, the United States Supreme Court may give the agency's interpretation weight, but such interpretation is not controlling.²²

There is undoubtedly some truth to the argument that interpretive and supplementary rules do not have the same status vis a vis the courts. However, the conceptual distinction between judicial review of an agency's translation of statutory language and judicial review to determine whether or not a rule serves stated legislative goals seems tenuous at best. Also as a practical matter, courts have paid a good deal of deference to interpretive rules.²³ Perhaps the distinction as to reviewability is a matter of degree, as another Supreme Court decision upholding a supplementary rule implies:

This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the... rule shall appear to be unwise or burdensome or inferior to another. Error or un wisdom is not equivalent to abuse.... The rule must appear to be so entirely at odds with the principles of correct accounting as to be an expression of a whim rather than an exercise of judgement....²⁴

There are two more ways in which the distinction between interpretive and supplementary rules is significant. As mentioned, agencies need not be authorized by statute to issue interpretive rules (although they often are). Also, the promulgation of interpretive rules is not subject to the

procedural requirements established by the Administrative Procedure Act. This will be discussed in the third chapter.

A third type of rulemaking, which will not be of interest here, can be characterized as "contingent." Contingent rulemaking power exists when the president or an agency is authorized to take certain actions pursuant to the occurrence of certain conditions or events. As Comer states, "The contingent class of delegated legislation involves discretion on the part of administrative officials in putting on the active list quiescent or dormant statutes which express congressional policy."²⁵ The following language from a tariff act passed in 1890 provides an example of contingent rulemaking authority:

... whenever and so often as the President shall be satisfied that the government of any country producing and exporting... [designated articles] ... imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such... [articles] into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power... to suspend... the provisions of this act relating to the free introduction of such... [articles] ... for such time as he shall deem just....²⁶

The element of discretion in the "pure form" of contingent rulemaking involves only the determination of whether or not certain conditions exist, and not the creation or elaboration of law. It should be added, however, that contingent rulemaking power is often combined with the discretionary authority to make rules which refine congressional intent. For instance, the president in the example above was also given the "supplementary" authority to specify tariff rates on formerly duty-free articles.²⁷

It is useful to distinguish a fourth type of rulemaking. Contingent, supplementary, and interpretive rules are conceptualized here as having direct implications concerning the implementation of congressional policy.

One might say that they put into effect, shape and refine, and translate statutory objectives, respectively. As distinguished from these, "rules of agency practice and procedure" govern the internal mechanics of the administrative process, and are not directly concerned with substantive policy output. Of course, it should be added that rules of practice and procedure may well affect policy indirectly by influencing how it is made. For example, the procedures agencies use to promulgate supplementary and interpretive rules, as well as a variety of other decision-making procedures, are often the product of this type of rulemaking.

Rules of agency practice and procedure are not usually discussed as a separate class. Most scholars simply include them within the categories of supplementary and interpretive rules. In this respect, it should be pointed out that, as with supplementary versus interpretive rules, rules of practice and procedure may or may not be made pursuant to an explicit statutory grant of rulemaking authority, may or may not be legally binding, and may or may not be subject to judicial review on substantive grounds. However, it is useful to conceptualize rules of practice and procedure as a separate entity in this thesis, which focuses on rulemaking from a policy perspective.

The concern throughout this thesis will be primarily with supplementary rulemaking-- the true exercise of discretionary legislative authority by administrators. As used here, the terms "rule" and "rulemaking" will refer to "supplementary rule" and "supplementary rulemaking," unless otherwise qualified.

Rulemaking as an Element of Governmental Discretion

Rulemaking can be appreciated if we consider its relationship to other types of decision making. Its position and significance as a means

of exercising governmental discretion is of special interest.

In Hart's view, governmental discretion is exercised on essentially two levels: the "legislative" and the "individual."

Legislation is the discretionary determination of the legal rights and duties of private persons generally, or private persons of a reasonably defined class, and the provision of means of enforcing these rights and duties. By discretion is meant the exercise of choice involving not the scientific application to the facts of objective standards but a subjective evaluation of the advisability of alternatives. The regime of law does not eliminate discretion, but substitutes discretion as to a uniform rule for discretion in individual cases.²⁸

Administrators make individual decisions in many ways. Adjudicatory orders and decisions to withhold or bestow government grants, contracts, subsidies, services, etc. are obvious examples. However, these represent only what is perhaps the most visible fraction of all individual decisions made by administrators. If adjudication represents the formal culmination of an agency's enforcement process, for instance, consider the other choices that must be made along the way. First, the agency must decide whether or not to investigate a given activity. Assuming that it does and discovers wrongdoing, it must then decide whether or not to take action, and if so, what type of action. For example, an agency may attempt to reach some sort of informal agreement with an alleged violator rather than initiate a formal adjudicatory proceeding. It should also be noted that Congress makes individual decisions when it does such things as pass private bills and investigate the conduct of named parties, although these activities are not of concern here.

Hart's definition of legislation includes both the public laws passed by Congress and administrative rules. In general, it is simplistic to think that the exercise of legislative discretion can eliminate discretion in individual cases by reducing administrative decisions to

the mere "application of facts to objective standards."²⁹ But it is accurate to say that the individual decisions made by administrators involve discretion to the extent that they are not guided and delimited by legislation.

Modifying Hart's schema, one can conceptualize a hierarchy of governmental discretion. At the lowest level is discretion exercised in individual cases. This sort of discretion is bounded by, takes place pursuant to, and is therefore subordinate to legislation. Hart's concept of legislation can, in turn, be divided into two hierarchical categories. Congressional legislation (statutory law) authorizes and prescribes the limits for administrative legislation (rulemaking), much as rules constrain individual decisions. (Of course, this is not to say that statutes do not sometimes control individual administrative decisions in a "direct" sense.) One might even extend this hierarchy further to say that rulemaking is subordinate to statutory law in much the same way that the latter is subordinate to the Constitution. As Comer says, "Just as a large part of congressional legislation results directly from the "necessary and proper" clause of the Constitution, so rulemaking is a direct result of the secondary "necessary and proper" clauses of the statutes under which it issues."³⁰

The Functions Rules Perform

Rules perform the function of limiting case-by-case discretion in several basic ways. In a direct sense, supplementary rules serve to refine or elaborate the terms of statutes, thus leaving administrators less leeway in determining to whom statutory provisions apply or do not apply. In turn, this takes place within two very general contexts, depending on the type of governmental activity involved.

Freund's characterization of governmental activity as being either service- or control-oriented is useful for illustrating the direct functions performed by supplementary rules.³¹ In service areas, rules define-- beyond statutory language-- to whom and for what purposes governmental resources will be allocated. (The choice of whether to define the allocation of public goods such as grazing lands and broadcasting licenses as service or control is troublesome.) To illustrate the relationship between rule-making and individual discretion in service areas, consider a hypothetical program of federal grants to cities. Assuming the authorizing statute to be sufficiently vague, the administering agency might promulgate a rule clarifying eligibility criteria. The rule would be made in the spirit of fulfilling the explicit or implicit purpose of the statute and might include such considerations as the types of areas and citizens that should benefit from grants, and the specific purposes for which funds should be used. Agency officials would undoubtedly still have significant discretion in determining the worthiness of individual applicants for funds, but would be constrained in this regard in accordance with the specificity and objectivity of the rule's criteria.

In areas where government seeks to control individual behavior, supplementary rules define beyond statutory language what sorts of behavior shall be proscribed or prescribed. For example, suppose that an agency is charged with determining whether or not direct commercial air carrier service should be required between cities, and suppose further that its only statutory guidance for making such decisions is that it should regulate air transport for the "public interest, convenience, and necessity." (In reality, regulatory statutes are often this vague.) Obviously, a mandate such as this leaves considerable room for administrative

discretion. As an alternative to relying on vague statutory language as a basis for individual decisions, the administering agency might promulgate a rule establishing considerations to be taken into account in determining whether or not air carrier service should be required between specific pairs of cities. Relevant criteria might include the sizes of the cities in question, their proximity, and their economic relationship. Standards such as these would naturally constrain case-by-case discretion. Similarly, rules which define proscribed activities (such as the rules the FTC makes proscribing "unfair or deceptive practices"³²) also limit ad hoc discretion.

It should be added that, although the primary focus here is on supplementary rules, interpretive rules and rules of practice and procedure can also limit ad hoc discretion. Even though interpretive rules are not legally binding, their effects in terms of refining and standardizing decisional criteria may be the same as those of supplementary rules. Rules of agency practice and procedure may also standardize individual decision making as it affects the recipients of government services or the objects of regulation. In the case of the grant-administering agency, a rule standardizing the mechanics of the application process might eliminate or reduce individual discretionary choice by administrators concerning such things as time limits for submitting requests. Indirectly, this might have a "substantive" impact in terms of standardizing the types of potential applicants possessing the administrative wherewithall to compete for funds. In the case of regulatory agencies, rules prescribing such things as investigatory procedures, while not serving to standardize the substance of the law being administered, might nevertheless have important effects in standardizing the application of the law.

THE SCOPE AND LIMITS OF RULEMAKING

The Use of Rulemaking

Congress' delegation of rulemaking authority is often supposed to be a response to the complexities of modern life. It is true that Congress, increasingly burdened with regulatory and social service policy needs, has seen fit to delegate more and more legislative authority to administrators in the 20th Century. However, agencies and the president have been vested with significant rulemaking powers since the first days of the Republic. For example, the first session of Congress authorized the head of each Department to "prescribe rules and regulations not inconsistent with the law, for the government of his Department, the conduct of its officers, the distribution of its business, the custody, use, and preservation of the records, papers, and property appertaining thereto."³³ Interestingly, this provision has since served as the basis under which many agencies have assumed the authority to issue rules of practice and procedure, even in the absence of specific authority. The Chief Executive and other administrative officials were also authorized to issue supplementary rules to achieve a variety of generally-stated goals. The president, for instance, was given the power to regulate all trade with indians,³⁴ and the Secretary of the Treasury was given discretion to "regulate... the marks to be set upon casks [of distilled spirits] and the forms of the certificates which are to accompany the same."³⁵

Without dredging up a mass of supporting examples, suffice it to say that Congress has seen fit to delegate its legislative power throughout the United States' history. Comer's 1927 study of federal legislation corroborates this at some length. In it he divides the "history of

national lawmaking" into four periods-- 1789-1824, 1825-1860, 1861-1890, and 1891-1926. He offers the following statement as a summary of his findings:

... the legislature was inclined to share the burden of legislation with the executive often during the first period; ... this practice was continued to some extent during the second; ... Congress was liberal in delegating discretion during the third period; and ... during the fourth period the practice was generally established. Furthermore, although the President received a major portion of all delegated legislation during the first three periods, a division of labor was appearing in the administrative branch of the government and the basis for practically all legislative powers exercised at the present time by the major departments was being laid.³⁶

Comer was prescient in implying that, although rulemaking had always been significant, its use by agencies would burgeon in the future. The magnitude and relative importance of rulemaking have increased tremendously over the past several decades. The Federal Register, which is a daily publication of new federal rules and orders, provides a rough index of the growth in rulemaking activity. The Register totaled 2,619 pages in 1936, the first year that it was published. After forty years of fairly secular growth, the 1975 volume contained 60,221 pages. Figure 2.1 graphs this increase. The anomaly posed by the high figures for the 1942-1946 period is the product of War-related regulations.³⁷ (See the following page.)

Some dispute the contention that there has been an increased need for Congress to delegate rulemaking authority. Be that as it may, an increase in rulemaking seems inevitable, given the tremendous growth in the scope and complexity of government activity. Congress, as presently constituted, can only do so much. Thus, the number of pages of public bills enacted has not increased appreciably since the 80th Congress (1946-48), as shown in Table 2.1. It follows, then, that Congress' ability to legislate in detail has declined as it has sought to provide more services

Figure 2.1

Growth of the Federal Register
(thousands of pages)

Source: Congressional Quarterly Weekly Report

Table 2.1

Pages of Public Bills

Congress	Pages of Public Bills Enacted	Ratio of Federal Register Pages to Pages of Public Bills
80th (1947-48)	2236	8.28
81st (1949-50)	2314	7.57
82nd (1951-52)	1585	15.82
83rd (1953-54)	1899	9.91
84th (1955-56)	1848	11.21
85th (1957-58)	2435	8.93
86th (1959-60)	1774	14.43
87th (1961-62)	2078	12.57
88th (1963-64)	1975	17.29
89th (1965-66)	2912	11.70
90th (1967-68)	2304	17.86
91st (1969-70)	2927	13.84
92nd (1971-72)	2330	23.34
93rd (1973-74)	2361	34.31

Source: Congressional Quarterly Weekly Report

and to control more types of behavior.

It should be added that, in contrast to the 1800's, the overwhelming majority of administrative rules today are issued by agencies rather than by the president. This development is analogous to the one discussed above in terms of its causes. Regardless of the considerable growth of the "institutionalized presidency," the Chief Executive has not been able to keep up with the increasingly numerous and complex policy-making duties which Congress has seen fit to delegate. Thus, more and more rulemaking authority has devolved upon non-elected officials.

Rulemaking and the Constitution

Congress' delegation of legislative authority to administrators seemingly runs athwart of one of the most fundamental principles of American government: separation of powers. Because of this, the political system has been faced with a dilemma. On the one hand, rulemaking appears to many to be an illegitimate means of making policy, but on the other it seems necessary if government is to cope with society's needs. Rulemaking has been and continues to be controversial in this regard.

Many scholars have felt the need to reconcile rulemaking with the Constitution. The document itself contains nothing explicit in regard to delegated legislation. As strictly construed, Article I, section 1, which states that "All legislative powers herein granted shall be vested in a Congress of the United States," would seem to preclude the use of rulemaking. Some, however, have argued that other sections of the Constitution give implicit sanction to delegated legislation. For example, Davis contends that the "necessary and proper" clause of Article I, section 8 implicitly bestows the ability to delegate rulemaking authority. Likewise, he argues by way of analogy that the Constitution's grant to Congress of

the power to collect taxes and coin money was certainly no indication that the framers expected the legislature to actually execute these tasks.³⁸ In another liberal interpretation of the separation of powers doctrine, Cheadle argues that "sub-delegation," per se, is not unconstitutional so long as it is done pursuant to general guidelines expressed by Congress. In his view, only the "duty of meeting in annual session and declaring the national will in some form of enactment in the general laws" cannot be delegated.³⁹

Arguments such as these, based on the language of the Constitution itself, have seemed to be conjectural rationalizations to many. As a result, some scholars have attempted to justify rulemaking on the basis of "historical evidence" from the records of the Constitutional Convention. One such argument is that Madison attempted to have a clause added which stated that the Executive should be empowered to "execute such other powers not legislative or judicial in their nature as from time to time may be delegated to the national legislature." Madison supposedly did not object to the defeat of this proposal out of reconsideration as to the desirability of delegated legislation.⁴⁰

The most convincing attempt to square rulemaking with the Constitution is made by Hart. He notes that many of the members of the Convention and the state ratifying conventions-- men who presumably knew the true intent of the Constitution-- subsequently held key positions in the three branches of government. Since Congress saw fit to delegate, and executive officials carry out, rulemaking authority from the very first, it is logical to assume that rulemaking did not violate the framers' intent. This argument is bolstered by the observation that at least three early Supreme Court decisions supported the notion that the powers of the

Executive included quasi-legislation-- at least to a limited degree.⁴¹

Congress' power to delegate legislative authority has been challenged many times in the courts. A confusing and contradictory body of precedent has resulted, both in regard to the legality and allowable scope of administrative rulemaking. Consider the following examples:

It will not be contended that Congress can delegate to the courts or to any other tribunal, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself.... The line has not been drawn which separates these important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.-- Chief Justice John Marshall, Wayman v. Southard 1825.⁴²

The true distinction [between what can and cannot be delegated] is between delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law.-- Cincinnati, W. & Z. R. Co. v Commissioner, 1852.⁴³

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.-- Field v. Clark, 1892.⁴⁴

That the legislative power of Congress cannot be delegated is, of course, clear.-- United States v. Shreveport Grain & Elevator Company, 1932.⁴⁵

Delegation by Congress has long been recognized as necessary in order that the expression of legislative power does not become a futility.-- Sunshine Anthracite Coal Co. v. Adkins, 1940.⁴⁶

These excerpts from a few leading decisions clearly indicate that the judiciary has been inconsistent with regard to the constitutionality of rulemaking. As a generalization, the conservative courts of the late-1800's and the first two or three decades of the 1900's espoused what is commonly referred to as the "non-delegation doctrine." That is, decisions expressed in abstract terms the view that delegation of legislative authority

by Congress was unconstitutional. However, such pronouncements were of little practical importance. Only two decisions-- both rendered in 1935-- actually declared specific congressional delegations to government authorities invalid.⁴⁷ The latter and more important of these was the famous Schechter case, which rules that the National Recovery Act had gone too far in delegating authority to the president "to promulgate codes of fair competition."⁴⁸ However, Schechter was an anomaly, and courts of the non-delegation era typically groped for ways to rationalize their decisions upholding particular delegations. For instance, the above-quoted Field v. Clark decision, which upheld a grant of contingent rulemaking authority to the president, included the following justification:

The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its action depend. To deny this would stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and must, therefore, be a subject of inquiry outside the halls of legislation.⁴⁹

In other instances, the courts attempted to resolve the conflict between their decisions and the non-delegation doctrine by implying that rulemaking was somehow not legislative in nature, provided that it was delimited by clearly-articulated congressional directives. Thus, as Davis states, "The verbiage gradually developed that a delegation was lawful only when accompanied by a sufficient standard."⁵⁰ The rise of the "sufficient standard" concept provided the transition out of the non-delegation era.

The non-delegation doctrine has long since passed by the way. Some scholars and jurists still cling to the notion that the delegation of rulemaking authority must be accompanied by a sufficient standard, but what constitutes a sufficient standard is no more clear today than it was in Marshall's time (see the quote from Wayman v. Southard on preceeding

page.) Again to speak in practical terms, it should be reiterated that the first and last two instances in which delegations were declared ultra vires occurred in 1935. Since then, grants of rulemaking authority under exceedingly broad mandates have gone untouched by the courts.⁵¹

The issue of the constitutionality or rulemaking has never been resolved in the courts, it has just become mute. The judiciary's willingness to accept delegated legislative authority in practically any form has clearly been a response to felt policy needs, rather than to purely legal considerations. As Freund put it, the justification for delegation is "one of convenience, primarily to relieve the legislature of a mass of detail, secondarily perhaps to gain greater flexibility."⁵² The Sunshine Anthracite decision, which states that delegation is necessary in order that the "expression of legislative power does not become a futility,"⁵³ summarizes the rationale of the courts most succinctly.

It should be added that the constitutionality issue has gained new life in recent years, although not yet in the courts to a significant degree. However, the question of constitutionality, per se, remains subservient to practical considerations. Thus, the issue is brought up most frequently by business-oriented groups, whose ire has been aroused by the great proliferation of rules promulgated by such agencies as OSHA and EPA. At present we are in the midst of a significant reaction against what is perceived as ill-considered, unfettered, and excessive administrative policy making. Because of such pressure, Congress has felt a new need to reconcile the delegation of rulemaking authority with constitutional principles, and has responded with such devices as the legislative veto and the imposition of more restrictive rulemaking procedures. This "dynamic" is a major theme that will be developed more fully in subsequent chapters.

FOOTNOTES

¹James Hart, for example, sees no need to go beyond this as a definition for the term "rule" in his book, The Ordinance Making Power of the President of the United States (Baltimore: The Johns Hopkins Press, 1925), p. 28.

²Quoted from Kenneth Culp Davis, Administrative Law Text (St. Paul, Minnesota: West Publishing Company, 1973) p. 228.

³Administrative Procedure Act 60 Stat. 237 (1946), sec. 2(c), 5 U.S.C. sec. 551(4)

⁴See, for example, Hart, "The Exercise of Rulemaking Power," Report of the President's Committee on Administrative Management (Washington: U.S. Government Printing Office, 1937) pp. 313-22.

⁵Davis, pp. 229-30.

⁶The American Bar Association and the Administrative Conference of the United States have both offered this recommendation.

⁷Davis, p. 228.

⁸Ernst Freund, Administrative Powers Over Persons and Property (Chicago: University of Chicago Press, 1928) p. 15.

⁹David L. Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," Harvard Law Review, LXXVII (March, 1965), p. 924.

¹⁰Davis, p. 228.

¹¹Ibid.

¹²Ibid.

¹³In this sense, judicial review of rules is analogous to judicial review of statutes as to their constitutionality.

¹⁴For a good discussion of this see the opinion of J. Skelly Wright, National Petroleum Refiners Association v. FTC 482 F. 2d. 672 (1973)

¹⁵Judge Fahy in Pub. Services Comm'n. of State of New York v. FPC, 117 U.S. App. D.C. 195, 199, 327 F. 2d 893, 897 (1964)

¹⁶SEC v. Chenery Corp. 332 U.S. 194 (1947)

¹⁷Several scholars have debunked these arguments convincingly. See Robert Weston, "Deceptive Advertising and the FTC," The Federal Bar Journal XXIV (June, 1964)

¹⁸Wright (see footnote 14)

¹⁹John P. Comer, Legislative Functions of the National Administrative Authorities (New York: Columbia University Press, 1927) p. 27.

²⁰Ibid.

²¹Davis presents a good discussion of the difficulty of distinguishing interpretive from supplementary rules, pp. 230-33.

²²Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). Quoted from Davis, p. 230.

²³Davis, pp. 230-33.

²⁴Ibid.

²⁵Comer, p. 30.

²⁶26 Stat. L., 567, chap. 1244. Quoted from Hart, Ordinance, pp. 48-49.

²⁷Ibid.

²⁸Ibid.

²⁹Herbert Simon argues this point very persuasively in Administrative Behavior (New York: MacMillan Co., 1947)

³⁰Comer, p. 26.

³¹Freund, pp. 7-9.

³²15 U.S.C. sec. 45.

³³1 Stat. 28 (1789). Quoted from Comer, p. 52.

³⁴Ibid.

³⁵Ibid.

³⁶Comer. p. 51.

³⁷The Federal Register contains adjudicatory orders, notices of adjudicatory proceedings, notices of rulemaking proceedings, and interpretive rules, in addition to what have been defined here as supplementary rules. The assumption in using the Register as an index of increased rulemaking activity is that the proportion of pages devoted to supplementary rules has not declined appreciably.

³⁸Davis, p. 27.

³⁹From Hart, Ordinance. pp. 135-37.

⁴⁰Ibid.

⁴¹Ibid., pp. 137-45.

⁴²Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 15-16, 6 L.Ed. 253 (1825)

⁴³Cincinnati, W. & Z. R. Co. v. Commissioner, 1 Ohio St. 77, 88 (1852)

⁴⁴Field v. Clark, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892)

⁴⁵United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85, 53 S.Ct. 42, 44, 77 L.Ed. 175. (1932)

⁴⁶Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 389, 60 S.Ct. 907, 914, 84 L.Ed. 1263 (1940)

⁴⁷Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935); and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)

⁴⁸Ibid.

⁴⁹Field v. Clark (see footnote 44)

⁵⁰Davis, p. 28.

⁵¹For example, the Federal Trade Commission has been given the broadly defined mission of preventing "unfair or deceptive practices in or affecting commerce," and the Federal Communications Commission is directed to "issue such rules and regulations and prescribe such restrictions and conditions, not inconsistent with the law, as public convenience, interest, or necessity requires."

⁵²Freund, pp. 14-15.

⁵³Sunshine Anthracite (see footnote 46)

Chapter 3

AN OVERVIEW OF RULEMAKING PROCEDURE

There are almost as many specific variations of rulemaking procedure at the federal level as there are agencies. In fact, many agencies use more than one type of procedure, depending on the statute they are administering and/or the policy area involved, and others operate essentially on an ad hoc basis. A detailed description of all the ways rules are made is beyond the scope of this chapter. It is possible, however, to provide a comprehensive overview of the most important dimensions of procedural variation.

Rulemaking procedure may be solely the product of agency discretion, or may be prescribed by statute. In the latter instance, agencies still typically exercise some discretion in choosing specific procedures within more or less detailed legislative constraints. The logical place to begin a general discussion of rulemaking procedure is with the Administrative Procedure Act of 1946, whose requirements pertain abstractly to all agencies. The APA specifies decision-making procedures for the promulgation of federal rules, and also requires that final rules be published in the Federal Register prior to their taking effect. Certain broad substantive policy areas are exempted from APA control, and requirements imposed by other, specifically-oriented statutes can supersede the APA. Because of this, a few types of rules need not be published in the Register, and the majority of all rulemaking decisions fall outside the APA's embrace. However, APA procedures are by far the most common variants at the federal level.

Additionally, an understanding of the APA and the reasons for it provides a good structure and basis for the discussion of all rulemaking procedure.

THE ADMINISTRATIVE PROCEDURE ACT

Pressures to Reform the Administrative Process

The amount and scope of discretionary authority exercised by administrators began to "take off" dramatically in the late-1800's and early-1900's. Perhaps the most significant developments in this respect were the broad legislative and judicial mandates delegated to agencies for the essentially novel purpose of economic regulation. Between 1887 and 1935 agencies were empowered to regulate railroads, trusts, foods and drugs, standards of fairness in commerce, broadcasting, securities, and a variety of other things.¹ Elihu Root was able to observe as early as 1916:

We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts.... The necessities of our situation have already led to an extensive employment of that method.... Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedures of legislation and courts as in the last generation.²

Root's understanding was perhaps a decade or so ahead of its time. By the late-1920's, however, the growing importance of administrative policy making had become a matter of widespread concern. What was especially disconcerting to many was that, in most cases, there were no procedural safeguards which governed how the legislative and judicial functions of agencies were to be performed. Administrative procedures were typically the product of administrative discretion, and often varied in an ad hoc

fashion within agencies. In the case of adjudication, this meant that participants in proceedings could not be certain of whether or not or how various elements of judicial due process would be provided. As for rule-making, there was no assurance that administrative officials would listen to the views of the interested public, or that decisions would be made rationally or openly. True, a few enabling statutes did prescribe that rules be made pursuant to public hearings or that agency officials meet with designated group representatives, and a few agencies instituted devices such as these on their own initiative-- at least from time to time.³ By and large, however, safeguards such as these were missing from administrative rulemaking. The frustration of one scholar expressed in 1927 illustrates the closed, potentially unresponsive nature of most rule-making processes at the time.

Just what the procedure is in any particular department or special agency at any one time is difficult to get at; departmental practices are not for the outsider. A governmental employee ... sometimes gives a glimpse of what actually happens. Usually such glimpses, since they are given with an initial cautiousness and a finger-on-the-lip sign, are of little documentary value. Few departments give freely.⁴

Dissatisfaction with the administrative process mounted during the 1930's and early-1940's, and eventually culminated with the passage of the Administrative Procedure Act in 1946. Proponents of reform during this period were not of a common mind, however. One camp, the most important members of which were the legal profession and the business community, chafed at the notion of bureaucrats exercising legislative and judicial powers-- at least beyond what was absolutely necessary. This sentiment was partially due to the belief that such delegations violated the separation of powers principle. Also, it was correctly perceived that administrative authority of these sorts was an essential element of "big

government," which in turn was seen as infringing on individual freedoms and the sound operation of the free enterprise system. These feelings were reflected in the titles of two popular books of the era, The New Despotism and Our Wonderland of Bureaucracy.⁵ The following passage from the latter work perhaps summarizes the feelings of many of those who had become dismayed by the growth of administrative power:

Uncle Sam has not yet awakened from his dream of government by bureaucracy, but ever wanders further afield in crazy experiments in state socialism. Possibly some day he may awaken from his irrational dreams, and return again to the old conceptions of government as wisely defined in the Constitution of the United States.⁶

Others, however, took a much more sanguine view of the exercise of legislative and judicial powers by bureaucrats. The most articulate spokesmen for this latter group might be loosely described as New Deal intellectuals. To them, broad delegations of authority were necessary if government was to cope with society's needs. In addition, they felt that delegation was often salutary because it enabled administrators to bring their expertise to bear on public problems. Congress and the courts typically lacked the time or the training to deal with the complex issues generated by modern society. The famous report of the Brownlow Committee reflects these views.

The tradition in favor of statutes is a perversion of a principle that is fundamental to the system of government in the United States. Nobody questions the principle that the basic policies of government must be embodied in the statutes of Congress. But it does not follow from this-- indeed it is both unhistorical and unsound to hold-- that Congress must state in minute detail either its basic policies or the administrative methods by which they are to be carried out.... The practice of delegating rule-making authority to administrative agencies represents the adaption of eighteenth century governmental machinery to twentieth century governmental problems.⁷

... by constantly rubbing elbows with their particular problems, administrators are in a peculiarly advantageous position to attain an intimate and specialized knowledge, born of experience which gives them a "sense of what is practically enforceable" and enables them to "plan a program of development."⁸

As would be expected, the proposals for reforming the administrative process that were offered by these two camps differed considerably. The American Bar Association appointed a special committee on administrative law which in 1934 began issuing annual reports and proposals. The thrust of these was generally to limit administrative discretion as much as possible. In 1939 the ABA sponsored the Walter-Logan Bill, which would have emasculated administrative agencies of many of their rulemaking and adjudicatory powers. Without going into detail, the following excerpt from testimony offered by the President of the ABA captures the tenor of the bill's rulemaking provisions.

... Congress is the legislative branch of government... and we do not any longer want Congress to set up bureaus and commissions and say to them: "We recognize there is a great problem in this particular field. We have not the time to solve this problem as we did in the early days of this Republic; we are merely going to set up a commission of some kind and give you full powers and you endeavor to solve that problem."⁹

The Walter-Logan Bill passed both houses, but was vetoed by President Roosevelt. In 1938 FDR had requested the Attorney General to appoint a committee to investigate the need for reform in administrative law. As his justification for vetoing the Walter-Logan Bill, Roosevelt stated, "I should desire to await their [the Attorney General's Committee] report and recommendations before approving any measure in this complicated field."¹⁰ It is safe to assume, of course, that Roosevelt was never in doubt concerning the desirability of the bill, since legislation crippling administrative agencies would necessarily have done irreparable damage to his New Deal programs.

In his message accompanying the Walter-Logan veto, Roosevelt stated that the purpose of the Attorney General's Committee was not to hamper administration, but to "... suggest improvements to make the process more workable and more just."¹¹ The Committee's recommendations, which were generally intended to strengthen and improve the administrative process, reflected this. World War II delayed further consideration by Congress of proposals for administrative reform, but in 1946 the Administration finally reached a compromise with the ABA and its allies, and the Administrative Procedure Act was passed. The word "compromise" should be used advisedly, however, for the Act conformed much more closely to the recommendations of the Attorney General's Committee than to those of the ABA. This is best evidenced by the fact that the Report of the Attorney General's Committee has been designated as the official legislative history for the Administrative Procedure Act.¹²

Rulemaking Requirements of the Administrative Procedure Act

The APA regulates several aspects of the administrative process. It prescribes what types of agency output shall be published in the Federal Register, under what circumstances. It also establishes procedures for adjudication, as well as criteria governing judicial review of various types of administrative actions. The concern here, however, is strictly with the Act's rulemaking procedures.

The APA stipulates that agencies publish in the Federal Register all "substantive rules of general applicability." The only rules exempt from this requirement are: 1) those "authorized... by an Executive order to be kept secret in the interest of national defense or foreign policy," 2) those "related solely to the internal personnel and practices of an agency," 3) those "specifically exempted from disclosure by a statute,"

and 4) those involving privileged or confidential trade secrets and commercial or financial information.¹³ Aside from these exceptions, rules not so published are not legally binding, except in certain circumstances where individuals are notified in some other manner.¹⁴ Rules which are subject to publication in the Register do not become effective until thirty days after they first appear there. The only exceptions to this last requirement are rules which grant or recognize exceptions from other federal regulations, interpretive rules, and rules that, for good cause, an agency feels should go into effect before thirty days has elapsed. In this last instance, a statement of the agency's rationale for waiving the thirty-day requirement must accompany the rule as published in the Register.¹⁵

In addition to these requirements concerning publication of final rules, the APA establishes two sets of procedures for arriving at rules. These, which are most often referred to as "informal" and "formal" rule-making, will be the subject of the remainder of this subsection. Informal requirements apply to the general exercise of rulemaking power. They are superseded by formal procedures only when the latter are dictated by the statute under which an agency derives its authority. Such phrases as "rules shall be made after an agency hearing" or "rules shall be made on the record after a hearing" are supposed to evoke formal procedures. In practice, however, there has been a good deal of controversy over the obligation to use formal rulemaking in specific situations.¹⁶

Certain, broad substantive categories of rules are exempted from the APA's requirements for promulgating rules. In fact, informal or formal procedures are required for regulatory rulemaking and little else. (The exemptions from the APA's procedural requirements will be discussed at some length in the next subsection.) Still, informal and formal rulemaking

are by far the most common procedural variants at the federal level, and and in a sense, constitute polar types between which many other rulemaking procedures fall. Also, an increasing number of agencies have come to adopt informal procedures voluntarily.

Informal rulemaking is the more widely used of the APA's procedures. Under its requirements, agencies must provide notice that rulemaking is being contemplated, and must provide some means by which interested parties may express their views. (For obvious reasons, informal rulemaking is also commonly referred to as "notice-and-comment rulemaking.") The APA stipulates that, with exceptions,¹⁷ notice be published in the Federal Register, and that it include: "(1) a statement of the time, place, and nature of the public rulemaking proceedings; (2) reference to the legal [statutory] authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."¹⁸ This last requirement means that, at the very least, notice must indicate that an agency is contemplating making policy in a particular area to confront certain alleged problems or needs. In practice, notices often contain quite specific proposals.

Comment can be solicited in written form and/or through oral testimony at hearings in informal rulemaking. Agencies must always solicit written comment, regardless of whether or not hearings are held. The APA's informal requirements instruct agencies to consider relevant comments in formulating their final decisions, and specify that rules be accompanied by a "concise general statement of their basis and purpose."¹⁹ Practically, however, no mechanisms are provided to ensure that agencies give due consideration to relevant comments, aside from the vague provision that courts may overturn rules determined to be "arbitrary or capricious."²⁰

Whereas informal rulemaking bears many similarities to the legislative process, formal rulemaking can be described as "quasi-judicial." Hearings are mandatory under formal rulemaking, and are conducted much like courtroom proceedings, with the swearing of witnesses, the taking of depositions, and rulings on offers of proof and the relevancy of evidence. The burden of proof in formal rulemaking is on the proponent of the rule (usually the agency), and parties are entitled to present their cases through oral or documentary evidence, to submit rebuttals, and to conduct cross-examination. Perhaps the most salient feature of formal rulemaking is that decisions must be based explicitly and exclusively on the "record," which consists of the hearing transcript and any written comment/evidence submitted before, during, or after the hearing.

Formal rulemaking is subject to strict standards of judicial review. Courts may overturn rules which are not properly substantiated on the basis of the record. Formally-promulgated rules may also be reviewed on procedural grounds. That is, affected parties may challenge rules under the contention that the agency did not afford them all the rights of due process to which they were entitled.

There may be several reasons for the existence of both formal and informal rulemaking procedures. It has been suggested that informal rulemaking, like the legislative process, is flexible and well-suited for making general policy that involves the weighing of values. On the other hand, formal rulemaking, like the judicial process, may be superior for determining questions of fact. For example, an agency charged with regulating the prices of certain commodities in accordance with specified parameters of supply and demand might use formal procedures in evaluating the testimony of economists, bureaucrats, industry officials, consumers,

and other witnesses. Relatedly, the Attorney General's Committee Report suggests that formal rulemaking may also be appropriate when it is clear in advance that certain narrow interests will benefit and suffer if a proposed regulation is issued. In such cases, the due process provided by formal procedures may be desirable as a guard on individual rights.

Whatever the logic of these rationale, however, formal procedures have been prescribed by Congress for all sorts of rulemaking, ranging from that based on narrow factual issues to that involving broad policy considerations. For example, the Agricultural Marketing Service uses formal procedures to make rules establishing prices for various commodities. Its decisions turn essentially on narrow questions such as, What is the likely yield of a certain crop from a certain area during a particular period of the year?²¹ On the other hand, formal procedures have also been imposed on agencies required to make decisions based largely on broader, "value-laden" considerations. As an illustration, the Food and Drug Administration uses formal procedures to regulate the advertising and labeling of some products. Often, its decisions involve considerations such as, What should be the standards required for a product to be legally advertisable under a given generic name. Thus, one well-known proceeding involved an attempt by the FDA to define a "peanut-content standard" for peanut butter.²²

The APA's prescription of two rulemaking formats may be better explained as the product of conflict over the desirability of administrative policy making. Informal rulemaking seems to reflect the view of liberals of the era that the exercise of legislative authority by administrators was necessary and desirable. The Report of the Attorney General's Committee abjures the analogy between informal rulemaking and the legislative process, arguing that it is precisely because administrators are non-elected that

Table 3.1

Characteristics of Formal and Informal Rulemaking

	<u>Informal Rulemaking</u>	<u>Formal Rulemaking</u>
<u>Hearings</u>	optional, legislative, inquisitorial	mandatory, trial-like, adversary
<u>Decision-Making Constraints and Judicial Review</u>	comment intended as a decisional aid (optional) rule must not be arbitrary or capricious, and must serve general intent of enabling legislation	rule must be based on factual evidence contained in rulemaking record interested parties must be afforded procedural rights associated with due process
<u>Underlying Rationale</u>	reflects sanguine view of administrative policy making agency will use notice-and-comment procedures to improve its responsiveness to public interests and, hence, the quality of its decisions	reflects skeptical view of administrative policy making agencies are not appropriate institutions for making policy, and should be constrained to base decisions on narrow, factual considerations affected parties should have ample opportunity to challenge unsound rules

they should consider the views of interested parties as they make decisions.²³ This rather dubious argument may have been offered as a sop to opponents of delegated legislation, or may have been a justification for making notice-and-comment procedures mandatory throughout the federal government. It remains that the information-gathering process in informal rulemaking bears many similarities to that used by congressional committees. Hearings-- if they are held-- are conducted in an inquisitorial rather than an adversary manner. Likewise, comments received in informal rulemaking are intended as an aid which the agency can use or ignore at its discretion.

Formal procedures reflect a much more skeptical view of administrative policy making. The premises for formally-made rules are treated as assertions of fact which may be challenged in an adversary setting and which the agency must substantiate in the record. Courts may overturn rules not so justified, as well as rules felt to have been promulgated without scrupulous regard for the procedural rights of affected parties. In contrast, the criterion for judicial review of rules made informally is that they shall not be arbitrary or capricious. The inclusion of formal procedures in the Administrative Procedure Act may represent a concession to conservative, anti-delegation interests. Essentially, formal rulemaking is a readily available constraint that can be imposed on agencies. In practice, these procedures have been required in regulatory policy areas where opponents of regulation have been able to mount sufficient pressure.²⁴

RULEMAKING PROCEDURE BEYOND THE APA

Exemptions From the APA

Although the APA's procedures apply to all agencies in the abstract,

its requirements governing the promulgation of rules pertain to only a small percentage of all federal rulemaking. There are two reasons for this. Rulemaking procedures prescribed by authorizing statutes always take precedence over APA requirements. Perhaps more importantly, certain substantive classes of rules are exempted by the APA from its procedural requirements.

The following types of rules need not be made in accordance with APA procedures:

- rules relating to the military or foreign affairs functions of the United States
- rules relating to public property, loans, grants, benefits, subsidies, or contracts
- interpretive rules (see Chapter 2)
- general statements of policy
- rules of agency organization, procedure, or practice

For good measure, APA procedures are not required "when the agency for good cause finds... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."²⁵ Some of these exemptions are perhaps better justified than others.

Interpretive rules are exempted from the APA's procedural requirements because they are not legally binding and, more dubiously, because they merely "interpret statutory intent that already exists." Rules relating to foreign and military affairs are exempted because in some cases notice and comment would violate national security or render timely decision making impossible. Also, many such rules, while perhaps having substantive policy effects, do not directly affect the "rights and duties" of U.S. citizens. The exemptions for interpretive, and military and foreign affairs rules have been accepted as more or less legitimate. It has been

argued, however, that foreign and military affairs is too broad a category, and that some of these rules (such as many of those defining criteria for the allocation of government contracts) should be the subject for notice and comment.²⁶

Rules concerning personnel and management and those of organization, procedure, and practice have been exempted because they deal solely with internal agency matters and, as such, do not have substantive policy impact. Agencies have to make many rules of these sorts in order to operate, and notice and comment requirements would cause undue inefficiency in many cases. At the same time, however, some rules of practice and procedure prescribe the way agency policy decisions are to be made. Decision-making procedures may, in turn, have substantive policy implications. Arguably, groups and individuals can have a legitimate stake in rules such as these, and should be allowed to participate in their promulgation. Indeed, a few agencies have occasionally allowed comment on proposed rules of practice and procedure-- especially where potential controversy has been great.

The exemptions for rules relating to public property, loans, grants, benefits, and contracts are perhaps most difficult to justify. The reasoning of the framers of the APA was most probably that these classes of government activity involve the allocation of privileges, and not individual rights and duties, and that therefore citizens are not entitled to the same participatory guarantees as in regulatory policy. A good many commentators, as well as the Administrative Conference of the United States, have recommended that these broad exemptions be deleted from the APA.²⁷ Such critics have attacked the artificiality of the rights-versus-privileges argument, marshalling recent court decisions to support their position. More practically, it is also noted that loans, grants, benefits,

and contracts represent a very sizeable portion of the federal budget, and that the public has a tremendous material interest in the rules which establish criteria for the allocation of these goods.²⁸

Rulemaking procedure is a matter of agency discretion in policy areas exempted from the APA, unless of course it is prescribed by an agency's authorizing legislation. The APA's legislative history clearly encourages the adoption of informal procedures wherever possible.²⁹ Exemptions were conceived as classes of policy in which it might not be appropriate to use notice and comment. Therefore, it was necessary to ensure that agencies were not indiscriminately bound by procedural requirements in these areas. But the framers of the Act felt that much rulemaking within the exempted categories could be improved by notice and comment, and agencies were encouraged to use informal rulemaking whenever practical. As the Attorney General's Committee Report states, none of the Act's blanket exemptions

is to be taken as encouraging agencies not to adopt voluntary public rulemaking procedures where useful to the agency or beneficial to the public. The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rulemaking procedures they will adopt in a given situations within their terms.³⁰

Despite this encouragement, agencies have been reluctant to adopt APA procedures. Little current evidence exists concerning the precise extent to which informal rulemaking is used throughout the executive branch. A fairly comprehensive questionnaire on the administrative practices of agencies was distributed by the House of Representatives in 1957. It indicates that, at the time, agencies seldom used informal procedures in situations where they were not required to do so.³¹ Another, less comprehensive questionnaire sent out the the Senate in 1968 reveals approximately the same thing.³² These studies found that rules were

often promulgated without any attempt to solicit the views of interested parties. Where such attempts were made, they often fell short of the APA's informal requirements in terms of comprehensiveness. For example, some agencies reported that they occasionally notified and engaged in informal consultation with whomever they happened to think appropriate under the circumstances.³³

The questionnaire revealed several typical agency responses as to why informal rulemaking procedures were not used voluntarily. Perhaps the most common was that notice and comment imposed an undue administrative burden. Another was that it was the agency's business to represent the public interest, and that the agency was doing quite well in this regard without public notice and comment. Relatedly, some agencies indicated that their policies affected only a few groups and individuals with whom they consulted regularly.

The qualification should be added that there does appear to have been a significant increase in the voluntary use of informal procedures during the past ten years. Table 3.2, which presents a sampling of the Federal Register at three points in time, shows a dramatic rise in the ratio of proposed rules to all rules. (see the following page) Writing in the early 1960's and again in the late-1960's, Davis estimated that perhaps as much as 20% of all federal rulemaking was subject to APA constraints. Accepting this, the data in the table confirm the impression rendered by the 1957 survey that notice and comment was seldom used voluntarily. By 1968 the relative incidence of informal procedures had risen some, but the great increase appears to have occurred in the 1970's. (Of course, this finding rests on the assumptions that the proportion of rules subject to APA constraints has remained fairly constant, and that

Table 3.2

Rules and Proposed Rules: 1958, 1968, 1978*

	<u>Dec. 1958</u>	<u>Dec. 1968</u>	<u>Dec. 1978</u>
Rules	286	433	504
Proposed Rules	58	123	247
Ratio: Prop Rules/ All Rules	20.3	28.4	49.0

* Agency business which appears in the Register is published under the headings, "Notices," "Rules and Regulations," and "Proposed Rules." Notices alert the public to agency actions other than rulemaking. Rules and Regulations consist of the final rules promulgated by agencies. Most rules are required to be published in the Register, regardless of the procedure used in their promulgation. On the other hand, almost every entry under Proposed Rules represents a notice of proposed rulemaking and an invitation for public comment. Therefore, one can obtain a fairly accurate idea of the extent to which notice and comment procedures are used by comparing the number of Proposed Rules over a given period with the number of Rules and Regulations.

This design is open to the criticism that proposed rules represent policy that will be finalized several months hence. Therefore, the numbers in the Proposed Rules column are not "components" of the respective figures in the Rules column. The approach used here is probably fairly accurate, however. Using pages in the Federal Register as a rough index, it does not appear that rulemaking activity is consistently higher at some times of the year than at others.

the increased use of notice and comment is not primarily due to individual statutory requirements. Both these assumptions seem reasonable.)

Individual Statutory Requirements

A few authorizing statutes prescribe notice-and-comment procedures for rulemaking in policy areas falling outside the APA's embrace. However, a far more common scenario has been the imposition of additional requirements on agencies already bound to use informal rulemaking. Congress' interest in rulemaking procedure has, with a few exceptions, centered around regulatory policy, almost all of which (and little else) falls under APA control.

Some statutes contain provisions that particular persons, groups, or other agencies be consulted before final rules are promulgated. Requirements such as these may add little beyond informal rulemaking, serving mainly to emphasize Congress' desire that the views of certain interests be duly considered (or its desire to placate certain interests). In some cases, though, language requiring "consultation and cooperation" with particular interests may impose an obligation to weigh comments to a degree not required under the APA's informal requirements. Also, there are accompanying provisions in some cases that agencies prepare written monographs and formal recommendations to be considered by specified parties. These are potentially time- and labor-consuming practices not required under informal rulemaking.³⁴

Several statutes require that agencies create and consult with committees before promulgating rules, or that agencies do so upon request by affected individuals. These requirements are usually imposed in addition to, rather than in lieu of, informal rulemaking. Typically, it is specified that committees be composed of one or more representatives

for each of several categories of affected interests. In some cases, committee members are chosen by the agency, and in others they are selected by an outside body, such as the National Academy of Sciences. The role committees play varies from that of consultation and comment to the preparation of studies, reports, and formal recommendations. In this latter case, committees may bear a large share of the responsibility for formulating rules.³⁵

The most common category of requirements imposed by authorizing statutes can be termed "mixed" or "hybrid" procedures. These combine elements of formal and informal rulemaking, and can, in turn, be divided into two sub-types. Under "multiphase" procedures, rules are initially promulgated using informal notice and comment, but formal hearings and decision making on the record are subsequently required upon request by a party whose interests are affected by the rule to a sufficient degree. In other hybrid formats, formal and informal elements are mixed in the same proceeding in various ways. For example, hearings may be conducted in a legislative manner, but with the exercise of cross-examination and rebuttal on certain issues. Or decision making on the record may be required, but only with respect to certain types of decisional premises. Mixed procedures imposed by the Federal Trade Commission will be discussed in detail in the latter part of this thesis.

SUMMARY

All in all, a diverse array of rulemaking procedures exists at the federal level. Davis captures this fact in the following statement:

Rules may be formulated through any one or more of the following methods: No participation by affected parties, consultations and conferences between the agency and the parties, consultation with advisory committees, written presentations of facts and arguments,

oral presentations, and trial-like hearings. Any or all of the methods of party participation may be used for the formulation of one set of rules: An original draft may be prepared through consultation, then questionnaires or invitations for written comments may be sent to affected parties with or without submission of a tentative draft of the rules, then the agency may receive oral arguments, and finally disputed issues of fact that emerge may be isolated for trial-type hearing.³⁶

It would be impossible to devise a concise typology of rulemaking procedures. However, it is possible to describe variation within several important procedural dimensions.

Notice of proposed rulemaking may or may not be provided.

If it is, notice varies along two dimensions. One of these is the means by which it is provided. Notice is commonly published in the Federal Register, but this method may be supplemented and in some instances replaced by such devices as letters to affected parties, informal contacts, and publication in newspapers, and trade and professional journals. Notice also varies in terms of the specificity of its content. At one extreme, an agency may issue a detailed proposal, and at the other it may declare its intention to formulate a rule in a certain area to achieve certain goals.

Opportunity to comment on proposed rules also may or may not be provided. If it is, it varies according to its scope and the manner in which it is obtained. Comment of limited scope may be solicited through such means as informal contacts and advisory committees. On the other hand, comment from all interested parties may be obtained solely in written form, or through informal or formal hearings.

Finally, decision-making requirements also vary. In some cases, agencies are required to base their decisions on a rulemaking record. At the other extreme, rulemaking procedures may place no decision-making

constraints upon the agency. In between are stipulations such as those of the APA's informal procedure, which requires a statement of basis and purpose. Statutorily-imposed procedures that require consultation and cooperation with specific groups represent still another point within the decision-making dimension.

Procedural variants within these different dimensions can be and are combined to yield a multitude of permutations. The above quotation from Davis reflects this. At the same time, however, certain elements and types of rulemaking procedure are more prevalent than others. The choice between no provision of notice and an opportunity for comment, and informal rule-making is of dominant importance in regulatory policy areas.

FOOTNOTES

¹For a discussion of the development of regulation in these and other areas see Theodore J. Lowi, The End of Liberalism (New York: W.W. Norton & Company, Inc., 1969) pp. 128-46.

²Root in an address as President of the American Bar Association. 41 American Bar Association Review 355, 368-69 (1916). Quoted from Kenneth Culp Davis, Administrative Law and Government (St. Paul, Minnesota: West Publishing Company, 1975) p. 11.

³See, for example, James Hart, The Ordinance Making Powers of the President of the United States (Baltimore: Johns Hopkins Press, 1925), pp. 292-314; also, John P. Comer, Legislative Functions of National Administrative Authorities (New York: Columbia University Press, 1927), pp. 198-270.

⁴Comer, p. 201.

⁵Gordon Hewart, The New Despotism (London: Ernest Benn, 1929); and James M. Beck, Our Wonderland of Bureaucracy (New York: MacMillan Publishing Co., 1932).

⁶Quoted from Davis, p. 12.

⁷James Hart, "The Exercise of Rule-Making Power," Report of the President's Committee on Administrative Management (Washington: United States Government Printing Office, 1937), p. 323.

⁸Ibid., pp. 323-24.

⁹David A. Simmons before the House of Representatives Committee on the Judiciary, June 21, 1945. Quoted from The Administrative Procedure Act: A Legislative History (Washington: United States Government Printing Office, 1946), p. 51.

¹⁰Ibid., p. 244.

¹¹Ibid.

¹²Final Report of the Attorney General's Committee on Administrative Procedure 102 (1941). Also published as Senate Document No. 248, 79th Cong., 2d Sess. (1946)

¹³60 Stat. 237 (1946), as amended by 80 Stat. 378 (1966), as amended by 81 Stat. 54 (1967) and 88 Stat. 1561 (1974). 5 U.S.C. sec. 552.

¹⁴Ibid.

¹⁵5 U.S.C. sec. 553 (d)

FOOTNOTES (continued)

¹⁶For a discussion see Robert W. Hamilton, "Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking," California Law Review LX (1972), pp. 1276-83.

¹⁷The Act states that, "General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with the law." 5 U.S.C. sec 553 (b)

¹⁸₅ U.S.C. sec. 553 (b)(1-3)

¹⁹₅ U.S.C. sec. 553 (c)

²⁰₅ U.S.C. sec 706 (2)(A)

²¹Hamilton, p. 1299.

²²For a good account of FDA rulemaking under the Federal Food, Drug and Cosmetic Act see Hamilton, pp. 1283-93.

²³Final Report of the Attorney General's Committee, p. 101.

²⁴Hamilton, pp. 1276-1325.

²⁵₅ U.S.C. sec. 553.

²⁶Arthur E. Bonfield, "Military and Foreign Affairs Functions Rulemaking Under the APA," Michigan Law Review LXVII (1972)

²⁷For example, Bonfield, "Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts," University of Pennsylvania Law Review CXIX (1970); and Roger C. Crampton, "The Why, Where, and How of Broadened Public Participation in the Administrative Process," Georgetown Law Review LX (1972)

²⁸Ibid.

²⁹Final Report of the Attorney General's Committee, pp. 255-60.

³⁰Ibid., p. 257.

³¹For a discussion of this survey and its findings see Bonfield, "Public Participation," and Bonfield, "Representing the Poor in Federal Rulemaking," Michigan Law Review LXVII (1969)

³²Ibid.

³³Ibid.

FOOTNOTES (continued)

³⁴Hamilton, pp. 1315-16.

³⁵Ibid., 1316-17.

³⁶Davis, p. 121.

Chapter 4

LITERATURE REVIEW

The first two sections of this chapter examine the literature which reflects on the significance of and the reasons for the use of rule-making as an alternative means of implementing policy. The third and fourth sections discuss work bearing on the significance of and reasons for the selection of specific procedures as alternative means of promulgating rules.

Although much has been written on rulemaking and rulemaking procedure, the vast bulk of this work is by law scholars. Unlike political scientists, lawyers are not usually preoccupied with questions of cause and policy effect. Furthermore, those legal writers who have considered rulemaking and rulemaking procedure from a "policy perspective" have usually done so in a purely deductive fashion. Thus, for example, while there are a good number of logically-derived propositions concerning the impact of rule-making as a means of implementation, there is a dearth of empirical evidence which casts light on the extent to which or the circumstances in which these sometimes contradictory propositions are valid. Because the work on the "causes" and policy effects of rulemaking and rulemaking procedure is sketchy and largely non-empirical, it has been necessary to incorporate observations and arguments in this review which crop up tangentially as by-products in the works in which they appear.

THE EFFECTS OF RULEMAKING

Since rulemaking is an alternative means of implementing policy, it is logical to conceptualize its effects in a comparative fashion. What are its advantages and disadvantages with respect to other modes of implementation? In this sense, one must contrast rulemaking with its antithesis, the "unguided-case-by-case," or ad hoc approach. This section reviews arguments made in favor of rulemaking, as well as accompanying qualifications and criticisms. As a forewarning, the effects of the choice between rulemaking and adjudication tend to dominate the discussion. Although there are many varieties of ad hoc administrative decision making, scholars have devoted their attention overwhelmingly to the choice between these two alternatives. The reason that lawyers have focused on adjudication as a means of case-by-case implementation is that it alone has a direct "legal" bearing on the rights and duties of individuals. In this regard, it should also be mentioned that law scholars have been interested primarily in the administration of regulatory statutes.

Rulemaking and Fairness

Many writers posit advantages that inhere in rulemaking. The most fundamental of these is that it is simply more just to articulate criteria for the application of regulatory statutes or the allocation of goods and services before these policies come to bear on individuals. This is the basis for Davis' Discretionary Justice, in which he argues that the absence of clear standards permits inconsistency in the way policy is administered from case to case. Davis illustrates his thesis with examples of both good (guided by clear standards) and bad (unguided) administration from a variety of areas of government activity.¹ Friendly makes essentially the

same point in a series of published lectures which present case studies of competent and incompetent administration by different regulatory agencies.²

Although the notion that precise administrative standards are desirable enjoys much currency, however, it is not accepted without reservation. The obvious counter is that detailed, binding rules which limit discretion and ensure uniformity in the application of policy may also contribute to administrative inflexibility. Thus, fairness may actually suffer in the sense that administrators are rendered unable to tailor implementation decisions to variation in individual circumstances.³ This abstract critique of the argument that rulemaking ensures fairness is applicable to the articulation of detailed standards in any area of government activity. Flexibility is widely valued among students of administration, even to the extent that Davis admits that some case-to-case discretion is always necessary.⁴

The use of rulemaking in areas where agencies enforce statutes through adjudication is deemed especially desirable by many writers. Adjudication bears directly on the rights and duties of individuals, often imposing sanctions for actions taken in the past which violated regulatory statutes. In situations where legislative standards are vague and are not refined by rules, adjudication is said to operate in an unwanted, "retro-active" manner. Baker, for instance, states that the "factor of retro-activity... goes against elemental notions of fair play when it is considered that the agency, unlike the courts, is not restricted to this one method [adjudication] of dealing with those regulated."⁵ He goes on to illustrate the utility of rulemaking as a means of avoiding retroactivity by citing the FCC's issuance of rules pertaining to reserved time contracts. This is a policy area in which the Commission's former reliance on

adjudication aroused much criticism for its "destruction of private interest." Such criticism was effectively quelled when the Commission promulgated rules establishing clear contract standards.⁶

Shapiro agrees that rulemaking tends to be superior to adjudication in terms of avoiding retroactive punishment, but feels that this claim must be modified. He offers two salient observations in this regard. In many instances, adjudications result only in cease and desist orders which do not impose punishments for past actions, but merely proscribe future actions (as do rules). Also, rules themselves may operate retroactively for practical purposes when they proscribe activities, equipment, or products (such as advertising practices, unsafe assembly line equipment, foods and drugs, etc.) in which businesses have sunk costs.⁷

It is also frequently asserted that rulemaking is fairer than adjudication because the latter singles out individuals or small groups of alleged violators for prosecution, while others engaged in the same or similar practices go unpunished. Thus, it is maintained that a rulemaking proceeding "operates evenhandedly to bar that practice on the part of all, while an order directed to only one permits his competitors to gain an unfair advantage."⁸ The potential for such capriciousness is arguably great, since adjudication often singles out members of large industries. The establishment of standards through rulemaking is held up as a hedge against this danger.

The notion that rulemaking is superior to adjudication in terms of capriciousness is also subject to attack. However, it is perhaps less vulnerable than the retroactivity argument. Several observe that rules operate evenhandedly across an entire industry only if they elicit widespread voluntary compliance. If this is not the case, then the rules

themselves which do not pertain to individual violations, must be enforced on a case-by-case basis.⁹ Both Shapiro and Robinson further state that adjudicatory sanctions can be and have been applied evenhandedly. Actions can be taken against groups of alleged violators, or alternatively, agencies may delay the effectiveness of orders until similar edicts have been issued against all offenders.¹⁰ Shapiro points out that the FTC has used both these devices.¹¹

Although these arguments demonstrate the need to modify the capriciousness argument, they should not be overstated. Even though regulatory rules must ultimately be enforced through adjudication against individual parties, the articulation of clear standards does insure against the capricious application of vague statutes. Thus, assuming that there is not widespread voluntary compliance with a rule and that the agency must still arbitrarily select individual violators for prosecution, at least these "unfortunate" parties will have been adequately forewarned. Also, it is not feasible in many instances to group together alleged violators or to delay the effectiveness of orders until all engaged in a given practice have been prosecuted. This is because many industries subject to federal regulation are large, and the practices which agencies seek to proscribe are often widespread. Robinson, who is especially critical of what he views as exaggerated claims for rulemaking, nevertheless admits that the costs in time and agency manpower of bringing adjudicatory actions against large groups of respondents can be prohibitive, since it is necessary to offer procedural rights such as cross-examination and rebuttal to all parties. Likewise, the practice of delaying the effectiveness of orders until all have been prosecuted may cause extreme delay in the implementation of policy.¹²

The Policy-Making Advantages of Rulemaking

Adjudication is unique as a form of case-by-case implementation in that it may create formal criteria for future decisions through precedent. Thus, it constitutes an alternative to rulemaking as a means of developing policy. In this sense, rulemaking is frequently advocated as a more powerful and expedient way for agencies to achieve desired policy results.

Some writers theorize that adjudication is inherently inferior to rulemaking because it tends to limit the scope of agency decisions to the facts presented by particular cases. Policy must be developed in a piecemeal fashion, and it may take a long series of orders to achieve the same substantive effects as a single rule. Therefore, rulemaking arguably enables administrators to formulate policy more quickly, with less expenditure in terms of agency resources.¹³ For the most part, this proposition is offered as something self-evident. However, Fritschler offers one attempt to demonstrate the utility of rulemaking in this regard. His study of the FTC's attempts to regulate cigarette advertising through adjudication and the agency's subsequent adoption of rulemaking demonstrates the futility of the former approach, if not the expediency of the latter.¹⁴

Few if any dispute the notion that rulemaking is a more efficient way of developing standards. Although at one point Robinson states that the choice between rulemaking and adjudication as a means of developing policy is of little import, he goes on to admit that rulemaking typically requires less expenditures in terms of time and agency resources for like output.¹⁵ Several contend, however, that adjudication can be an adequate means for articulating standards, and that, for this reason, the case-by-case approach may sometimes be preferable to rulemaking based on other considerations which compete with efficiency. To demonstrate the adequacy

of adjudication in this regard, Shapiro notes that all the examples of good administration through clear articulation of standards offered by Friendly are instances of adjudication.¹⁶

A crucial question which bears on the relative merits of adjudication and rulemaking concerns the degree to which administrators can articulate standards in orders which go beyond the facts presented by cases at hand. Obviously, the more flexibility agency officials have in this regard, the less the relative advantage of rulemaking as an expedient way of developing policy. Robinson presents a fairly comprehensive review of judicial decisions bearing on this subject, and concludes that, in Justice Black's words, a standard expressed in an order must be "a legitimate incident to the adjudication of a case before the agency."¹⁷ Clearly, this leaves agencies some discretion in formulating general principles in the course of adjudication which go beyond the facts of individual cases. But Robinson adds that the degree of freedom permitted by Black's phrase remains a matter of controversy.¹⁸

A related argument for the use of rules is that adjudication is an inferior tool for planning and developing coherent policy. McFarland contends, for example, that courts do not select issues to be litigated before them, and suggests that "when an agency acts like a court, it must depend more on the accident of litigation than on conscious planning."¹⁹ Relatedly, McFarland argues that, beyond the premise that adjudication depends on the accident of litigation, it is tied at any rate to the disposition of actual cases. As a result, it does not lend itself to the confrontation of anticipated problems.²⁰

Several writers contend that the "planning argument" is an over-generalization. Robinson, for instance, observes that the FCC has long

relied heavily on rulemaking, yet it has been criticized severely for its failure to plan adequately.²¹ He offers the Commission's failure to establish a coherent deintermixture policy as a dramatic example of the fact that rulemaking need not always lead to effective planning.²²

Shapiro also attacks the notion that policy development in adjudication need be an accident of litigation. This may well be the case in instances where an agency cannot adjudicate except upon complaint of a private party, or where the agency's prosecuting and judging functions are divided. The National Labor Relations Board operates under both these constraints, for example. But it is also true that many agencies have the power to initiate cases as well as decide them. Shapiro contends that, in instances such as these, "agencies can exercise virtually the same degree of planning in the commencement of adjudicatory proceedings as they can in rulemaking."²³ An obvious criticism of this statement is that it overlooks the fact that, under the best of circumstances, adjudication is bound to existing situations.

If Robinson and Shapiro argue that adjudication can be used for planning, Baker notes conversely that planning is sometimes not possible--no matter what means of implementation is chosen. In such instances, it may be preferable to deal with narrow problems on a case-by-case basis as they arise, rather than waiting until sufficient experience has been accumulated to promulgate a rule.

It is... a fact of administrative life that no agency can anticipate by rule all the problems, whether general or specific, that may confront it.... the agency has the choice of making a policy determination in the particular case or of withholding action until the conclusion of a general rulemaking proceeding to establish a governing rule. The latter course may, however, be precluded by the delay entailed. In short, the problem is before the agency, and the fact that it has not been anticipated does not excuse the agency from acting.²⁴

Additional Advantages of Rulemaking

Aside from the theoretical advantages of rules, per se, it is also maintained that the rulemaking process is superior to adjudication as a policy-making tool because it allows broader participation and a more comprehensive consideration of decisional criteria. The adjudicatory process, by its very nature, centers around named parties, and respondents are offered extensive opportunities to comment on and test issues relevant to the determination of guilt or innocence. But a number of writers argue that, precisely because adjudication focuses on the facts of particular cases, it tends to ignore (or at least subordinate to a large degree) comment from other parties that might ultimately be affected by orders. Rulemaking, on the other hand, allows participation by and gives equal deference to entire spectra of affected interests. Thus, it is arguably more just and leads to more enlightened decisions.²⁵ As Bonfield states, "The most obvious reason why... public participation is desirable is that it helps to elicit the information, facts, and probabilities which are necessary to fair and intelligent action."²⁶

However, while it is widely accepted that the rulemaking process tends to be superior to adjudication for eliciting comprehensive decisional input, several writers explicitly or implicitly challenge the allegation that adjudication discriminates against broad participation. One contends:

Although the compulsory nature of the requirements [the APA's informal rulemaking] does distinguish rulemaking from adjudication in theory, it is erroneous to conclude that the difference between [rulemaking and adjudication] is simply the difference between notice and no notice, participation and no participation. The difference is one of degree.²⁷

Several observations are made to substantiate the above claim. There is the obvious fact that essentially only regulatory rulemaking must involve notice and comment due to the APA's broad exemptions. Even some

regulatory rules, which are issued as interpretive rules, are not required to be promulgated through notice and comment, as Shapiro points out.²⁸

Conversely, agencies may, and often do, provide for "outside participation in adjudication by a variety of means ranging from the informal filing of statements or amicus briefs to full intervention by interested parties."²⁹

Reflecting on recent developments in this regard, Robinson notes that, "When the alternative means of participation allowed by agencies is combined with a judicial trend towards liberalizing rules of intervention, it is apparent that the scope of industry and general public participation in adjudication has been greatly expanded."³⁰ Peck's case study of the NLRB illustrates how one agency has stimulated outside participation through amicus briefs.³¹

As a matter of perspective, however, the utility and impact of devices such as amicus should not be oversold. Practically speaking, they are strictly optional in adjudication and have been used infrequently. At the same time, it is doubtful that the amicus brief, when used, is comparable to informal rulemaking for providing broad input. As Peck adds after noting the NLRB's solicitation of outside comment in adjudication:

It is doubtful that an amicus brief, the arguments of which have been oriented to problems presented in the factual context of a particular case, could approach in value the critical analysis which might have been given to a set of rules covering the multitude of problems....³²

If rulemaking does tend to be superior to adjudication as a means of soliciting broad decisional input, it remains to be asked if this is always desirable. Robinson, for example, admits that the nature of the adjudicatory process places limits on the breadth of participation in agency decision making-- that effective participation by broad segments of the public is not possible as it is in rulemaking. He wonders, however,

if this is not a blessing in many cases.

To expand participation appreciably beyond those who have a distinctive interest or those who can make a significant contribution may add to the democratic character of the process, but this may not be worth what it costs in efficiency to review the volumes of irrelevant or marginally useful commentary that sometimes descends upon the agency from such an invitation.... The very facet of rulemaking... which is applauded for permitting broad participation may serve as well to keep the depth of involvement and the treatment of specific, complex issues shallow.³³

Related to some of the points just discussed, it is also contended that, aside from allowing a quantitatively broader range of input through participation, rulemaking promotes broader decisional input in a "qualitative" sense. Crampton feels that the values and preferences of affected parties, which are weighed in rulemaking, are irrelevant in adjudication. This is essentially because they cannot be treated as factual issues within the context of formal hearings and decision making on the record. Crampton goes on to argue that this is unfortunate where orders establish broad policy.³⁴ Robinson points out another type of input that is likely to be excluded, or at least discouraged, in adjudication. The expertise of administrators, as such, is not generally tenable as a basis for adjudicatory decisions as it is in rulemaking.³⁵

As a counter to these arguments, some contend that the constraint of value input and administrative expertise as decisional bases may be desirable. Those who construe the Constitution's separation of powers clause more literally maintain that it is not an agency's function to weigh and resolve values-- that this function should be reserved for the legislature.³⁶ Likewise, the constraint of administrative expertise in agency decision making by adjudication is not universally viewed as something to avoid. Schwartz, for example, feels that, while administrators

do accumulate knowledge which can sometimes be usefully brought to bear on public problems, "expertness has been oversold in this country."³⁷ It is often argued that expertness tends to be synonymous with narrow mindedness and parochialism.

Another argument that is often made in support of rulemaking is that, even to the extent that adjudication allows for the consideration of broader policy issues (in both the quantitative and qualitative senses), it is an inferior device for dealing with them. Davis has gone farthest in the way of analysis and refinement of terms on this topic. He makes the oft-cited distinction that the adjudicatory process is appropriate for dealing with "adjudicative facts." These usually answer the questions of who did what, when, where, how, with what motive or intent."³⁸ While devices such as discovery, cross-examination, rebuttal, and decision making on the record afford named parties the guarantee of due process on such issues, Davis goes on to argue that these procedures are inappropriate for treating "legislative facts." Legislative facts "do not usually concern the immediate parties, but are general facts which help to... decide questions of... policy and discretion."³⁹

Davis and others maintain that the adversary process used in adjudication is poor for dealing with policy issues (or legislative facts) because of its formality and rigidity. For instance, Elman states that decision makers often lack the freedom to consult with agency staff personnel during the course of adjudicatory proceedings.⁴⁰ It is also felt that the contentiousness of adjudication (notably cross-examination and rebuttal) stifles the efforts of administrators to "get at the truth." In contrast, it is widely believed that the informal, investigative, give-and-take, quasi-legislative atmosphere of rulemaking lends itself

well to the consideration of policy issues.⁴¹

Like the other arguments discussed so far, the notion that rule-making is superior to adjudication for dealing with policy issues is subject to criticism. Several scholars readily jump on the premise that a useful distinction can be drawn between policy and administrative issues. Davis' concept of the legislative fact/adjudicative fact distinction is attacked roundly as something that is very often impossible to apply to specific issues that arise in administrative proceedings. Nathanson contends, for instance, that, as a general guide, the concept of legislative fact is as "elusive as all the other magic keys that have been offered."⁴² Beyond this, several writers argue that adjudicatory procedures may be quite useful for dealing with broad policy issues. Many policy concerns-- and even some probabilistic judgements-- can arguably be treated as issues of fact, subject to empirical verification. In such cases, adjudicatory procedures may help cast light on policy-making premises.⁴³

In what might be viewed as a corollary to some of the points just discussed, Peck brings out another argument for reliance on rulemaking as a means of developing broad policy. He notes simply that adjudication may be unfair to named parties in situations where administrators do take into account the broader policy implications of their orders.

If the tribunal in an adjudicatory proceeding is too intent on fashioning rules for future guidance, the task of rendering a fair result on the record before it may be slighted.... Consequently, the agency may frequently fail to do complete justice to the parties before it.⁴⁴

Accepting the validity of this argument, an adjudicatory process "cannot win" when it comes to making policy. It either tends to ignore broader interests, or to do injustice to the litigants to a case. Peck uses several convincing examples of policy making through adjudication by the

National Labor Relations Board to illustrate this latter danger.⁴⁵

Addressing himself to Peck's argument, however, Robinson feels that the use of adjudication for making broad policy need not do injustice to named parties. He does concede that the NLRB case studies demonstrate that respondents' interests can be slighted in this way, but he argues that this provides no basis for concluding that "fairness in adjudication and policy formulation are inherently incompatible."⁴⁶ He feels that the NLRB examples are "rather extreme cases of conscious selection and manipulation of individual cases for an ulterior end," and that there have been many other instances in which adjudicative and policy issues have been "virtually identical in substance and coextensive in their implications."⁴⁷

Disadvantages of Rulemaking

So far the discussion has focused on the good effects that have been claimed for rulemaking, as well as relevant criticisms of these arguments. For the most part, the thrust of the criticisms is that the relative advantages of rulemaking over the case-by-case approach have been oversold. It is appropriate also to touch on the alleged disadvantages of rulemaking.

The notion that the articulation of clear standards enhances the desired impact of regulatory statutes understandably has a good deal of currency. As a counterpoise to this, however, Shapiro states that "specific rules may subtract from the force of a general statutory prohibition by inadvertantly setting up guideposts for the evasion of basic statutory objectives."⁴⁸ Shapiro offers this interesting speculation as an argument that rulemaking may be inappropriate in some circumstances, but offers no supporting examples. He fails to account for the fact that, by even his own analysis, specific standards may be established through adjudication.

Perhaps implicit in his argument is that precedents established through adjudication are easier than rules to disregard in future cases.

Baker offers another plausible argument for the non-use of rule-making in some instances. An agency simply may not possess the knowledge to issue sound rules, due to its newness or the newness of the problems before it. Therefore, it may be prudent, if not necessary, to proceed on a case-by-case basis until the experience required to draft a rule has been accumulated. As Baker says,

This method of proceeding slowly and developing the agency rules as the needed expertise is built up has a great deal to recommend it. The first impression or reaction to a matter often turns out to be quite erroneous, after development of all the facts and considerations.⁴⁹

The author offers the Federal Communications Commission's 1952 decision to proceed on an ad hoc basis following the lifting of a "freeze" on television license applications as an example of a prudent abstention from the use of rulemaking.⁵⁰

As a general proponent of rulemaking, however, Baker feels that an agency's lack of knowledge should not be used as an excuse to avoid articulating standards wherever possible. In this regard, he recants to say that it may often be good to initially issue vague rules in order to "advise interested parties of an agency's general direction or attitudes."⁵¹ Such rules can obviously be made more specific as the agency gains needed experience.

In Shapiro's view there are some areas in which rulemaking is "never feasible, even after the accumulation of considerable experience."⁵² As an example, he cites the NLRB's mandate to ensure that unions bargain in "good faith." He feels that little can be added to this statutory command-- that the ultimate question in each case... must remain the subjective good

faith of the bargaining agent."⁵³ Shapiro offers the Supreme Court's rejection of the Board's attempts to articulate standards in this area as evidence of the inadvisability of rulemaking.⁵⁴ It should be added, however, that other writers criticize the NLRB for this very inability to successfully develop rules which define "good faith bargaining."⁵⁵

Neglect of the Political Effects of Rulemaking

While scholars have given considerable thought to rulemaking in terms of its "administrative advantages and disadvantages," the "political effects" of rulemaking have been virtually ignored. It is logical to assume that the choice of rulemaking as an alternative means of implementation is not neutral in terms of its impact on various affected groups and individuals. Indeed, this must be the case, assuming that rulemaking has some of the administrative effects claimed for it, such as being a more expedient, forceful, and flexible way of pursuing policy objectives. It follows that, if the use or the non-use of rulemaking does have a differential impact on affected interests, then they should react accordingly. For example, one would expect to observe "negative feedback" from those who perceive that an agency's use of rulemaking has adversely affected their interests. Such feedback might be directed towards Congress, the courts, or the agency itself, and would be intended to discourage the future use of rulemaking. Similarly, one would expect "positive feedback" from those who perceive that they have benefited from the use of rulemaking. Considerations such as these are almost entirely missing from the literature.

One might expect rulemaking to affect an agency's relationship with its political environment in other ways as well. Gellhorn and

Robinson posit that when an agency behaves like a legislature, it opens itself up to the same sorts of political pressures that impinge on Congress. That is, it becomes a target for interest group lobbying.⁵⁶ Of course, one can counter that the mere exercise of broad discretion through any alternative means of implementation, should have this effect. But perhaps rulemaking renders an agency's discretionary role more visible. It certainly enhances the importance of individual decisions. This being the case, the use of rulemaking may prompt stronger attempts to influence policy at the agency level. There is little if any evidence which bears on this supposition.

EXPLAINING THE NON-USE OF RULEMAKING

While there is at least a good deal of speculation concerning the effects of rulemaking, much less has been written on the subject of why agencies use or fail to use rulemaking to implement policy. This neglect is understandable when one considers that few outside the legal discipline have been concerned with rulemaking, and that explaining agency behavior is not a logical concern for lawyers.

Administrative Considerations

The decision to use or not use rulemaking must partially be the product of its perceived advantages and disadvantages as a means of implementation. Therefore, the preceeding discussion of the hypothesized effects of rulemaking obviously reflects on its "causes" as well-- at least to the extent that administrators perceive the same sorts of likely effects as those who have written on the subject. Several case studies indicate that agencies have been influenced by considerations of "good administration."

Fritschler's account of the FTC's election to issue a rule requiring health warnings on cigarette packages indicates that the Commission was influenced by several of the traditional arguments in favor of rulemaking. Among the ostensible reasons the FTC gave for its decision were that rulemaking would avoid retroactivity, would provide advance warning, and would operate evenhandedly. Most importantly, however, Fritschler seems to feel that considerations of effectiveness and efficiency were of overriding importance. For years, the agency had attempted unsuccessfully to regulate cigarette advertising through adjudication, and had come to view rulemaking as a more forceful and expedient way of achieving its policy goals.⁵⁷

Likewise, Baker's explanation for the FCC's use of rulemaking in establishing criteria for the allocation of FM radio and TV broadcast licenses, as well in promulgating standards governing multiple ownership in these two areas indicates that the agency was influenced primarily by its perception that rulemaking was a superior means for developing policy. In both instances, the FCC had previously attempted to regulate the AM component of the broadcast industry in an ad hoc fashion, and had encountered many problems. As Baker states:

... the Commission's long experience in coping with allocation problems on a piecemeal, adjudicatory basis in AM led it to adopt an allocation plan for both FM and TV services.

and

... here again, the Commission, when it authorized the new services in FM and TV, decided, in light of its experience with the ad hoc approach in AM, to employ rulemaking in dealing with the multiple ownership question in these new services.⁵⁸

The literature also contains a few examples of agency decisions not to use rulemaking based on administrative considerations. Again, Baker

states that the FCC's decision to regulate certain aspects of AM broadcasting in an ad hoc manner stemmed from the newness of both the agency and the radio industry. The Commission had simply not developed sufficient expertise to promulgate sound rules.⁵⁹ Illustrating another cause for failure to use rulemaking, Shapiro cites the NLRB's decision not to attempt to define criteria for the settlement of work-assignment disputes between competing groups of employees. He feels that the Board wisely realized that this was an area inherently unsuited to rulemaking-- that the articulation of detailed standards would have rendered the agency inflexible in attempting to cope with the nuances of individual situations.⁶⁰

Other Possible Determinants of Rulemaking

Although administrative considerations are important, however, it is unlikely that they are usually the sole determinants in agency decisions to use or abstain from rulemaking. At least two writers note an apparent contradiction which points to this.⁶¹ On the one hand, there has been an overriding sentiment among scholars for some time that rulemaking has many advantages as an administrative tool, and that it should be relied upon more heavily. Even those who feel that some of the claims made for rulemaking should be modified tend to share this view. On the other hand, agencies have shown continued reluctance to use rulemaking over the years. If indeed rulemaking would enhance agency efficiency and effectiveness, as well as fairness and wisdom in the implementation of statutes, then there must be other considerations which tend to counterbalance these administrative advantages. As one writer asks rhetorically:

If there are instances in which the principles of sound administration would suggest, if not dictate, resort to rulemaking proceedings, is there an explanation for the frequent failure to utilize such proceedings? Are there considerations, perhaps

felt but not fully perceived, that may lead an agency to conclude that it is safer to rely on other means for the announcement of important policies.⁶²

Shapiro suggests three partial explanations for the failure of agencies to rely on rulemaking more heavily. One is that policy developed through adjudicatory precedent may be better able to withstand judicial review than the same policy issued as a rule. This is because of the possibility that a reviewing court may disagree with the expressed reasons for an adjudicatory order (and these, of course, are what establish standards for future decisions), but may nonetheless agree with the agency's finding. Thus, a standard established via adjudication may endure until it has been held invalid in a later case. On the other hand, the same policy established in a rule would be reviewed solely on its own merits. In support of this explanation, Shapiro cites several examples of orders which were upheld, although the courts disagreed with the decisional principles expressed therein.⁶³

Shapiro feels that another reason for reluctance to issue rules may be that agencies wish to retain discretion for future decisions.

... by eschewing [rules] in favor of the declaration of [standards] by adjudication, an agency is likely to regard itself as freer, and will in fact be given greater freedom by the courts, to ignore or depart from those [standards] in specific instances without giving sufficient reasons.⁶⁴

The author admits that the degree to which adjudication does allow more flexibility is certainly not clear, and rests on a number of vague and contradictory judicial decisions relating to the binding effects of both rules and standards established through adjudication. Nevertheless, he feels that this may be a significant factor behind the non-use of rule-making.⁶⁵

A final reason offered for reliance on adjudication is that it permits agencies opportunity to apply new policy to prior conduct.

Recalling arguments made previously, Shapiro admits that rules, which theoretically are only prospective in their effect, can act in a retro-active manner. However, he feels that, as a matter of tendency, agencies are freer to apply newly-developed principles to past actions through adjudication than through rulemaking. Again, Shapiro's argument rests on inferences drawn from a rather recondite body of judicial precedent.⁶⁶

Shapiro admits that his explanations for the failure of agencies to use rulemaking more extensively are conjectural, and are based on perceived tendencies rather than clear systematic differences.⁶⁷ Robinson goes farther in his criticism, stating that there is little evidence to suggest that Shapiro's explanations have any validity. He notes, in fact, that courts are typically apt to be more exacting in their review of orders than rules, and that examples can be found which contradict each of Shapiro's three arguments.⁶⁸ As a general criticism, it seems that, as a lawyer, Shapiro strains to find legal explanations for the failure to use rule-making. Each of his arguments hinges primarily on agency perceptions of what the courts are likely to do. Perhaps the author is being parochial in overlooking the possible significance of other influences.

If Shapiro's explanations are inadequate, what does account for the failure of agencies to rely more heavily on rulemaking? Few if any have addressed themselves directly to this question-- at least in general, across-the-board terms. However, several case studies offer explanations for the reluctance or willingness of particular agencies to issue rules.

In Crisis and Legitimacy, Freedman compares the performance of the Securities and Exchange Commission with that of the FTC. He attempts to explain why the former agency has issued clear rules in most of its policy areas, while the latter has tended to proceed on an ad hoc basis

with few and poorly-articulated standards of implementation. Freedman feels that part of the reason for this lies in what the agencies have to do. The fact that the SEC regulates primarily a single industry has permitted

a more precise definition of the disclosure requirements and the antifraud prohibitions than would have been possible if these concepts were applicable to a number of different industries; were that the case, the SEC would have been required to frame definitions of greater generality and imprecision in order to take account of the divergent trade practices and customs of the various industries subject to regulation.⁶⁹

By the same token, the FTC's mandate to regulate trusts and protect consumers in all areas of commerce has defied the articulation of clear standards through rules. Relatedly, the author points out that the SEC finds it easier to issue rules because its statutory mission is relatively well-defined and well-understood. In contrast, the FTC operates under an extremely vague statutory mandate.⁷⁰

Another important factor which Freedman feels has contributed to these agencies' respective performances has been their policy-making environments. The groups most affected by and interested in the SEC's policy-- the securities industry and the public utility services-- have generally favored regulation. Obviously, consumers have wished to be protected from fraud, while large sellers of securities have realized that the policing of disreputable fringe operators will enhance public confidence in the industry. This support, which has been reflected in congressional attitudes, has made it easier for the SEC to issue rules. On the other hand, the FTC has faced general opposition from the business community, which tends to view its activities as a threat to free enterprise.⁷¹

Bailey and Mosher's case study of the Office of Education's administration of the Elementary and Secondary Education Act of 1965 (ESEA)

may provide additional insight into the reluctance of some agencies to use rulemaking. Their work is doubly significant, since it presents one of the few examinations of rulemaking by a non-regulatory agency. Basically, the authors find that OE did not rely on rulemaking more heavily because of resistance from some education groups, and state and local education agencies. These important members of the agency's "constituency" disagreed with Congress' intention that ESEA grants be used to benefit underprivileged children, rather than as general aid. They felt that funds channeled through local education agencies could more easily be diverted for general support to education in the absence of detailed rules.⁷²

Unlike the work of Shapiro, which is essentially deductive and normative, Freedman, and Bailey and Mosher rely on empirical analysis to suggest hypotheses explaining the use or non-use of rulemaking. Also, they go beyond administrative and legal factors-- which are inadequate explanations by themselves-- to suggest that "political considerations" may ultimately determine the use or non-use of rulemaking. The promise shown by these case studies highlights the general paucity of empirical and politically-oriented inquiry in the literature.

Rulemaking procedure looms as a final factor that probably influences the willingness of agencies to issue rules. Hamilton contends that the prospect of having to conduct formal hearings may well discourage the use of rulemaking. His case study of the Food and Drug Administration, as well as data on the numbers of rules promulgated under formal procedures throughout the federal government, support this argument.⁷³ This alleged disincentive imposed by formal rulemaking will be discussed more fully in the literature review on the effects of rulemaking procedure to follow.

THE EFFECTS OF RULEMAKING PROCEDURE

Just as the use or non-use of rulemaking as an alternative means of implementing policy is felt to be significant, it is also hypothesized that the choice of specific procedures as alternative means of promulgating rules has various sorts of administrative and political implications. Little of the work in this area is explicitly comparative. Implicitly, however, scholars are generally concerned with the significance of the choices between no provision of notice and an opportunity for comment and informal procedure, and between informal and formal rulemaking.

For the purposes of organization, the discussion of the literature reflecting on procedural effects is divided into three sections. The first concerns the success of rulemaking procedures in achieving their intended effects. In this sense, the literature focuses almost exclusively on the degree to which informal, notice-and-comment procedures have achieved their ostensible goals. The two remaining sections review the work which reflects on unintended effects of rulemaking, categorized as "efficiency and effectiveness" and "legitimacy and compliance."

The Effects of Procedure on Representation

Ostensibly, the purpose of public notice and comment is to ensure that administrative decisions are informed by the views of affected members of society. It is reasoned that comment can provide agency officials with valuable factual input, as well as information concerning the preferences of relevant individuals and groups. In order for notice and comment to work as designed, however, three conditions must be fulfilled. First, notice must effectively alert potentially interested individuals. Second, interested parties must have not only the legal right, but the practical

ability to comment. Third, agency officials must obviously respond to comment if it is to affect decisional output. While many make strong claims for notice-and-comment procedures such as the APA's informal requirements, others attack these implicit premises. The following several paragraphs reflect on some of the issues that are raised.

The public must be aware that an agency intends to promulgate a rule as a precondition for effective participation in administrative policy making. Several observe that the Federal Register-- the standard means of providing notice-- is a voluminous, cumbersome document which few Americans know about, much less read.⁷⁴ It is further maintained that monitoring the Register involves costs which not all elements of society can bear with equal ease. Bonfield argues that the poor and/or unorganized are especially prone to be disadvantaged in this regard. To substantiate this, he cites a survey in which representatives of poor peoples' groups complained that the Register was inadequate as a source of information. In this sense, the author feels that the APA's rulemaking procedures have a "middle class bias."⁷⁵

Recognizing the inadequacy of the Federal Register as a means of alerting affected interests, a few agencies have adopted either supplementary or substitute notice procedures. As Bonfield observes, these vary greatly, and include: informal contacts, letters to potentially affected individuals and groups, special agency newsletters, and publication in newspapers, trade journals, and magazines.⁷⁶ The effect of these alternative means of notice is largely an uncharted area, although both Gellhorn and Bonfield point to instances in which they have been successful.⁷⁷

Aside from the method of providing notice, the content of notice

may also help determine the viability of public comment. Bonfield and others observe that issues for comment are defined-- either expressly articulated or implied-- by the rulemaking agency in its notice. Where a proposed rule is vague, or where the agency errs or is incomplete in its expression of decisional criteria, the effect may be to encourage irrelevant comment.⁷⁸ This danger was noted long ago by the Attorney General's Commission, which stated that unspecific notice would probably

be diffuse and of little real value either to the participating parties or to the agency.... Hence, sound practice dictates that ... notice be accompanied by tentative drafts of the regulations being considered or by precise statements of the subjects which it is expected may ultimately be touched.⁷⁹

The provision of an opportunity to comment is the second condition upon which meaningful public participation in rulemaking rests. Anyone who wishes to participate in informal rulemaking as defined by the APA is entitled to do so. This is also the case with almost all the informal procedures that have been adopted voluntarily by agencies in areas not subject to APA constraints. On the other hand, a party who wishes to participate in formal rulemaking must usually obtain approval to intervene. Agencies sometimes establish guidelines with respect to intervention, and render initial decisions granting or refusing participation rights in formal rulemaking.⁸⁰ However, the ultimate decision in this matter rests with the courts. Gellhorn and Shapiro present good analyses of the state of the law in this area. The criterion for standing to intervene is basically that a party have a demonstrable interest in the issue at hand. Originally, this was construed as "material interest," but in recent decades the term has taken on a much broader connotation.⁸¹

In analyzing the opportunity to comment, the right to comment is not nearly so important or interesting as the ability to comment. Perhaps

to a more significant degree than the information costs associated with notice, the costs of participation in rulemaking dictate the effects of procedures in many instances. Gellhorn notes that effective participation demands, at the very least, the expenditure of a certain amount of time and effort in preparation.⁸² Beyond this, several types of monetary costs are typically involved in rulemaking. Comfort, for instance, reports that attorney's fees for participation in proceedings before the CAB, FCC, and FTC have often exceeded \$100,000. Similarly, he notes that expert witness fees can be substantial. The fee for the average expert witness in FDA rulemaking ranges from \$2,500 up, and in ICC proceedings from \$4,000 or \$5,000 in small cases to \$40,000 or \$50,000 in complex, drawn-out cases.⁸³

Some scholars visualize the importance of such costs as not only a potential impediment to participation in general, but as something having a differential impact on representation in the administrative process. Frederickson, *et. al.* note, for example, that privately owned electric and natural gas utilities spent more than \$38,000 in regulatory rulemaking proceedings in 1974, and then ask rhetorically if consumer groups could conceivably have mounted efforts of this magnitude.⁸⁴ Likewise, Crampton and Bonfield argue that the poor are disadvantaged in this way as they compete with middle class groups for funds and services administered by federal agencies.⁸⁵

Beyond the costs of participation in general, several writers further note that the cost of participation in formal rulemaking proceedings is significantly greater than in informal rulemaking. The basis for this argument is that judicialized proceedings tend to place a higher premium on legal expertise, thus increasing attorneys' fees.⁸⁶ Furthermore, issues in formal rulemaking tend to be treated in a factual context, which

enhances the value of statistical and technical data, and of expert witnesses.⁸⁷

Of course, an agency's receipt of comment is no guarantee that its ultimate decision will reflect the views expressed by affected interests. A number of studies suggest or imply that notice-and-comment proceedings may represent only a fraction of an agency's decisional process that results in a rule, or that they may be of little consequence whatsoever. Fritschler, in his study of the FTC's regulation of cigarette package labeling states, "Hearings themselves serve some useful and important purposes. However, one of these does not seem to be changing the viewpoints of any of the participants."⁸⁸ His contention is that the FTC had already decided what it was going to do at the time it published notice of proposed rulemaking in the Federal Register. The substantive issue upon which the validity of the Commission's proposed rule rested was whether or not cigarette smoking indeed constituted a health hazard. By the author's well-documented account, the FTC, bolstered by its own research findings as well as by those of the Surgeon General's Commission, had already made up its mind in the affirmative on that question.⁸⁹

Other case studies come to similar conclusions. Hamilton mentions that the FDA generally conducts months or even years of research before it proposes a rule. By the time notice is published in the Register, the agency is usually convinced that it is proceeding on sound rationale.⁹⁰ Pederson's study of the Environmental Protection Agency provides a rare and interesting glimpse of the pre-notice-and-comment process typical of one agency. Tentative EPA rules are normally subjected to scrutiny through informal contacts with industry and environmental groups, and other agencies before being submitted for public comment. Pederson does not

directly suggest this, but it seems likely that the EPA is fairly well satisfied that it has heard all the relevant comments it is going to hear and that it has made all the modifications it reasonably should make before proposed rules are published in the Federal Register.⁹¹

One should not assume, however, that all rulemaking proceedings are devoid of impact on agency decision making. Scholars are understandably more prone to focus on anomalies, rather than on congruence between intention and result. Also, it is usually difficult to demonstrate a connection between comment and decision making. Just how much an agency official is influenced by written or oral comment is something even he is likely to be unsure of.

Despite the difficulties involved, a few studies plausibly show that comment can have a substantial effect on administrative rulemaking decisions. In a lengthy study of rulemaking by the Nuclear Regulatory Commission, Boasberg, et. al. detail a number of significant contributions hearing participants have made to that agency's policy. Methodologically, the authors assume a connection between participation and policy output in those cases where recommendations or considerations were initially raised by intervenors in NRC proceedings. By this standard, numerous innovations relating to radiological health and safety, environmental policy, and agency procedure are attributable to input from interested parties.⁹²

Several works dealing with the impact environmental groups have had on the policy of various agencies use longitudinal analysis to demonstrate the effects of changing procedure. It seems fairly certain, for example, that the opening up of the Forest Service's decision making to a wider range of affected interests has substantially altered that agency's policy orientation.⁹³

The intended effect of notice-and-comment procedures of various sorts is to facilitate and enhance access to agency decision making. Thus, there is an implicit hypothesis that these procedures are superior to rulemaking without public notice and comment in promoting more balanced and comprehensive decisional input. As the preceeding discussion indicates, a few scholars have sought to examine premises or linkages upon which this hypothesis is based. However, the resulting body of evidence is disjointed and does not seem to point to any consistent conclusions. Perhaps this is to be expected in dealing with a subject as diverse as rulemaking in the federal bureaucracy.

The Impact of Rulemaking Procedure on Efficiency and Effectiveness

The costs imposed by rulemaking procedures is a popular subject among administrative law scholars. In this regard, there is a widespread and frequently expressed sentiment that formal rulemaking is inferior to informal procedure. The best empirical work on this subject is Hamilton's study of the FDA, in which he argues that statutorily-imposed formal procedures have delayed the promulgation of rules for years in most cases.⁹⁴ The author feels that the elements of formal rulemaking which contribute most to delay are cross-examination and, relatedly, hearing records upon which decisions must be based. He notes, for example, that one hearing concerning the labeling of diet foods involved over two hundred days of testimony and produced a transcript of 32,000 pages. Hamilton adds that such administrative burdens not only lead to delay, but impose a tremendous drain on agency resources as well.⁹⁵ Goodrich comes to essentially the same conclusion as Hamilton in an earlier, less rigorous study of the FDA.

experience has shown that formalism in rulemaking is costly, time-consuming, and not too well adapted for the job to be done. Excessive delay, protracted proceedings, and mountainous records have resulted.⁹⁶

Hamilton also contends that an important outgrowth of the FDA's formal procedures has been a pronounced disinclination to make rules. This has resulted, not only from delay and other administrative costs involved, but because many agency officials simply do not wish to undergo the discomfort of testifying at proceedings and undergoing cross-examination. As a rough way of substantiating this proposition, Hamilton compares the FDA's administration of the Child Protection and Toy Safety Act, under which it has been required to use informal procedure, with its implementation of the Hazardous Substances Act, under which formal procedures have been required. In the two years after these statutes were passed (1970), the FDA attempted to ban only three or four substances under the latter, while it removed from the market or caused to be modified hundreds of dangerous toys.⁹⁷

Of course, one can argue that other factors may also have affected the willingness of these agencies to issue rules. For example, the FDA may have encountered less resistance to "toy rules" because each proscribed toy constituted only a small percentage of the market. Conversely, individual toxic substances may have constituted large shares of the markets of individual chemical companies. Also, toy rules-- as devices to protect children-- may have evoked more intense support from society.

Although he feels that formal procedures are usually undesirable, Hamilton does not conclude on the basis of his FDA study that they are always excessively time-consuming and burdensome. He finds that the USDA's Agricultural Marketing Service is also required to conduct formal hearings in regulating prices paid to farmers for basic agricultural commodities,

but that it seems to conduct its business quite expeditiously. Between 1966 and 1970 the AMS-- a rather small agency as compared with the FDA-- completed an average of roughly sixty proceedings per year.⁹⁸

Hamilton feels that two contextual factors probably do much to explain the difference in the effects formal procedures have had in the FDA and the AMS. One is the nature of the issues the agencies deal with. The AMS is typically concerned with narrow, empirical determinations relating to economic parameters. For example, "What is the anticipated production of tomatoes in Florida during a given period?" The FDA, on the other hand, often deals with policy issues such as, "What should be the peanut content of peanut butter?" Hamilton argues that policy issues lend themselves less readily to formal proceedings.⁹⁹ A second explanation for the disparity in agency performances under formal rulemaking relates to the difference between the AMS's and FDA's policy-making environments. According to Hamilton, the AMS operates in a consensual atmosphere. Those most directly affected by and interested in the agency's policy are typically in agreement that regulation is desirable, and therefore cooperate to ensure that rules are made expeditiously. In contrast, the FDA operates in a conflictual environment. As a result, industries, which do not wish to be regulated, use devices such as cross-examination and rulemaking records to delay proceedings.¹⁰⁰

It is widely assumed that formal rulemaking procedures are time-consuming and place heavy administrative costs on agencies, and as discussed, at least one writer deals with these notions empirically. Critics of formal rulemaking are usually concerned with regulatory policy, and it is often implicit or explicit in their arguments that informal procedures are not burdensome. This assumption has gone largely unexamined

Bonfield is one of the few, if not the only author to suggest that informal procedures may impose significant administrative costs. He cites a government-wide survey indicating that, at the time it was taken, many agencies perceived that notice-and-comment procedures were more trouble than they were worth. For example, in explaining why it did not use informal procedures where they were not required, the General Services Administration stated:

public participation in the management of property and contracts would be so complicated and cumbersome as to seriously impede and delay the efficient and economic conduct of the Government's business.¹⁰¹

Similarly, the Veterans' Administration cited "delay in rendering services and administering benefits" as the reason for its failure to use informal procedure.¹⁰² Responses such as these may have been largely rationalization, but perhaps they do point to the need to examine the potential costs of informal procedure more closely-- both where it is used and where it is advocated.

The Effect of Procedure on Legitimacy and Compliance

Several writers observe that a probable effect of notice and comment is to increase public confidence in the administrative process. Gellhorn, for example, remarks that public participation might enhance "confidence in the performance of government institutions and in the fairness of administrative hearings."¹⁰³ Likewise, Fritschler implies in his study of the FTC's Cigarette Rule that the important function of informal proceedings is not to solicit additional views and facts, but to give legitimacy to final decisions.¹⁰⁴ A study of the Atomic Energy Commission's rulemaking lends some empirical support to this proposition. Survey data show that public acceptance of the presence of nuclear power

plants increased significantly after the Commission began conducting public hearings prior to its issuance of rules.¹⁰⁵ (Of course, one wonders what the findings of a similar survey issued in the late-1970's would be.)

In addition to increasing the acceptance of administrative decisions, it is also claimed that notice and comment serve to educate the public concerning the existence and substance of rules.¹⁰⁶ The natural effect of this, combined with an increase in legitimacy, should be to stimulate voluntary compliance with administrative policy.¹⁰⁷

The contentions that notice-and-comment procedures legitimize rules, educate the public, and lead to voluntary compliance are not universally accepted, however. Some point to the rows of empty seats in hearing rooms, arguing that participation is seldom sufficient to warrant the assumption that it contributes appreciably to public awareness. In a different vein, another observer of the AEC maintains that public hearings have not increased public acceptance of that agency's decisions. Rather, "losing" participants have become increasingly frustrated with hearing results.¹⁰⁸

The way in which notice and comment affects public awareness and acceptance of administrative decisions is an important issue which has received little serious attention. Almost all of what has been said on the subject has been offered in passing, and is little more than conjecture.

THE DETERMINANTS OF RULEMAKING PROCEDURE

Relatively little has been written to explain why agencies use the particular rulemaking procedures they do. In part, this may be because explaining administrative and congressional behavior are not deemed

appropriate subjects for law scholars. (Procedural effects, on the other hand, can be used to bolster legal and policy arguments.) The neglect may also owe to the facts that, to a large extent, rulemaking procedure in regulatory policy areas seems rather cut and dried, and that regulatory policy making has been far and away the dominant focus among administrative lawyers. In this respect, one statute-- the APA-- prescribes procedures to be used in all regulatory rulemaking. Therefore, an understanding of the forces which led to the passage of the APA serves as an explanation for much of the rulemaking procedure used by federal agencies today.

Essentially, there are two fundamental questions in need of answer with respect to the determinants of rulemaking procedure in the federal bureaucracy. These are not germane to all the procedures in use, but certainly the vast majority. One is, "What causes agencies to use or not to use informal procedures in those policy areas where they are not required by the APA to do so?" The other is, "What causes Congress to impose formal procedures, or elements thereof, on agencies otherwise required by the APA to use informal rulemaking?"

With the exception of a few, scattered statutes which prescribe rulemaking procedures in non-regulatory areas, agencies are generally free to choose how they will make rules in areas exempted from the APA. Bonfield's reference to a government-sponsored survey of federal agencies is perhaps the only work in the rulemaking literature which helps to explain the factors influencing this choice. The author finds that few agencies voluntarily used notice-and-comment procedures. (However, this may have changed. See Chapter 3.) Their expressed reason for this was almost always that such procedures were unduely burdensome, and would interfere with the efficient performance of agency functions. Many of the respon-

dents also stated that notice and comment would provide little decisional input beyond what they already obtained through informal contacts.¹⁰⁹

Scholarly attention addressed to the question of why Congress imposes formal and supra-informal procedures on regulatory agencies is equally sparse. Hamilton appears to be the only writer to hazard an explanation, and even this is offered in passing. Hamilton feels that formal procedures, or elements thereof, are not imposed out of "textbook" considerations as to what types of issues and other contextual factors lend themselves to judicialized hearings. Rather, he feels that the imposition of formal procedures is politically inspired-- that it always represents a concession to regulated groups powerful enough to secure its passage. In this respect, Hamilton offers the generalization that formal procedures have been required in situations that "involve the heavy hand of the bureaucrat coming down on entrepreneurs in a supposedly free enterprise economy."¹¹⁰

Beyond these meager bits of evidence, there is little to suggest why agencies and Congress choose the procedures they do. Additional research on both the general questions posed above would seem especially fruitful in light of recent developments. Comparative glances at the Federal Register reveal that many non-regulatory agencies have voluntarily adopted informal procedures in the past ten years. In view of the late-1960's survey cited by Bonfield, it is interesting to consider what new factors have brought about this change in heart. Likewise, it is interesting to ask why Congress' willingness to impose judicialized requirements on regulatory agencies has risen so dramatically in the past decade or so.

CONCLUSION

Given a case-and-effect perspective, there are several general deficiencies in the literature on rulemaking and rulemaking procedure. First, the focus is overwhelmingly on the regulatory arena, largely to the neglect of other policy areas. Thus, the relative merits of rulemaking and adjudication are discussed at length, while there is a dearth of analysis concerning the advantages and disadvantages of rulemaking in the administration of government subsidies and services, foreign and military affairs, etc. Likewise, in terms of procedure, there is much more written concerning the significance of the choice between formal and informal rulemaking (which, practically speaking, are the two main procedural variants in regulatory administration) than there is on the choice between informal procedure and no provision of notice and an opportunity for comment (which, again in practical terms, are the two alternatives in non-regulatory rule-making).

Another deficiency in the literature-- from a political scientist's perspective-- is that there is a general shortage of empiricism. A number of useful propositions are offered and criticized, but supporting examples are used too seldom and with too little rigor. Most of the theory relating to the utility and desirability of rulemaking or various procedural alternatives hinges around contextual factors. These alternative means of implementation are argued to have salutary or unwanted effects, depending on the type of agency, the nature of the statutory mandate, the types of issues involved, the agency's experience with the problem, the nature of the agency's constituency, etc. Factors such as these are offered as "intervening variables" which help explain the significance of the choice of rulemaking or of a particular procedure. More and better case studies

are needed to gain understanding about the relative strengths of these factors and their relationships with one another. Obviously, administrative rulemaking takes place in many and diverse contexts at the federal level. Empirical research of the kind suggested here would hopefully lead to some sort of typology.

The literature is also imbalanced in the sense that much more attention is given to the effects of rulemaking and rulemaking procedure than to explaining why they exist. As discussed, the inattention to "causes" probably owes to the facts that law scholars and not political scientists have been interested in rulemaking and rulemaking procedure, and that administrative and congressional behavior are not appropriate subjects for lawyers to study. This neglect is especially serious in the area of rulemaking procedure. The anomaly suggested by the widespread advocacy of rulemaking juxtaposed against the apparent reluctance of many agencies to employ it has prompted at least a few writers to speculate about the reasons for the use or non-use of rulemaking.

A final general criticism of the literature is that "political" causes and effects are neglected. Many interesting propositions are offered concerning the effects of rulemaking and rulemaking procedure vis a vis "good administration." Thus, for example, rulemaking is supposed to avoid retroactivity, notice and comment is supposed to ensure broader decisional input, and formal procedures are supposed to cause undue delay. Of course, hypotheses such as these are useful and are worthy of further analysis. However, it is also useful to inquire how agencies' use or non-use of rulemaking or of various procedures affects their relationships with actors in their political environments, such as Congress, the executive, the judiciary, interest groups, and other agencies. In this sense, political

and administrative effects are closely intertwined, as are effects and causes. The perception of probable effects by the agency and significant members of its environment should affect the initial choice of rulemaking and rulemaking procedure. Likewise, feedback concerning actual effects should help determine subsequent choices. A few case studies, such as those by Freedman, suggest the utility of this line of analysis.

The following chapter seeks to explain the Federal Trade Commission's use and non-use of rulemaking, and what the effect of its rulemaking-- as an alternative means of implementation-- has been. Essentially, it traces the history of FTC rulemaking. The first section asks why the Commission began issuing rules in 1962, after having considered itself strictly an adjudicatory agency for almost fifty years. Following that, it analyzes the Commission's subsequent reliance on rulemaking. The second section examines the policy effects of FTC rulemaking.

Chapter 6 examines the causes and policy effects of FTC rulemaking procedures. It focuses mainly on the procedures the agency has used since the passage of the Magnuson-Moss Act, which amended the Commission's enabling legislation in 1974 by imposing judicialized rulemaking procedures. The first section seeks to explain what forces and rationale induced Congress to impose these procedures on the Commission, while the second section analyzes the effects "Magnuson-Moss procedures" have had.

One case study will not fill in all of the lacunae discussed in the literature review. Importantly, however, the analysis of the FTC focuses on political as well as administrative causes and effects, and on their interrelationships. The failure to examine the implications of rulemaking and rulemaking procedure with respect to agencies' relationships with their political environments represents the most glaring general

deficiency in the literature. At least a good number of hypotheses have been offered (if not adequately tested in most cases) on the administrative side. The study of the FTC suggests several politically-oriented hypotheses which have broader implications for all, and especially for regulatory, rulemaking and rulemaking procedure.

FOOTNOTES

¹Kenneth Culp Davis, Discretionary Justice (St. Paul, Minnesota: West Publishing Co., 1969)

²Henry J. Friendly, "The Need for Better Definition of Standards," Harvard Law Review LXXV (1962)

³See, for example, Glen O. Robinson, "The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform," Pennsylvania Law Review CXVIII (1970); Warren E. Baker, "Policy by Rule or Ad Hoc Approach-- Which Should it Be?" Law and Contemporary Problems XXII (1957); and David L. Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," Harvard Law Review LXXVIII (1965)

⁴Davis, pp. 210-17.

⁵Baker, p. 662.

⁶Ibid., pp. 665-70.

⁷Shapiro, pp. 933-35.

⁸FTC's "Statement of Basis and Purpose of Trade Regulation Rule," 29 Federal Register 8325, p. 8367.

⁹Shapiro, pp. 935-36.; Robinson, pp. 516-17.

¹⁰Ibid.

¹¹Shapiro, pp. 935-36.

¹²Robinson, p. 517.

¹³Davis and Baker both make this point. Also see, Cushman, "The Problems of the Independent Regulatory Commissions," President's Committee on Administrative Management, Report 205, 230 (1937); and Cornelius Peck, "The Atrophied Rulemaking Powers of the National Labor Relations Board," Yale Law Journal LXX (1961)

¹⁴A. Lee Fritschler, Smoking and Politics (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1969)

¹⁵Robinson, pp. 517, 535.

¹⁶Shapiro, p. 920.

¹⁷Robinson, p. 509.

¹⁸Ibid., pp. 506-10.

¹⁹James McFarland, "Landis' Report: The Voice of One Crying out in the Wilderness," Virginia Law Review XLVII (1961), p. 433.

²⁰Ibid.

²¹Robinson, pp. 535-39.

²²Ibid.

²³Shapiro, p. 932.

²⁴Baker, p. 662.

²⁵See, for example, Roger C. Crampton, "The Why, Where and How of Broadened Participation in the Administrative Process," Georgetown Law Journal LX; and Arthur E. Bonfield, "Public Participation in Rulemaking," Pennsylvania Law Review CXVII (1970)

²⁶Ibid., p. 553.

²⁷Robinson, p. 514.

²⁸Shapiro, pp. 930-33.

²⁹Ibid.

³⁰Robinson, p. 515.

³¹Peck, pp. 729-33.

³²Ibid., p. 756.

³³Robinson, pp. 515-16.

³⁴Crampton, pp. 527-32.

³⁵Robinson, pp. 519-20.

³⁶See Davis, pp. 175-83 for a discussion of these views.

³⁷Louis Schwartz, "Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility," Harvard Law Review LXXVII (1954), p. 471.

³⁸Davis, Administrative Law Treatise (St. Paul, Minnesota: West Publishing Co., 1958), sec. 7.02.

³⁹Ibid.

⁴⁰Philip Elman, "Rulemaking Procedures in the FTC's Enforcement of the Merger Law," Harvard Law Review LXXVIII (1964), p. 390.

⁴¹Davis, Ad Law, sec. 7.02; Crampton, pp. 535-36.

- ⁴²Robinson, p. 503.
- ⁴³Ibid., pp. 519-21.
- ⁴⁴Peck, p. 756.
- ⁴⁵Ibid.
- ⁴⁶Robinson, pp. 525-26.
- ⁴⁷Ibid.
- ⁴⁸Shapiro, p. 928.
- ⁴⁹Baker, p. 662.
- ⁵⁰Ibid., pp. 665-66.
- ⁵¹Ibid., p. 662.
- ⁵²Shapiro, pp. 927-28.
- ⁵³Ibid.
- ⁵⁴Ibid.
- ⁵⁵Friendly, pp. 863 et. seq.
- ⁵⁶Ernest Gellhorn and Glen O. Robinson, "Administrative Law Perspectives," Columbia Law Review LXXV (1975), p. 778.
- ⁵⁷Fritschler, pp. 74-82.
- ⁵⁸Baker, pp. 667-68.
- ⁵⁹Ibid., pp. 665-66.
- ⁶⁰Shapiro, p. 928.
- ⁶¹Shapiro and Robinson both make this observation.
- ⁶²Shapiro, p. 942.
- ⁶³Ibid., pp. 944-47.
- ⁶⁴Ibid., p. 951.
- ⁶⁵Ibid., pp. 947-52.
- ⁶⁶Ibid., pp. 952-57.
- ⁶⁷Ibid., pp. 957-58.
- ⁶⁸Robinson, p. 506.

⁶⁹James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government (Cambridge: Cambridge University Press, 1978), p. 98.

⁷⁰Ibid., pp. 100-05.

⁷¹Ibid.

⁷²Stephen K. Bailey and Edith K. Mosher, ESEA: The Office of Education Administers a Law (Syracuse, New York: Syracuse University Press, 1968)

⁷³Robert W. Hamilton, "Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking," California Law Review LX (1972)

⁷⁴Crampton, pp. 536-37.; Also see Bonfield, "Representation for the Poor in Federal Rulemaking," Michigan Law Review LXVII (1969)

⁷⁵Bonfield, Rep for Poor, p. 512.

⁷⁶Ibid., pp. 546-48.

⁷⁷Ibid.; Also see Ernest Gellhorn, "Public Participation in Public Proceedings," Yale Law Journal LXXXI (1972)

⁷⁸Bonfield, Public Participation, p. 542.

⁷⁹Final Report of the Attorney General's Committee on Administrative Procedure 102 (1941). Also published as Senate Document No. 248, 79th Cong. 2d Sess. (1946), p. 542.

⁸⁰Gellhorn, p. 375.

⁸¹Shapiro, "Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators," Harvard Law Review LXXXI (1968)

⁸²Gellhorn, pp. 398-403.

⁸³Comfort, "Federal Agency Assistance to Impecunious Intervenors," Harvard Law Review LXXIX (1966), p. 1819.

⁸⁴Frederickson, et. al., "Facilitating Public Participation at FPC Hearings," report for the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 94th Cong, 2d Sess., pp. 483-85.

⁸⁵Crampton, pp. 537-42.; Bonfield, Rep for Poor, pp. 511-21.

⁸⁶Crampton, Bonfield, and Comfort, among others, make this point.

⁸⁷Ibid.

⁸⁸Fritschler, p. 90.

⁸⁹Ibid.

⁹⁰Hamilton, pp. 1283-93.

⁹¹William F. Pederson, "Formal Records and Informal Rulemaking," Yale Law Journal LXXXV (1975)

⁹²Boasberg, et al., report for the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 94th Cong. 2d Sess.

⁹³See, for example, Friesma and Culhane, "Social Impacts, Politics, and the Environmental Impact Statement Process," Natural Resources Journal, April, 1976; also, Robinson, The Forest Service: A Study of Public Land Management, 1975.

⁹⁴Hamilton, pp. 1283-1311.

⁹⁵Ibid.

⁹⁶Goodrich, "The FDA's View on Procedural Rules," Food, Drug, and Cosmetics Law Journal XXIII (1968), p. 485.

⁹⁷Hamilton, p. 1290.

⁹⁸Ibid., pp. 1293-1300.

⁹⁹Ibid., pp. 1311-13.

¹⁰⁰Ibid.

¹⁰¹Quoted in Bonfield, pub Part, p. 555.

¹⁰²Bonfield, Rep for Poor, p. 515.

¹⁰³Gellhorn, p. 375.

¹⁰⁴Fritschler, p. 90.

¹⁰⁵Report Prepared for Subcommittee..., pp. 391-92.

¹⁰⁶Gellhorn, p. 375.

¹⁰⁷Ibid.

¹⁰⁸Report Prepared for Subcommittee..., p. 391.

¹⁰⁹Bonfield, Pub Part; and Bonfield, Rep for Poor.

¹¹⁰Hamilton, p. 1314.

Chapter 5

THE CAUSES AND EFFECTS OF RULEMAKING

This chapter focuses on the FTC's use of rulemaking. The first section seeks to explain Commission decisions to use or not use this means of implementation-- why the agency began issuing rules in 1962 and what has influenced its use of rulemaking since then. The second section examines the administrative and political significance of the FTC's use of rulemaking. This topical organization makes sense, although considerations of "cause" and "effect" are interrelated and not neatly separable for analytical purposes, as will become apparent.

INTRODUCTION

In 1914 Congress, which was struggling with the problem of trusts, passed the Clayton Act and the Federal Trade Commission Act. The latter statute created the Federal Trade Commission and gave it the mission of policing "unfair practices" in commerce. This was a vague mandate, but was generally intended to enable the Commission to deal with unethical actions undertaken by one firm which adversely affected another firm or firms. The most prominent type of "monopolizing behavior" Congress was trying to prevent was the practice by which a large firm would attempt to run a smaller competitor out of business by undercutting prices.

Another unfair practice which the FTC saw fit to confront was deception, such as misleading, exaggerated, or false claims concerning a

product's characteristics or performance. Under the original FTC Act, the agency was technically empowered only to prevent only that deception which had an adverse effect on other businesses-- that is, deception which constituted an "unfair competitive practice." Deception which merely harmed consumers was not fair game as such. Although the Commission tended to ignore or circumvent this distinction in its first years, a Supreme Court decision in 1923 explicitly confined the agency's authority to instances in which unfair practices affected a business competitor.¹ Consumer protection, therefore, could only be incidental to agency actions undertaken for another purpose. The FTC's instructions with regard to deception remained unchanged until 1938, when Congress finally reacted to consumer needs by passing the Wheeler-Lea Act. This statute amended the FTC Act by explicitly empowering the Commission to prevent deception for the purpose of consumer protection.

Today, the two primary purposes of the FTC remain antitrust enforcement and consumer protection. The Commission issues rules to prevent unfairness and deception in furtherance of both these ends, although consumer protection is by far the more commonly-stated basis for rulemaking. The FTC does not issue rules as a means of antitrust enforcement in areas other than deception, such as illegal mergers and anti-competitive pricing.² The agency's rationale for this over the years has been that individual violations of these sorts are unique, and should be dealt with on a case-by-case basis. On the other hand, modes of deceptive advertising and the like often occur on an industry-wide basis. Several statutes of limited scope, such as the Fur Products Labeling Act of 1945, have given the Commission explicit but circumscribed power to issue rules regulating particular industries. However, the concern here

is with rulemaking pursuant to the agency's principle enabling legislation, the FTC Act, which gives the FTC authority to police commerce in general.

THE FTC'S USE OF RULEMAKING

The Commission's Adoption of Rulemaking Authority

The FTC did not begin issuing substantive rules until 1962. Until then it had relied primarily on adjudication in attempting to protect consumers and industry from deception in the market place. Under adjudication the FTC would bring suit against individuals who it felt were guilty of unfair or deceptive practices. Adjudications were sometimes precipitated by complaints submitted to the Commission, and sometimes arose from the agency's own investigations. Formal, trial-like hearings would be held for the purposes of determining 1) whether or not the party in question did, indeed, engage in the alleged practice, and 2) whether or not the practice was unfair or deceptive. In a recent report the Commission has described its role under adjudication as that of a law enforcement agency, implying that its task was merely to ensure compliance with the FTC Act.³ Actually however, the Commission was making policy in a very real sense by defining what was unfair or deceptive through precedent.

Adjudication was the only tool the FTC used which had legal, coercive force. However, the Commission did employ a variety of other, informal techniques to police deception. The FTC began issuing Trade Practice Rules (TPR's) in 1919. These were limited in their effects to particular industries, and were drawn up with the help of industry representatives in "Trade Practice Conferences." Proceedings of this kind were sometimes initiated by the Commission, but often came at the request

of trade associations, who wished to establish codes of fair play for their members. In 1955 the FTC also began issuing guides. These were designed to perform the educational function of spelling out in clear detail the requirements of laws administered by the Commission. Most guides were applicable to specific industries, but some pertained to all commercial activity.

TPR's and Guides were interpretive rules (see Chapter 2). They served to refine the meaning of "unfair or deceptive" in particular areas, but they had no legal force. Compliance was strictly voluntary, and their main function was to warn industry of what the FTC might consider grounds for adjudicatory action in the future. The crucial determination of whether or not the practices described in TPR's and Guides were unfair or deceptive still had to be substantiated in an adjudicatory proceeding against an individual violator.

Aside from TPR's and Guides, the Commission also used advisory opinions and consent orders as informal means of preventing deception. As statements of how the agency might view the legality of a proposed action, advisory opinions were usually given to potentially affected industry members upon request. Consent orders were voluntary agreements between the Commission and a party about to enter, or in the course of, an adjudicatory proceeding.⁴ Naturally, the usefulness of a consent order depended upon a party's willingness to reach an agreement with the FTC, or perhaps more accurately, its disinclination to go through an adjudicatory proceeding.

The Commission still uses the devices mentioned above. However, in 1962 it added Trade Regulation Rules (TRR's) to its consumer-protection arsenal. Its adoption of rulemaking was unusual, since the Federal Trade

Commission Act, under which the agency assumed this authority, said nothing explicitly indicating that the Commission could issue substantive rules. The FTC had considered itself strictly an adjudicatory agency for almost fifty years.

The FTC's adoption of rulemaking was very controversial. The Commission justified its move on several grounds. First, it argued that rulemaking authority was implicit in its mandate to prevent unfair or deceptive practices. By its nature, adjudication was only a remedial action. In an interesting argument, the Commission also maintained that TRR's were neither "legislative" nor "interpretive." Rather, they were "substantive," just as judge-made common law.⁵ The reasoning was that, if the agency had the power to make what were in effect rules in the course of adjudication, it also had the power to use rulemaking procedure for the same purpose. The FTC was able to strengthen this argument by pointing to Supreme Court decisions upholding the rulemaking authority of agencies. Perhaps foremost among these was the Chenery case of 1947, in which the Court said, "the choice made between proceeding by a general rule of by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."⁶ A final point made by the agency was that, although rulemaking was not authorized in Section 5 of the FTC Act (which gave the FTC power to prevent unfair or deceptive practices), it was authorized in Section 6(g), which said that the Commission could "... make rules and regulations for the purpose of carrying out the provisions of this Act."⁷

Those opposed to the FTC's assumption of rulemaking power contended that the agency could not legally issue TRR's without an explicit grant of authority to do so. They argued that nothing in the language of the FTC

Act hinted that its framers had meant to let the FTC issue rules.

Opponents of rulemaking maintained that Section 6(g) was intended only to authorize the agency to make rules concerning internal, administrative matters, and not substantive policy. This point was well supported, both by reference to the statutory context in which 6(g) occurred and the FTC Act's legislative history.⁸ Critics went on to claim that Congress certainly would have been explicit if it had intended to delegate such significant power to the FTC. Instead, there was evidence in the FTC Act's legislative history which seemed to indicate that Congress did not want the FTC to issue rules. For example, Congressman Covington, a Conference Committee member, stated, "The Federal Trade Commission will have no power to prescribe the methods of competition to be used in the future. In issuing its orders it will not be exercising power of a legislative nature."⁹ (In fairness to the FTC, however, other statements from the legislative history seemed to indicate just as strongly that Congress did intend that the Commission have rulemaking authority.¹⁰)

The full controversiality of the FTC's assumption of authority to issue TRR's is perhaps best illustrated by the fact that its rulemaking was twice declared illegal by the courts, but eventually vindicated upon appeal.¹¹ It is understandable, then, that the Commission came to its decision with great difficulty. In 1961, Commissioner MacIntyre, the foremost proponent of rulemaking, stated publicly that the Commission was empowered to issue substantive rules having the force and effect of law. Later, however, he retreated, stating before the Miami-Dade Chamber of Commerce that a TRR would only establish a prima facie case, and that a respondent could show that a rule should not be regarded as legally binding during an adjudication.¹² Likewise, FTC Chairman Dixon stated in 1961

that rules which had "the force and effect of law" were authorized by Section 6(g) of the FTC Act, but later said that the Commission had no intention of issuing substantive rules, and that TRR's "would not be law in any sense."¹³ Given the thorny nature of the rulemaking issue, coupled with the conventional wisdom that established agencies are docile beasts guided by inertia, what explains the FTC's decision?

The most important and obvious reason for the FTC's decision was simply that, in several respects, rulemaking represented a more expedient and equitable way for the agency to pursue its policy goals. The Commission was becoming increasingly frustrated with adjudication as its only legally-binding enforcement device. Often deceptive practices would be widespread throughout an industry, yet the FTC could attack only one violator at a time. Others engaged in the same or similar practices could go on doing so until the Commission moved against them. Thus, it might take years to police an entire industry.

A related shortcoming of adjudication was that it had limited substantive scope, since the Commission could proscribe only those specific actions named in a suit. Restricted only by their imaginations, businesses were free to adopt new deceptive practices which were often similar to and had substantially the same effect as the old. As a leading student of the FTC has observed, "... firms can and do change their advertising messages and emphasis with great frequency. By the time a complaint-- or even an application for a preliminary injunction-- is entered, the firm has abandoned the questionable claims and made many others."¹⁴

Fritschler's case study of the FTC's experience with cigarette advertising illustrates well the Commission's frustration with the case-by-case method.

One of the early cases involving cigarette advertising oiuhts up the difficulties in commission procedures. The manufacturers of a now extinct brand called Julep cigarettes claimed in their advertisements that their product was a remedy for coughs. Even in the early 1940's this strained the credulity of the commission, and the Julep makers were forced to stop making the claim. Yet within a short period, other manufacturers advertised similar health claims. One producer claimed that there was not a cough in a carload of his cigarettes. That same manufacturer later announced that more doctors smoked his cigarette than any other brand.¹⁵

As Fritschler has characterized the FTC's thirty years of attempting to police the cigarette industry through adjudication, "... the Commission found itself putting out brush fires of deception while the inferno raged on."¹⁶

Trade Practice Rules and Guides were originally envisioned by the FTC as means of overcoming the problems discussed above. As generally-applicable statements, they would pertain to all members of an industry, or more broadly, to all those engaged in a particular class of behavior. Also, they could be stated in sufficiently abstract terms, or with sufficient enumeration, to confront a group of similar deceptive practices, possibly anticipating future industry inventiveness. However, as interpretive rules, TPR's and Guides relied on voluntary compliance, and the Commission had become thoroughly disillusioned with their effectiveness by the 1960's. As Commissioner MacIntyre stated in 1961, "... the sad fact of the matter is that in a number of very important areas, industry practices adverse to the trade generally, and apparently inconsistent with the law, have been continued despite the advice set forth in Trade Practice Conference Rules and Guides."¹⁷

The Commission saw in rulemaking a much more positive policy-making tool for some areas. As with TRR's and Guides, rules were general statements of policy which could apply to an entire industry or all of

commerce, and which could be expressed in such a way as to anticipate variation on deceptive themes. But unlike these interpretive rules, TRR's were legally binding. Once promulgated, they could be used as a basis for adjudicatory action against a party who violated their terms. Their essential advantage was that, in such an adjudicatory proceeding, the Commission would be burdened only with proving the accused violated the TRR, and not that the act itself was unfair or deceptive. This would not only make adjudicatory proceedings easier, but would hopefully deter industry members from "testing" the Commission as they might do were the same practices merely to be proscribed in TPR's or Guides.

In addition to these advantages, the Commission felt that rulemaking would be fairer to affected parties. Rather than arbitrarily singling out an individual from a group of several or many violators, rulemaking would treat an entire industry equitably. Moreover, rules would have only future effect. Therefore, firms would not be punished for their failure to predict what the Commission would define as unfair or deceptive. Relatedly, rulemaking would let potentially affected parties plan their future actions more effectively, since they would not have to wait for a series of precedent-establishing decisions to discover what was illegal.

Finally, rulemaking procedures themselves were perceived as a better policy-making device. Adjudication solicited only the views and arguments of the immediate party to a case. Rulemaking, on the other hand, could bring in comments from an entire spectrum of affected interests.¹⁸

These perceived administrative advantages do much to explain the FTC's adoption of rulemaking, but they do not present the full picture. Agency people, as well as other government influentials and scholars,

had been aware of the potential advantages of FTC rulemaking for years. For example, the famous Brownlow Commission advocated that the FTC issue rules as early as 1937.¹⁹ Yet despite the apparent utility of rulemaking, the Commission waited for almost half a century to issue its first TRR.

Part of the explanation for the fact that the FTC waited until it did to adopt rulemaking is that demands on the agency had built to such an extent that it was forced to go beyond adjudication to retain some degree of effectiveness. Commerce in 1914 was vastly different from what it had become in the early-1960's. The number of products on the market had not only increased dramatically with advancing technology, but so had their complexity. In a wide variety of industries, manufacturers had adopted the strategy that the best way to gain a larger share of the market was to incorporate extra conveniences (or gimmicks), additives, etc. in their products. For example, refrigerators in the 1940's and early-1950's had two operational units, but by 1970 the simplest model had at least seven and the most complex sixty-three.²⁰ Of course, this trend was accompanied by great advances in the extent and sophistication of advertising. As "new, improved" became Madison Avenue watchwords, the variety of ways in which consumers could be deceived or cheated multiplied.

Concomitant with this evolution of the commercial sector, it is generally agreed that consumer awareness and activism began to take off in the late-1950's and early-1960's. Alan Stone has attributed this to two basic phenomena. First, the developments discussed in the paragraph above created more reason for consumers to be concerned. Second, the enormous expansion of higher education, coupled with a similar growth in public and quasi-public employment, created a "New Class" of relatively sophisticated and articulate people who were free from the control and

influence of the commercial sector.²¹ Influential books such as Galbraith's American Capitalism and Packard's The Hidden Persuaders, the Kefauver hearings on monopoly power and administered prices, and extensive publicity from such events as the FDA's cranberry decision and the thalidomide controversy were both symptomatic and causative of the rise in consumerism.²² Perhaps the consumer movement fully came to life politically with President Kennedy's proposal of a consumer's bill of rights in 1961.²³

As Simon and others have remarked, an agency's strength and survival typically depend upon its ability to serve and build political support from segments of society.²⁴ For most of its history, the only viable sources of support for the FTC were the industries it regulated. The business community strongly perceived that rulemaking, as a more forceful and expedient means of regulation, would have an adverse effect on its interests. (The nature and strength of industry's feelings in this regard will be treated in more detail later in this chapter.) However, the rise of consumerism gave the agency a viable alternative which enabled it to take actions that might alienate industry in favor of the theretofore diffuse and inarticulate beneficiaries of regulation.

It is difficult to document consumer support for rulemaking. However, tangible evidence exists that such support did filter through Congress. In 1957, the House Interstate and Foreign Commerce Committee established a subcommittee on legislative oversight which looked extensively into the performance of the independent commissions. According to Representative Moss, who served on the subcommittee from 1958-1968, the FTC was subject to a good deal of "adverse comment" for its lack of diligence in the consumer protection area. None of the Subcommittee's reports explicitly encouraged rulemaking. However, it is safe to assume

that a good deal of informal encouragement was given to the Commission. As Moss stated in regard to rulemaking: the Subcommittee "... invited the Commission to stop being so timid and to go out and undertake to test the full reach of its powers... and to let the courts tell them when they had exceeded it [sic], rather than attempting beforehand to tightly circumscribe their own authority." He added that this was virtually a unanimous sentiment among the Subcommittee.²⁵

The decision to issue TRR's, then, resulted from the perceived administrative advantages of rulemaking as an alternative form of implementation, coupled with an increase in political support for consumer protection. The balance of forces in the FTC's political environment have continued to affect its rulemaking, both qualitatively and quantitatively.

The FTC's Subsequent Reliance on Rulemaking

The FTC began issuing rules in an atmosphere of uncertainty. This was partially because the legality of rulemaking was very much in question in the early-1960's. In addition, although the Commission knew it had some political support for rulemaking, it did not know how much. Because of these doubts, the agency's first rules were no more than token efforts to "test the water," which evoked little opposition from regulated interests. For example, the very first TRR stipulated that sleeping bag labels and advertisements must reflect the size of the finished product, rather than that of the pre-sewn material. Pre-sewn measurements obviously overstated the size of sleeping bags, and were therefore deceptive. There was nothing that could be termed controversial about such a rule, and the sleeping bag industry had little room for complaint. Subsequent rules dealt with matters of equally low consequence and controversy, such as deception in advertising the size of table cloths and the leather content of waist belts.

Guides would have been equally effective for treating such issues, since the Commission would have had to spend little effort "proving" that the practices in question were deceptive and thus in violation of the FTC Act. The FTC's intention with these TRR's was primarily to establish precedent for its rulemaking authority.²⁶

The Commission's first TRR of real consequence was its famous rule requiring health warnings on cigarette packages, promulgated in July, 1964. The FTC had been attempting to confront deception by cigarette manufacturers for thirty years with little success. Relying on a recent report by the Surgeon General, the cigarette rule involved the factual issue of whether or not smoking was a health hazard. In addition, however, the cigarette proceeding brought out strong criticism of the FTC for its assumption of rulemaking authority.²⁷

Resistance by the powerful tobacco industry and its friends in Congress was so formidable that a statute was soon enacted which nullified the Cigarette Rule, imposing considerably less stringent standards on the tobacco industry. Congress' lack of support "burned" the Commission deeply, and as a result, the agency reverted to the issuance of trivial rules. One of the most inane was a TRR specifying that advertisements for extension ladders must reflect the true length of the ladders, and not the length of the two halves (which of course overlap).

The scope and effect of TRR's remained very modest until the late-1960's. Then the Commission encountered a new wave of criticism which changed its course. In 1969 a group of law students working for Ralph Nader compiled a report on the FTC which was highly critical of the agency's passiveness in the area of consumer protection.²⁸ The report received considerable attention, both inside and outside government.

Largely because of the Nader group's impact, President Nixon asked the American Bar Association to study ways the structure and activities of the Commission could be improved. One of the ABA's primary recommendations was that the FTC rely more heavily on rulemaking as a more powerful consumer protection tool. Shortly thereafter, Miles Kirkpatrick, who had headed the ABA study, was appointed by Nixon as FTC Chairman.

Criticism of the Commission and the publicity surrounding it spurred both popular and governmental support for FTC activism in the area of consumer protection. As a result, TRR's issued in the late-1960's and early-1970's were clearly more ambitious than their predecessors.²⁹ They embraced more significant industry practices and relied on more controversial interpretations of the meaning of "unfair or deceptive." Some of the more notable TRR's passed during this era were rules regulating the care labeling of textile wearing apparel, retail food store advertising, and the use of negative option plans by sellers in commerce, as well as a rule establishing a three-day cooling-off period for door-to-door sales. It has been remarked that pre-1969 rules tended to codify either FTC policy that had already been established through adjudication or widely-accepted norms of industry behavior, while later rules tended to be "purely legislative," having little basis in previously-made FTC law.³⁰ Also, rules began to take on more of a remedial aspect, prescribing as well as proscribing behavior. For example, the Commission's Octane Rule required gasoline retailers to post octane ratings on their pumps and specified the measurement techniques through which these ratings were to be derived.³¹ In the past, prescriptive rules had been confined to matters involving potential health hazards.

As would be expected, the FTC's renewed vigor brought about

considerable opposition from regulated industry. In contrast to the trivial rules made previously, some of the new TRR's had a considerable economic pinch. Resistance again led to the curtailment of rulemaking activity, but this time opponents intervened through the courts rather than through Congress. In 1968, a federal district court denied a claim for injunctive relief partially on the theory that the FTC lacked authority to issue TRR's. On appeal, however, the D.C. Circuit Court avoided this question.³² Later, in 1971, the National Petroleum Refiners' Association successfully challenged the FTC's Octane rule in district court, again on the grounds that the Commission did not possess rulemaking authority. This decision was reversed at the circuit level in 1973,³³ but during this latter interim rulemaking activity almost came to a halt.

The Commission asked Congress to amend the FTC Act by giving it an explicit grant of rulemaking power when its ability to issue TRR's was being challenged in the courts. Beginning in 1969, a series of bills were introduced proposing such an amendment. A wide range of industry groups vehemently opposed the measure, and there ensued a fierce battle between consumer advocates and the business community which was drawn out over three Congresses.

Opponents of FTC regulation argued that such an open delegation by Congress in an area so expansive as interstate commerce was probably unconstitutional and certainly undesirable. Other delegations of rulemaking were confined to areas affecting single industries and usually limited agency discretion to the pursuit of some more concretely-defined goal. In contrast, a statute that would permit the FTC to make rules to prevent "unfair or deceptive practices in or affecting commerce" was a delegation of the vaguest, broadest sort. In an interesting attempt to borrow an

argument often employed to support the use of rulemaking, opponents also maintained that rulemaking was too inflexible a tool to deal with rapidly-changing commercial practices. Rules were too crude in this sense because they were too insensitive to varying contextual factors. Adjudicatory orders, on the other hand, could breathe with society in the same way as common law.³⁴

Opposition to the FTC's use of rulemaking was sometimes voiced in heavy ideological terms. Thus, a congressman who was sympathetic to business interests stated:

Would you not agree that the consumer in the United States has benefited to a greater degree in the availability of a variety of products at a fairer price to him under the system we have than anywhere else in the world.... It seems to me that the working of the market place itself is our best opportunity to see that the inefficient, that the manufacturer of shabby merchandise is eliminated from the market place.³⁵

One group spokesman even went so far as to predict that a grant of such far reaching rulemaking authority would be no less than an "economic death sentence" for American industry.³⁶

The FTC and consumer advocates used several arguments to justify their request for rulemaking power. Rulemaking was promoted as a more expedient means for coping with increasingly burdensome policy demands. In addition, rules were felt to be fairer to affected interests in at least two respects. Unlike adjudicatory orders, which had immediate effects on named parties, rules had uniform effects on entire industries or on all of commerce. Rulemaking was a much less arbitrary enforcement tool in this respect. Rulemaking procedures also afforded all affected parties an opportunity to express their views, whereas adjudicatory proceedings included only named parties.

In addition to these traditional arguments, it was also pointed

out that rulemaking would afford an opportunity for more flexible policy making. Testifying on behalf of consumer interests, a former FTC staff attorney cited the Commission's Octane ruling, in which the agency required refiners to average the figures obtained through the two currently accepted measuring techniques in deriving octane ratings. This averaging systematically cancelled out error inherent in each of the individual methods. Such an imaginative approach would not have been possible under adjudication.³⁷

Supporters of rulemaking were able to marshal a good deal of learned opinion to back their arguments. Several respected judges, as well as numerous other law scholars, had criticized the use of adjudication for making broad policy. The Ash Council had recently recommended that agencies rely less on the case-by-case method and more on rulemaking, and the Administrative Conference had adopted a resolution specifically advocating the use of rulemaking by the FTC.³⁸

Finally, in 1974, Congress passed the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. Magnuson-Moss did make concessions to industry (notably with regard to the procedures the Commission was to use in promulgating TRR's), but the statute gave the FTC explicit authorization to issue TRR's to "prevent unfair or deceptive practices in or affecting commerce."³⁹ On the whole, Magnuson-Moss seemed pro-consumer and pro-FTC in tone, and the Commission construed the Act as a clear signal to begin aggressive rulemaking. In 1976, the FTC's Bureau of Consumer Protection reported to Congress that the proportion of its staff resources devoted to rulemaking had risen to 21.3%, as compared with 10.0% in 1974 and 14.7% in 1975. Furthermore, it declared its intention to emphasize rulemaking even more heavily in the future.⁴⁰

The fact that the Commission proposed nine rules in 1975 also attests roughly to the effect of Congress' perceived encouragement.

A final turn in this history of the FTC's use of rulemaking is that, although the agency has devoted much more energy to rulemaking since the passage of Magnuson-Moss, its actual output has declined. In spite of the fact that the Commission has proposed rules at a significantly increased rate, only three final TRR's have been promulgated since Magnuson-Moss became effective in January, 1975. Part of this delay owes to the fact that recently proposed rules have been more ambitious. Rules which are more controversial and wide ranging naturally take longer to promulgate, for they generate more issues and more comment during rulemaking-proceedings. Although the FTC's authority to issue rules is no longer in question, the agency must still attempt to reach decisions which, to some degree, strike a compromise among various elements of its political environment.

Another factor that has slowed the output of final TRR's has been the rulemaking procedures stipulated by Magnuson-Moss. Although the thrust of the Act was to encourage rulemaking, it imposed procedural requirements on the FTC which were much more time-consuming than those used previously. Essentially, these procedures were added to the legislation as a concession to regulated industry. A full discussion of the causes and effects of the Act's procedural requirements will follow in this and the subsequent chapter.

Conclusion

In 1962 the FTC perceived that consumer support for rulemaking had grown stronger, and thus it began issuing rules after having relied on adjudication as its only formal means of implementation since its inception in 1914. At the same time, however, the Commission was uncertain

as to how consumer support for rulemaking would balance out against opposition from the business community. As a result, its first rules were tentative, token efforts designed not to arouse controversy. When the FTC finally issued the Cigarette rule (its first TRR of real consequence and controversy), the "defeated" tobacco industry was able to prevail in Congress. Following that, the agency reverted to trivial rulemaking until a new wave of consumer activism in the late-1960's again spurred it to more meaningful efforts. Once more, business interests intervened successfully against rulemaking-- this time in the courts. At that point, the Commission and its allies sought congressional intervention. The legislative history of the Magnuson-Moss Act, drawn out over three Congresses, reflects a continuation and perhaps an intensification of the group struggle over the issue of rulemaking that spanned the 1960's. As passed, the Act apparently encouraged the FTC to issue rules. However, its procedural requirements, which were a concession to industry groups, have since militated against rulemaking. This will be the subject of the next chapter.

It can be seen from the foregoing discussion that several factors have influenced the use of rulemaking by the FTC. Rourke defines organizational effectiveness as the achievement of an agency's external objectives or mission.⁴¹ Considerations of effectiveness by the FTC and its supporters have consistently favored the use of rulemaking as an alternative means of policy implementation-- at least to the extent that the regulation of unfair or deceptive practices has been an agency goal. The Commission has perceived that rulemaking will enable it to achieve its regulatory goals more forcefully and rapidly. Rourke distinguishes organizational efficiency as economy in the use of internal resources,

and points out that considerations of efficiency are sometimes in conflict with those of effectiveness. In the case of the FTC, however, the two reinforce each other. Rulemaking has been perceived as more efficient than the case-by-case method because it enables the Commission to achieve similar policy results with the expenditure of fewer manhours. As mentioned, this is because it can take many adjudications to police an entire industry and to develop a body of precedent having the same legal effect as a rule. The efficiency of rulemaking theoretically contributes to the FTC's effectiveness because it enables the Commission to attack more problems.

The perceived "administrative advantages" of rulemaking as a means of implementing statutory policy have been a fairly constant influence favoring its use. However, no agency pursues its mandate in a political vacuum, and this explains why the FTC waited almost fifty years to issue its first rule, and why its subsequent reliance on rulemaking has fluctuated so dramatically. Consumer interests, which have favored more aggressive regulation, have supported the use of rulemaking. This support has been based on their perception that rulemaking is a more forceful (more effective and efficient) means of preventing unfair or deceptive practices. Based on the same perception, the business community has opposed rulemaking. The Commission's varying willingness and ability to rely on TRR's has largely reflected the struggle between these two forces. As discussed in Chapter 4, scholars such as Shapiro and Robinson have been somewhat puzzled over the failure of regulatory agencies to rely more heavily on rulemaking, given its supposed advantages from an administrative standpoint. The political considerations which have discouraged rulemaking by the FTC point to one likely explanation for this phenomenon.

THE EFFECTS OF RULEMAKING

It is usually impossible to discuss "effects" comprehensively in the social sciences. So it is with rulemaking, whose effects-- intended and unintended, direct and indirect-- probably defy enumeration. The caveat is added, therefore, that this section treats those effects which seem most direct and significant.

The most straightforward way to deal with the effects of FTC rulemaking is to consider the degree to which it has achieved its intended goals. Rulemaking was adopted largely under the expectation that, in some cases, it would provide a better means for pursuing the FTC's legislative mandate. Adjudication had long been criticized as intolerably slow, inefficient, and unfair, and various informal alternatives such as TPR's, Guides, and Consent Orders lacked legal bite. Relatedly, it was argued that the case-by-case approach did not lend itself to planning and implementing policy priorities. To what extent has rulemaking, which was seen as a remedy for these ills, enabled the Commission to improve its performance in these respects? The first three parts of this section evaluate FTC rulemaking against the claims that have been made for its administrative superiority. Much of the discussion will reiterate arguments reviewed in the previous chapter's general discussion of the effects of rulemaking, but naturally with special reference to the FTC.

Of course, policies and means of implementing them typically have effects which are unanticipated or unintended. The work of scholars concerned with the reasons for and significance of rulemaking has been focused primarily on "intended" effects related to considerations of good administration. The last part of this section will focus on the unintended effects the FTC's use of rulemaking has had on the agency's

relationship with its political environment.

FTC Rulemaking as it Has Contributed to Fairness and Equity

It has been maintained that rulemaking is fairer to affected interests than the case-by-case approach in several respects. First, rules are theoretically only prospective in their effects. That is, they apply to the future, and do not impose punishment for actions taken in the past. As the Commission has stated in justifying its use of rulemaking:

Rules made in adjudicatory proceedings are ordinarily retroactive in application, while, under the Administrative Procedure Act, rules made in... rulemaking proceedings... are prospective only.... In a... rulemaking proceeding, the possibility of undoing consummated transactions is excluded.⁴²

It is argued that this is an especially worthwhile feature of FTC rulemaking because, due to the vagueness of the Commission's enabling legislation, it is unrealistic to expect those engaged in commerce to know what is unfair or deceptive.

Two observations might be made which mitigate this "retroactivity" argument commonly used to support FTC rulemaking. First, all TRR's are interpretive in nature, since they construe a statute already in effect. Technically, therefore, there can be no such thing as a "future effective date" of a TRR, because the FTC Act itself can be (and has been) used to justify an adjudicative proceeding at any time. As a leading authority notes, though, perhaps this criticism of the retroactivity argument sacrifices important practical considerations on the "alter of conceptualism."⁴³ Specifically, a proposed rule cannot be used as a basis for adjudication until some point in the future.

A more telling point which derives from the FTC's experience is that TRR's often affect substantial reliance interests, even when their form is entirely prospective. For example, several rules have declared

that, after a certain date, the use of a particular designation in a trademark name will constitute a deceptive practice unless the product possesses certain characteristics. TRR's such as these typically apply to existing products in which a substantial investment in formulation and advertising have been made.⁴⁴ Policy of this nature does not brand past conduct as unlawful. But, as Shapiro says, "the difference to one deprived of his trademark is marginal at best."⁴⁵

Conversely, most orders by the Commission do not impose direct punishments for actions taken in the past, and are thus no more retroactive than rules. For example, the product of FTC adjudication is often an order issued to an individual or corporation to "cease and desist" from certain actions which have been determined unfair or deceptive. Such an order may obviously operate retroactively to the extent that it affects reliance interests, but as discussed above, so do many TRR's.

Another argument made for FTC rulemaking has been that it permits participation by all those who might be affected by a proposed rule. Adjudication, on the other hand, permits participation only by the party to the suit, although the decision rendered may have much broader effects. Again quoting FTC doctrine:

Rulemaking requires that all interested persons be given an opportunity to express their views on a proposed rule before it is finally adopted.... Where rules are made, not in... rulemaking proceedings, but in adjudicative proceedings, the requirement is not ordinarily met. Views of all interested persons are not solicited or received-- only the views of particular litigants. Though a decision may have far-reaching significance by reason of the rule it lays down, and affect many persons besides the particular litigants, only the latter will have participated in the... process....⁴⁶

This argument that FTC rulemaking is more equitable in terms of participation should be modified slightly by noting that the Commission occasionally accepts amicus curiae briefs in its adjudicatory proceedings.

At the same time, however, the significance of this device is diminished by two factors. First, the use of amicus curiae is entirely optional in adjudication, whereas the Commission must let all interested parties participate in rulemaking. To date, the use of amicus briefs in adjudication has been very limited and seemingly whimsical. This has most probably been because of the fact that the essential determination in adjudication is the guilt or innocence of named parties, and not the broader effects an order might have. Second, even when outside parties have been permitted to participate via amicus curiae, they have still been at a relative disadvantage in that they have not been entitled to the same procedural rights enjoyed by named parties, such as cross-examination and rebuttal.

A final argument that falls under the ambit of fairness is that rulemaking operates even handedly to bar a practice on the part of all, while adjudication capriciously singles out one party, permitting others to go on as they had before. This often results in a substantial competitive disadvantage for the one unfortunate enough to have been singled out.

This argument is generally true. However, adjudicatory proceedings may be and have been brought by the Commission against virtually all those in an industry employing a particular practice. The Commission has also exercised its discretion to delay the effectiveness of orders until similar orders have been issued against all offenders and their validity has been determined.⁴⁷ The feasibility of using these devices obviously depends on the number of alleged violators in question. The more there are, the more impractical "comprehensive adjudication" becomes, due to the nature of the proceedings. An individual action or a series of actions against hundreds of parties would likely drag on for decades, since all

parties would have to be afforded the opportunities to cross-examine, rebut, etc. In such cases, rulemaking is the only way to ensure even handedness. In practice, TRR's issued by the FTC have usually had widespread application, and therefore, the comprehensive use of adjudication has not been a viable alternative.

Also, the argument that TRR's affect everyone at once is a premise that always seems to be glossed over by rulemaking enthusiasts. If this requirement is not met, then TRR's must be enforced through the "arbitrary" means of adjudication. Evidence which bears on this issue is scanty. Two industry surveys issued by the FTC pursuant to its promulgation of particular TRR's found almost total compliance. However, the methodological weakness of a questionnaire distributed by a law enforcement agency to determine who is obeying the law is obvious.⁴⁸

As a brief conclusion to this subsection, it appears that the use of rulemaking has contributed to the fairness and equity of FTC policy. The traditional arguments that are made in this regard are in need of some qualification. This is most especially the case with respect to the retroactivity contention, which seems weak in the case of the FTC. However, there is little doubt that rulemaking does yield broader participation by, and more even handed treatment of, affected interests.

Rulemaking as a More Flexible and Sensitive Tool for Implementing Policy

Several supposed advantages are subsumed under the argument that rulemaking is a more flexible and sensitive policy-making tool. One is that it lends itself better to planning. In this regard, it is argued that adjudication must rely upon the accident of litigation. Technically, this general criticism of the case-by-case approach is not germane to the

FTC, which has always had the power to bring its own cases. For some reason, however, the Commission has been notorious for using the "mailbag approach" in selecting cases for adjudication. That is, rather than relying on its own analysis to determine the most pressing consumer-protection needs, it has let complaints from outside parties dictate how a large portion of its adjudicatory effort is spent.

Regardless of the ability or the inclination of the Commission to choose cases, it is conceded that adjudication is an inferior method for articulating coherent policy. This is because precedent in a given area must be pieced together from several cases, each representing a peculiar set of facts. Even if the FTC does select its own cases, it is unlikely that it will be able to find a series of factual settings that will enable it to bring out precisely those principles it wishes to establish. The Commission may begin to develop needed policy with an initial decision, but may reach a dead end in its efforts to create a more elaborate body of precedent for want of cases presenting appropriate circumstances. True, in some instances the FTC has attempted to go beyond the facts at hand in the statements accompanying its adjudicatory decisions in an attempt to establish more comprehensive standards. However, the courts have tended to be unreceptive to such efforts.⁴⁹ This has been largely because such pronouncements could not be backed by evidence presented and tested in hearings-- supposedly the sole basis for adjudicatory decisions.

As mentioned earlier, many of the FTC's pre-amendment TRR's were token efforts designed to establish a precedent for the use of rulemaking. As such, these trivial, non-controversial rules can not be said to have represented an improvement in the allocation of the agency's consumer-protection resources. However, some of the latter pre-amendment TRR's and

most of those proposed since Magnuson-Moss have demonstrated the potential of rulemaking as a device which can facilitate planning. These rules have attacked problems which the Commission has considered important yet treatable, and they have done so in a comprehensive fashion. Significantly, rules are proposed today only after the Commission has conducted extensive investigations into the abuses in question-- their prevalence, the severity of their effects, and the likelihood that they can be remedied. The staff investigation leading up to the proposal of a TRR typically lasts two or three years, and generates a voluminous report justifying why the Commission should promulgate such a rule. These reports tend to run in the neighborhood of five hundred pages, and often draw on tens of thousands of pages of supporting evidence which the staff has collected.⁵⁰

Relatedly, it has also been contended that rulemaking is a more flexible tool in the sense that it permits a more well-rounded treatment of policy questions. Although adjudicatory decisions create policy, they are premised on the guilt of a named party. At least one scholar argues that nothing in the Administrative Procedure Act prohibits the consideration of broader policy questions in adjudicatory proceedings.⁵¹ However, experience has shown that this has seldom been the case with the FTC-- most probably because judicial review of an order is based on whether or not justice was done to the party in question. In contrast to adjudication, rulemaking is concerned with policy above all else. As such, it allows the expression and consideration of a much wider range of facts and opinions than does adjudication.

The FTC's experience demonstrates the superiority of rulemaking for dealing with policy questions. Issues discussed in TRR proceedings have been of two general types. As in adjudication, there has been the

question of whether or not the practices addressed by the proposed rule have really been unfair or deceptive as Congress meant those terms to be construed. Second, aside from the "legality" of the proposed rule, there has also been the consideration of its probable impact. How prevalent are the practices addressed by the proposed TRR? Would the proposed measures effectively remedy the situation? Do the rule's probable benefits outweigh its probable costs? It is these types of questions that are largely missing from the Commission's adjudicatory proceedings.

The FTC's TRR requiring health warnings on cigarette packages illustrates the distinction between rulemaking and adjudication in this regard. In the proceedings, FTC staff, tobacco industry representatives, and consumer advocates discussed at length the policy ramifications of the proposed rule. How much harm were cigarettes doing to the nation? What would be the effects of a health warning on smokers' consumption and, resultantly, on the cigarette industry? Scientific evidence, as well as surveys and economic projections, were brought to bear on these issues. Considerations of this type would not have been relevant in an adjudicatory proceeding.⁵²

Participation in rulemaking has typically been extensive, and has come from a variety of affected interests. It has often contributed useful decisional input concerning the probable effects of TRR's. Perhaps more importantly, rulemaking has allowed very substantial contributions by FTC staff-- often in the form of surveys, econometric studies, etc. As will be discussed in the following chapter, this tendency has been especially pronounced since the passage of the Magnuson-Moss Act.

Another advantage of rulemaking that falls under the heading of flexibility is that it has allowed the Commission to fashion more

imaginative solutions to perceived problems. Of course, this has been partially because of the wider range of considerations and input possible under rulemaking. But rulemaking has also given the Commission more freedom in the selection of policy options in a "qualitative" sense. Most importantly, perhaps, it has allowed the prescription of behavior. Although orders can sometimes dictate remedial measures designed to provide redress for injured parties, adjudication is otherwise limited to statements of what cannot be done, rather than what has to be done. For instance, a health warning requirement for cigarette packages could not have arisen from an adjudicatory proceeding.⁵³ Another illustration is provided by the Commission's Octane rule, which prescribed that octane ratings be placed on gasoline pumps, and that these ratings be derived by averaging the results of two measuring techniques currently in use. In adjudication, the Commission might possibly have proceeded against a refiner for failing to disclose ratings obtained through one of the two accepted techniques. However, the imaginative averaging of measures-- a device that systematically cancelled out some of the error inherent in each method-- would certainly have not been possible under adjudication.⁵⁴

Rulemaking as a More Powerful and Expedient Means of Implementation

Perhaps the primary justification for rulemaking has been that it would enable the Commission to achieve its policy goals more flexibly, more quickly, and with less expenditure of resources than would otherwise be the case. In short, it has been hoped that rulemaking would render the FTC significantly more viable in its efforts to prevent unfair or deceptive practices. The preceding discussion of rulemaking as a more flexible and sensitive policy-making tool obviously reflects on whether or not this hope has been realized. The purpose of this subsection is to

take a more general look at the impact of rulemaking to date.

Several premises are implicit in the contention that rulemaking leads to more forceful policy. One is that the rules the FTC promulgates are meaningful and sufficiently broad that similar policy results could only be achieved through a series of adjudicatory proceedings, if at all. As discussed in the preceeding chapter, many of the Commission's earlier TRR's were trivial and non-controversial, proscribing actions which were obviously unfair or deceptive. In such cases, the advantage of rulemaking as an alternative means of implementation was probably insignificant, since, in the absence of rules, little effort would have been required to "prove" unfairness or deception in individual adjudications. Guides would have been equally as effective as rules such as those dealing with the advertised sizes of extension ladders and sleeping bags, and would have taken less trouble to promulgate. It should also be noted that many of the Commission's earlier rules tended merely to codify precedents that had already been established through adjudicatory action.

At the same time, some of the latter pre-Magnuson-Moss TRR's were very meaningful. Most feel that, aside from the Cigarette rule (which was negated by a subsequent statute), the first of these was the Games of Chance TRR. This was a detailed rule which comprehensively limited games of chance in the food-retailing and gasoline industries. Among its provisions, the rule prescribed how games were to be advertised, how chances were to be distributed, and how proprietors were to represent to participants the chances of winning prizes. In addition, the rule required that dealers must post in public a list of the names and addresses of winners, and the total number of prizes available and won. A half dozen or so TRR's promulgated in the late-1960's and early 1970's followed this

to create a small body of rules which represented serious efforts to regulate industry behavior. Likewise, most of the rules proposed since the Magnuson-Moss Act took effect have been quite ambitious, although only three have been promulgated.

Of course, the mere promulgation of a rule, no matter how ambitious, is no guarantee that it will have a significant impact on industry behavior. For it to be effective, a TRR must either be enforced through adjudicatory action or must trigger widespread voluntary compliance.

To date, the FTC has not initiated any formal adjudications on the basis of the violation of a TRR. The Commission has occasionally used its rules in consent order proceedings and in obtaining assurances of voluntary compliance, but it has never actually relied on a rule in an adjudicatory hearing.⁵⁵ There are probably several reasons for this. One has to do with the nature of some of the TRR's that have been promulgated. As mentioned, some have been trivial. Others have been so vague that they have added little to the Commission's authorizing legislation, and hence have had little enforcement value.⁵⁶ Until recently, the FTC has also been reluctant to use TRR's as a basis for adjudication for "political" reasons relating to its uncertainty over the legality of rulemaking in the absence of specific statutory authorization. The employment of rules in adjudicatory actions would have undoubtedly added vitriol to industry's contention of FTC rulemaking authority, both in the courts and Congress.

The observation that TRR's have not been used in adjudication does not ineluctably point to their insignificance. An alternative explanation for this fact is that rules have induced voluntary compliance, thus obviating the need for adjudication. Evidence bearing on the degree to which this has been the case is scanty,⁵⁷ but there does appear to have

been widespread compliance with rules in at least some instances. In 1967 the Commission reported two surveys of industry members it had conducted, one on compliance with a rule on television screen sizes, and the other on compliance with a TRR prohibiting the use of the word "automatic" to describe sewing machines. Both surveys found total compliance.⁵⁸ In addition, some closely acquainted with the FTC, such as former Commissioner Philip Elman, have pointed to the powerful effect some rules have had in changing industry behavior in the desired direction. Elman has cited the television screen rule and a rule prohibiting use of the word "leakproof" to describe dry cell batteries as examples.⁵⁹

Another premise of the argument that rulemaking is a stronger and more expedient means of implementation is that a rule takes less effort and time to promulgate than a series of adjudicatory orders having the same cumulative scope. Interestingly, an FTC study has shown that both pre- and post-Magnuson-Moss TRR's have demanded fewer manhours from the Commission than some individual adjudicatory proceedings. One adjudication consumed over 230,000 manhours. It should be hastily added that this is not a truly representative comparison. It appears from the Commission's data that individual adjudications and rulemaking proceedings placed roughly the same demands on agency resources if one looks at mean and average manhour figures.⁶⁰ It should also be added that there is no rigorous way to compare rulemaking and adjudication on this basis, since the amount of effort required for each type of proceeding varies greatly from case to case. Still, presuming that most of the TRR's in the study were broader in scope than most of the orders, the data seems to bear rough testimony to the efficiency of rulemaking.

In terms of time, the Commission is most probably able to turn out

TRR's more quickly than it can develop like precedent through adjudication. This was certainly true of rulemaking before the Magnuson-Moss Act. Between 1962 and 1973, TRR's often took less than a year to promulgate, and proceedings seldom lasted more than two years. Since Magnuson-Moss has become effective, rules have taken considerably longer to promulgate. As will be discussed in detail in the following chapter, this has owed to the very ambitious nature of recently-proposed TRR's, as well as to the rule-making procedures imposed by the Act. The magnitude of delay under Magnuson-Moss is still unclear because so few TRR's have been finally promulgated under its requirements. However, proceedings which last three or four years will probably be common. But even given this delay, rule-making will probably remain a more rapid way of developing policy than adjudication. Many adjudicatory proceedings go on for years themselves.

It is probably fair to conclude that the overall impact of FTC rulemaking has been relatively slight to date. This owes to the facts that so few TRR's have been promulgated and that some of those that have been issued have been of little practical value. Much of the ineffectiveness of pre-Magnuson-Moss rulemaking in these regards can be attributed to the absence of specific authorizing language in the FTC Act and to accompanying industry resistance focused through Congress and the courts.

At the same time, the FTC's experience demonstrates the potential of rulemaking for achieving desired policy results. In some instances rulemaking has proven to be a more flexible policy-making tool, and relatedly, it has had rapid and profound effects on specific areas of commercial activity. One can safely surmise that when and if the twenty or so bold rules that have been proposed since the passage of Magnuson-Moss finally become federal regulations their cumulative effect in terms of furthering

the Commission's policy objectives will be quite substantial.

The Political Repercussions of FTC Rulemaking

One of the most significant effects of FTC rulemaking has been the response it has elicited from the agency's political environment. The FTC has been criticized by consumer advocates during periods in which it has been reluctant to promulgate rules.⁶¹ On the other hand, the Commission has come under harsh attack from the business community when it has reacted to consumer complaints by issuing meaningful TRR's. This was the case following the issuance of the Cigarette rule in 1964-- the first TRR of any consequence. It also occurred during the late-1960's and early-1970's when the Commission, reacting to the Nader Report and other indictments, again began to issue more ambitious rules. The FTC has probably experienced its strongest sustained criticism from industry groups and their friends in Congress since the passage of Magnuson-Moss. As mentioned, the Commission perceived that statute as a clear endorsement to begin rulemaking in earnest. Although it has yet to promulgate many TRR's under the Act, the number and scope of the rules it has proposed have brought a vociferous reaction from regulated interests.

In each instance, reaction against FTC rulemaking has brought tangible results. At the insistence of the tobacco industry, Congress passed a statute in 1965 which effectively nullified the Cigarette rule. In 1968 and again in 1971, the courts intervened against the FTC to declare its assumption of rulemaking authority ultra vires. Also, Congress reacted to rulemaking opposition by a wide range of industry groups during the late-1960's and early-1970's by imposing judicialized procedures on the agency through the Magnuson-Moss Act. Finally, it appears as though Congress' response to the most recent wave of reaction against FTC

rulemaking will be the imposition of especially severe constraints. Representative Quillen of Tennessee has expressed the attitude of many legislators in most picturesque terms. After asserting that the Commission is "out to destroy free enterprise," he adds: "Back home, the way to kill a rattlesnake is to cut its head off. That is what we ought to do today."⁶² Congress has recently imposed a legislative veto provision on FTC rulemaking in response to such sentiment. Henceforth, all "final" rules must be submitted to Congress for review before they become effective. With a majority in each house, the legislature can veto rules which it feels violate the intent of the Commission's enabling legislation. In addition, it appears as though Congress is soon to impose a number of other new constraints on FTC rulemaking.

It should be apparent by now that the "causes" and "effects" of FTC rulemaking are intertwined. Consumer groups favor rulemaking and industry groups oppose it because of its administrative effects-- because it is a more effective and forceful way of implementing regulatory statutes. The concept that the current "output" of government institutions is often a function of "feedback" they receive from their environments concerning previous output has long enjoyed a good deal of popularity among political scientists. In the present case, the use or non-use of rulemaking as an alternative means of implementation cannot, in itself, be considered substantive policy output. However, the members of the FTC's political environment have clearly perceived that the use or non-use of rulemaking would ultimately have substantive policy implications. As a result, they have sought to influence the Commission accordingly, both directly and indirectly through Congress and the courts. Thus, the FTC's reliance on rulemaking at one point in time has invariably affected its ability and

willingness to issue rules in the future.

Conclusion

The FTC's experience shows the potential utility of rulemaking as a tool for implementing statutory policy. Rulemaking has generally proved superior to adjudication in terms of guaranteeing fairness to affected parties. In addition, some TRR's have demonstrated the flexibility and forcefulness of rulemaking. Evidence which reflects on the actual impact TRR's have had on the subjects of regulation is scanty. But, assuming compliance, some rules have established significant, far-reaching directives in a relatively expeditious fashion. This, of course, has enhanced the FTC's effectiveness in carrying out its legislative mandate (or at least what it perceives to be its mandate).

At the same time, however, it is important to realize that perhaps the majority of the Commission's rules have been inconsequential. Therefore, the very obvious point to be made is that rulemaking does not ineluctably lead to the sorts of administrative "good effects" its advocates claim for it. It certainly can, but the impact of rules is naturally contingent upon their content. In the case of the FTC, the agency's willingness and ability to promulgate meaningful standards through TRR's has been primarily a function of the balance of forces in its political environment. The argument in favor of rulemaking from an administrative perspective, then, should be revised to read: rulemaking is a more effective means of implementation, given an agency's willingness to be forceful. It is important to add that this qualification does not render formal administrative process unimportant as a variable alongside "informal, political factors." Rather, it integrates the two.

A final important observation to reiterate is that it is shortsighted

to focus only on the administrative effects of FTC rulemaking. The agency's willingness or reluctance to issue meaningful rules has evoked strong reaction from its political environment. As discussed, causes and effects of FTC rulemaking have been linked in this way through feedback.

FOOTNOTES

¹Federal Trade Commission v. Curtis Publishing Company, 260 US 568 (1923)

²In practice, rules are almost always issued in the name of consumer protection. Occasionally however, a rule which proscribes an unfair or deceptive practice will also be justified as a means of protecting "reputable" competitors within an industry.

The ability of the FTC to issue rules for other antitrust purposes (such as the prevention of illegal mergers and anticompetitive pricing) is not clear. Aside from one anomalous and very controversial merger rule issued in the late-1960's, the Commission has not used rulemaking in these areas.

³Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, report to Congress by the Federal Trade Commission, unpublished, June, 1979.

⁴A. Lee Fritschler, Smoking and Politics (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1969) pp. 73-74.

⁵Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule, Federal Trade Commission Document, p. 141.

⁶Securities and Exchange Commission v. Chenery Corporation, 332 US 194 (1947)

⁷15 USC sec. 46 (g)

⁸See for example, Weston, "Deceptive Advertising and the FTC," The Federal Bar Journal, June, 1964, pp. 566-67.

⁹Ibid., p. 570 (fn)

¹⁰Fritschler, p. 96.

¹¹In 1968 a federal district court denied a claim for injunctive relief partially on the theory that the FTC lacked authority to issue TRR's. Briston Meyers Corp. v. FTC, 284 F. Supp. 745 (D.D.C. 1968). On appeal, the D.C. Circuit reversed in favor of the FTC, but avoided the question of the legality of rulemaking. Later, in 1971, the FTC's rulemaking authority was again struck down in district court. In 1973, however, the D.C. Circuit reversed the decision, explicitly affirming the Commission's authority to issue rules. National Petroleum Refiners' Association v. FTC, 482 F. 2d 672, 690 (D.C. Cir., 1973) cert denied, 415 U.S. 951 (1974)

¹²Weston, pp. 568-69.

¹³Ibid.

¹⁴Alan Stone, Economic Regulation and the Public Interest: The Federal Trade Commission in Theory and Practice (Ithica, New York: Cornell University Press, 1977) p. 233.

¹⁵Fritschler, p. 75.

¹⁶Ibid.

¹⁷Weston, p. 567.

¹⁸For a discussion of the advantages the FTC perceived for rule-making see David L. Shapiro, "The Choice of Rulemaking or Adjudication in The Development of Administrative Policy," Harvard Law Review, LXXVIII (1965)

¹⁹Report of the President's Committee on Administrative Management (Washington: United States Government Printing Office, 1937)

²⁰Stone, p. 233.

²¹Ibid., pp. 232-35.

²²Lucy Black Creighton, Pretenders to the Throne (Lexington, Mass.: Lexington Books, 1976) pp. 32-34.

²³Lynn Sutcliffe, "A History of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," case study manuscript prepared for use by the Kennedy School of Public Affairs, Harvard University (unpublished) p. 4.

²⁴Herbert Simon, Administrative Behavior (New York: MacMillan Co., 1947)

²⁵Representative John Moss, statement before the Subcommittee on Commerce of the House Interstate and Foreign Commerce Committee, March 30, 1973.

²⁶Robinson and Byse, Administrative Law (Brooklyn: Foundation Press, 1975) p. 530.

²⁷See Fritschler for a good discussion of the issues surrounding the Cigarette rule.

²⁸Cox, Fellmeth, and Schultz, The Nader Report on the Federal Trade Commission (New York: Barron Publishing Co., Inc., 1969)

²⁹See, for example, "FTC Substantive Rulemaking: An Evaluation of Past Practice and Proposed Legislation," NYU Law Review XLVIII (1973) pp. 144-45.

³⁰Wayne Hagar, statement before the Consumer Subcommittee of the Senate Commerce Committee, Hearings on the Product Warranties and FTC Improvement Act of 1971, S. 986. Com. Ser. No. 92-8.

³¹Mark Silbergeld, attorney for the Consumers Union of the United States, testimony before the Subcommittee on Commerce and Finance of the House Interstate and Foreign Commerce Committee, Hearings on H.R. 20 and H.R. 521, "Consumer Warranty Protection," Comm. Ser. No. 93-17.

³²See fn 11.

³³See fn 11.

³⁴Charles F. Hagan on behalf of the National Association of Manufacturers, Hearings on H.R. 20.

³⁵Representative McCollister, Hearings on H.R. 20.

³⁶John Ware on behalf of the National Chamber of Commerce, Hearings on S. 986.

³⁷Mark Silbergeld, Hearings on H.R. 20.

³⁸Barry B. Boyer, Trade Regulation Rulemaking Procedures of the Federal Trade Commission: A Report to the Administrative Conference of the United States by the Special Project for the Study of Rulemaking Procedures Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Washington: Administrative Conference of the United States, 1979) ch. 2, pp. 2-3. Hereafter cited as the Boyer Report.

³⁹15 USC sec. 42, et. seq.

⁴⁰Margery Smith, Hearings before the House Judiciary Committee, March, 1977.

⁴¹Francis Rourke, Bureaucracy, Politics, and Public Policy (Boston: Little, Brown, and Company, 1969) p. 96.

⁴²Trade Regulation Rule for the... Advertising and Labeling of Cigarettes (see fn 5), p. 141.

⁴³Kenneth Culp Davis, quoted in Shapiro, p. 933.

⁴⁴Ibid., pp. 933-34.

⁴⁵Ibid.

⁴⁶Trade Regulation Rule for the... Advertising and Labeling of Cigarettes

⁴⁷Shapiro, pp. 938-39.

⁴⁸"FTC Substantive Rulemaking," see fn 29.

⁴⁹Shapiro, pp. 938-39.

⁵⁰Data Appendix to the Boyer Report. Unpublished document compiled by the Administrative Conference of the United States.

⁵¹Kenneth Culp Davis, Administrative Law (St. Paul, Minnesota: West Publishing Company, 1958) sec. 7.20.

⁵²Fritschler, pp. 75-115.

⁵³Ibid.

⁵⁴Mark Silbergeld, see fn 31.

⁵⁵"FTC Substantive Rulemaking," p. 159.

⁵⁶Ibid., p. 152.

⁵⁷Ibid., p. 159.

⁵⁸Ibid.

⁵⁹Philip Elman, "Administrative Reform in the Federal Trade Commission," The Georgetown Law Journal, LIX (1971) p. 829.

⁶⁰FTC Study presented to the House Committee on Interstate and Foreign Commerce, 23 March, 1973 (unpublished)

⁶¹The Commission was criticized severely in the late-1960's following several years of torpor as the result of Congress' intervention negating its Cigarette rule. More recently, the FTC has been subject to harsh attack as the result of its failure to promulgate more rules under Magnuson-Moss (even though it has proposed over twenty ambitious TRR's.)

⁶²Quoted from Congressional Quarterly Weekly Report, March 29, 1980, p. 873.

Chapter 6

THE CAUSES AND EFFECTS OF RULEMAKING PROCEDURE

This chapter considers FTC rulemaking as a given, and examines the procedures the agency uses in promulgating TRR's. More specifically, it concentrates on the rulemaking procedures Congress stipulated for the Commission in the Magnuson-Moss Act of 1974. The first section analyzes the "causes" of these procedures. It describes the legislative battle over Magnuson-Moss, and relatedly, seeks to explain why Congress chose to impose procedures on the Commission which "went beyond" informal rulemaking requirements. The second section looks at the effects Magnuson-Moss procedures have had.

THE DETERMINANTS OF FTC RULEMAKING PROCEDURE

When the FTC began issuing TRR's in 1962, it published in the Federal Register "rules of practice" establishing the rulemaking procedures it would use. Since the regulatory nature of TRR's clearly placed them under the ambit of the Administrative Procedure Act, the format adopted by the Commission conformed to the minimum requirements established by the Act's section 553 (informal rulemaking).

The FTC stated in its rules of practice that it would hold oral hearings at its discretion, but in reality nearly all of the agency's subsequent informal rulemaking provided an opportunity for oral comment at legislative-type hearings. The Commission's decision to hold hearings

was probably in the interest of good public relations rather than enlightened decision making. Agency officials felt that oral comment seldom added useful information beyond what could be obtained in written form. One reason for this was that written arguments could be made in greater detail. It was usually the case that many witnesses wished to testify at hearings, and in order to expedite proceedings, individuals were typically limited to fifteen-to-twenty-minute presentations.¹ Informal hearings were perceived more as a device to legitimize FTC rules. There was nothing to assure interested parties that their written comments would be read by agency officials, and the opportunity to present views in a public forum helped give the appearance of a democratic decision-making process. The face-to-face aspect of hearings guaranteed to participants that their arguments would at least be registered.²

The FTC's rules of practice went beyond informal rulemaking in one minor respect. After written and oral comment had been received pursuant to its initial publication of notice, the Commission would formulate a "tentative rule," which would also be published in the Register. Written comment concerning the tentative rule would also be solicited before the agency made a final decision.

Congress' Amendment of FTC Rulemaking Procedures

As discussed in Chapter 5, the FTC's decision to issue rules under what it viewed as an implicit grant of authority in its enabling legislation was highly controversial, and was declared illegal by the courts on two occasions. Uncertainty over the FTC's power eventually led to a series of legislative proposals in the late-1960's and early-1970's to amend the FTC Act by giving the agency an explicit grant of rulemaking authority. These

eventually culminated in the passage of the Magnuson-Moss Act which, in addition to bestowing rulemaking power on the Commission, also imposed new procedural requirements.

Largely in response to the Nader Report and the American Bar Association study which corroborated its findings, President Nixon called in October, 1969 for expanded powers to revitalize the FTC. Senators Magnuson, Baker, Griffin, Prouty, and Scott introduced the Consumer Protection Act of 1969 (S. 3201) for the Administration on December 3 of that year. As introduced, S. 3201 contained nothing with regard to rule-making. It proposed an expansion of the powers of the FTC from matters "in" commerce to those "in and affecting" commerce. It also provided for preliminary injunction authority and for the bringing of class actions in federal court if the FTC had issued a cease and desist order which had become final.³ The Senate Commerce Committee called for hearings on S. 3201 later in December. The Committee's majority, which was in favor of the bill, sought to build support for the legislation by inviting testimony from FTC officials, as well as from various consumer representatives. An important product of these hearings was to secure additional ideas for reforming the FTC, among them an explicit grant of rulemaking authority. New FTC Chairman Weinberger, with the backing of the Commission, formally asked Congress to add rulemaking authority to the agency's enabling legislation in February of 1970. A committee print of S. 3201 prepared in May of 1970 was the first of a series of bills proposing rulemaking authority for the Commission.

In addition to a grant of rulemaking authority for the FTC, the redraft of S. 3201 proposed new rulemaking procedures for the agency. The FTC would be required to use informal procedures with certain important

exceptions. The Commission would hold oral hearings if requested. These were to be conducted in an informal manner, except that cross-examination would be required where the Commission felt it "appropriate." For the purpose of limiting cross-examination, the FTC could group together participants with the same or similar interests. Another important feature of the redraft was that the Commission was required to keep a rulemaking record, composed of the hearing transcript and all written submissions. In promulgating a final rule, the agency would base its decision on the "relevant matter" contained in the record.⁴

The "hybrid" rulemaking procedures (because they represented a compromise between formal and informal rulemaking) of S. 3201 were conceived by Lynn Sutcliffe, a young staff attorney for the Senate Commerce Committee. The issues of rulemaking and rulemaking procedure had not yet come to dominate the debate over FTC improvement legislation as they would in subsequent Congresses. This was likely due to the fact that the business community had not yet had time to react to these newly-posed issues. Nevertheless, Sutcliffe, who along with staff counsel Michael Pertschuk had responsibility for redrafting S. 3201, saw the potential for industry resistance to informal procedure and recognized the need for compromise.⁵ Considering the variety of procedures proposed in subsequent bills, it is remarkable how closely the procedural requirements of S. 3201 resemble those finally passed in the Magnuson-Moss Act.

S. 3201 failed to receive floor action, and its counterpart, H.R. 14931, was not reported out of the House Interstate and Foreign Commerce Committee. In the 92nd Congress, the FTC-related provisions of S. 3201 were combined with some warranty legislation that had been passed in the Senate in 1970, but that had not been acted upon by the House. This

legislation (S. 986) was the first of a series of similar bills introduced and considered in both houses which eventually culminated in the passage of Magnuson-Moss in the 93rd Congress. Each of these pieces of legislation was basically of the same format. Title I consisted of warranty requirements, while Title II proposed measures designed to improve the performance of the FTC.

Initially, debate during hearings on FTC improvement legislation revolved around rulemaking itself. The discussion in the previous chapter demonstrates the intensity of conflict over this issue. As hearings on FTC improvement legislation progressed, however, it became apparent that Congress was determined to give the Commission an explicit grant of rule-making authority. This being the case, debate naturally turned to the rulemaking procedures the agency was to be required to use. The business community was unanimous in its opposition to informal procedures, as advocated by the FTC and consumer groups. It was one thing, they argued, for elected representatives to make policy in an informal, legislative manner, but quite another for bureaucrats to do so. Industry groups favored the imposition by Congress of formal rulemaking requirements. This would ensure that the factual premises upon which the FTC based its decisions would be subject to the test of cross-examination. Relatedly, the requirement that final rules be based on the record would facilitate judicial review of the soundness of agency decisions. The following statements by representatives of the American Cannery Association and the National Chamber of Commerce illustrate the feelings of the business community in these regards.

In the typical trade regulation so-called hearing, anybody can come in and make an unsworn speech, present any wild assertion of fact, or submit a written statement that is never subject to

answer or checking. Typically, the Commission can shovel into the so-called record generalizations and opinions based on unresolved and necessarily unverified fact.⁵

... to assure the integrity of the decision-making process the decision maker should be required to consider the facts, to expose those facts to the crucible of cross-examination, and to be held to a decision based upon the weight of the evidence and logic. No such procedure is required or suggested here.⁶

The FTC and consumer advocates were just as adamant in their opposition to formal rulemaking as the business community was in its resistance to informal procedures. The Commission argued that informal procedures, as already practiced, provided sufficient means for gathering opinions and testing factual assertions. Trial procedures were useful in a judicial setting, since jurors were inexperienced triers of fact. However, FTC administrators-- most of whom had legal training-- did not need such an aid.⁷ The FTC and its supporters also echoed the viewpoint popular among students of administrative law that formal procedures were inappropriate for dealing with policy questions and issues of "legislative fact."⁸ In this regard, the FTC argued that the questions of fact administrators typically dealt with differed from those found in a judicial setting. Jurors had to determine if the defendant did it, whereas the FTC had to determine whether or not a practice might mislead the public. Rules, then, were based on a probability of error, rather than on an assurance of error.⁹

Perhaps the most important argument marshalled by the FTC was that formal procedures would be a great source of delay. Agency personnel and consumer representatives implied strongly that regulated interests would stall the promulgation of needed rules for months and even years by exploiting the rights of cross-examination and rebuttal, and their ability to create an extensive record. As Commissioner Kirkpatrick stated:

In my opinion the Commission can adopt fair rules without the delays, the unending delays and interruptions I am fearful would really break down our rulemaking proceeding were full cross-examination and discovery as a matter of due process to be compulsory. I would be very apprehensive that it would be a month of Sundays and much longer before we could adopt a rule that was going to be unpopular to those who would be governed by it, and by and large, rules are not the most popular thing. People have to change their ways because of the existence of a rule, and the longer they can fend it off, the happier they are. That is my problem.¹⁰

To back this claim, the Commission was able to point to delay that had apparently resulted from the use of formal procedures by other agencies. In one celebrated proceeding, for example, the Food and Drug Administration had taken over ten years to promulgate a rule defining the peanut content a product must have to be legally advertised as peanut butter. Most experts felt that this delay had been caused by lengthy testimony and extensive cross-examination, and relatedly, by the tremendous record generated by the proceeding (which was well in excess of 100,000 pages).¹¹

These arguments concerning the virtues and defects of formal and informal procedure were repeated often during the struggle over FTC improvement legislation. As mentioned, the Commerce Committee's redraft of S. 3201 in the 91st Congress largely anticipated conflict of this sort, and proposed compromise procedures which combined elements of formal and informal rulemaking. Perhaps owing to the impetus of S. 3201, bills in subsequent Congresses proposed a variety of procedures designed to strike a balance that would satisfy opponents and proponents of FTC regulation.

In the 92nd Congress, S. 986 (introduced on February 25, 1971) contained FTC improvement features similar to those of S. 3201. However, the bill's procedural requirements with respect to rulemaking differed somewhat from those of its predecessor. As introduced, S. 986 would have

required the FTC to use informal procedures with certain modifications. The Commission would be required to hold oral hearings if requested, but there was no mention of cross-examination. As in S. 3201, the FTC would also be required to keep a rulemaking record, and its final rules would have to be based on the record's substantial evidence.

Hearings on S. 986 were markedly different from those on S. 3201. Whereas numerous consumer-oriented witnesses had appeared before Congress in response to S. 3201, hearings on S. 986 were dominated by industry witnesses. Only Virginia Knauer of the White House Office of Consumer Affairs testified in support of the legislation, and even she, as an emissary of the conservative Nixon Administration, was equivocal in her support of FTC regulation of business practices. In addition to their criticisms of the notion of rulemaking itself, almost all of the industry representatives who testified voiced their dissatisfaction with the bill's procedural requirements. Perhaps the most common complaint was that the stipulation TRR's be based on the substantial evidence in the record provided little guarantee against poorly-reasoned decisions. This was because there was little to ensure that evidence placed in rulemaking records would be sound without such devices as the swearing of witnesses, discovery, cross-examination, and rebuttal. As the attorney for the Association of National Manufacturers stated:

I think, at least if the Commission continues to operate as it does now, it would be very liberal in allowing anybody to put in [the record] anything it wants. But that is the problem. Everything goes in. People can write in letters and never appear in person. They can say whatever they want and state whatever facts they wish. They do not have to attend and be subjected to cross-examination as they do in a [formal] proceeding.¹²

Later, the same witness elaborated on his doubts concerning the

effectiveness of judicial review under the procedural requirements of S. 986.

I don't know what basis the court could use for evaluating whatever is in the four corners of the record as substantial or not. Suppose letters come in-- let's say crank letters come in, and if you had the authors on the stand, your cross-examination would be able to show how ill-informed their comments and criticisms are. But you can't do that. How can any court look at one or more of those letters and say these are not substantial?¹³

The S. 986 procedures reported out of the Senate Commerce Committee in July of 1971 were considerably different from those of the original bill. Several procedural checks were added to FTC rulemaking. Perhaps the most significant was that if written or oral comment showed a "disparity of views concerning the material facts" upon which the rule was based, a formal trial-type hearing would be required. Such a hearing would be governed by the APA's formal requirements, except that cross-examination could be "limited in scope and subject matter," and a representative could be selected by the Commission to cross-examine for a group of participants with a common interest.¹⁴ As S. 986 was being considered on the floor, an amendment by Senator Hruska was adopted which deleted the language empowering the Commission to limit cross-examination. With this change, the bill passed the Senate in November of 1971.

H.R. 4908, the House counterpart of S. 986, was identical in its rulemaking provisions to the Senate bill. Industry witnesses before the House Interstate and Foreign Commerce Committee said essentially the same things with regard to rulemaking and rulemaking procedure as they had before the Senate. However, hearings on H.R. 4908 were more balanced than those on S. 986 in that considerably more input was received from consumer-oriented witnesses. Hearings in the House were held in September of 1971-- after the Senate Commerce Committee had amended the procedural

requirements of S. 986, making them more judicialized. As a result, consumer witnesses spent considerable effort attacking formal rulemaking requirements.

H.R. 4809 was not reported out of the House Commerce Committee. Nevertheless, hearings on the bill probably had a significant impact on the ultimate shape of FTC rulemaking procedure. There is good reason to believe that industry testimony induced some consumer-oriented congressmen to change their minds in favor of more judicialized procedural requirements. This was especially true of Representative Bob Eckhardt. As the hearings began, it appears that Eckhardt was not much concerned with the issue of rulemaking procedure. His colloquy with industry witnesses suggests, however, that their arguments convinced him that procedures offering something more in terms of due process than informal rulemaking was needed. Eckhardt was to play a key role in shaping the procedural requirements of the Magnuson-Moss Act in the next Congress.¹⁵

In the 93rd Congress, S. 356 was introduced by Senators Magnuson and Moss on January 12, 1973. This was nine days after the introduction of very similar legislation, H.R. 20, in the House. S. 356 included rulemaking provisions identical to those of S. 986, which had passed in the previous Congress.

The Senate Commerce Committee did not hold hearings on S. 356, but did solicit comment from interested parties. In a radical turn of events, the bill's rulemaking provisions were deleted in executive session before it was reported to the floor. The reason given for this change was a request in a letter from FTC Chairman Lewis Engman to Committee Chairman Magnuson. In the letter, Engman expressed his belief that judicial affirmation of the Commission's rulemaking authority was imminent (a belief soon

proved to be well-justified). He argued that the Commission would be better off without an express delegation of rulemaking authority, since it appeared from H.R. 20 (the House counterpart of S. 356) and S. 356 that such a grant would be accompanied by procedures considerably more rigorous and judicialized than those of the APA's informal rulemaking.

In view of the pending litigation... the Commission would oppose any statutory rulemaking provision limiting the flexibility of our present authority. The Commission recognizes the need to achieve a balance between procedural efficiency and procedural safeguards and feels that judicial affirmation of the Commission's rulemaking authority will provide the flexibility needed to develop procedures which strike the needed balance.¹⁶

Engman's other argument for dropping the rulemaking provision of S. 356 was that it might delay the passage of needed but less controversial portions of the bill.¹⁷

The Senate Commerce Committee was willing to drop the rulemaking provisions of S. 356 for at least two reasons. First, pro- and anti-regulation Senators alike were glad to be rid of such a controversial issue.¹⁸ Second, some members of the Committee viewed the delegation as a bargaining tool that could later be used in conference with the House. The membership of the Senate Commerce Committee was, in the aggregate, more pro-consumer and pro-regulation than its House counterpart. There is good reason to believe that the Committee's Senators never seriously believed that the House would accede to warranty-FTC improvement legislation that was devoid of a rulemaking provision. However, they did feel that their deletion of rulemaking might be used to help mitigate some of the procedural requirements imposed by the House, or to gain concessions on other aspects of the bill.¹⁹

The Senate had been the incubator for FTC improvement legislation in the 91st and 92nd Congresses. It was there that specific proposals for

FTC rulemaking procedure had been shaped through conflict and compromise. For its part, the House Interstate and Foreign Commerce Committee had considered the issue of FTC rulemaking procedures in its hearings, but had taken little legislative initiative. In the 93rd Congress, however, the House assumed the dominant role. To a great extent it was the House that formulated the rulemaking procedures which ultimately became law as part of the Magnuson-Moss Act.

Representative John Moss, Chairman of the House Interstate and Foreign Commerce Committee, introduced H.R. 20 on January 3, 1973. H.R. 20 was similar to H.R. 4809 of the 92nd Congress in most respects, but its provisions for FTC rulemaking were considerably different. The procedures in H.R. 20 were the product of considerable reflection and compromise within the House Commerce Committee, and especially among the members of its Subcommittee on Commerce and Finance. Although the positions of individuals varied, there had arisen a consensus among most members that: 1) the FTC needed rulemaking to effectively protect consumers, and 2) such authority should be accompanied by procedural safeguards more stringent than those of the APA's section 553. The second of these premises was based partially on the feeling that affected parties should be afforded due process at the rulemaking level, since it was often there and not at the adjudicatory stage of the enforcement process that most crucial issues were decided. It was also based on the realization that the breadth of the FTC's delegation made it unusual among rulemaking agencies.²⁰

Congressman Eckhardt played the key role in shaping the rulemaking procedures of H.R. 20. Eckhardt had long been a consumer advocate. He believed that the FTC should have the authority to issue TRR's, and that the efficiency of the agency's rulemaking should not be unduely constrained

by procedural requirements. As mentioned, however, he had also become convinced that TRR's should be promulgated under procedures more rigorous than those of the APA's informal requirements. In coming to this conclusion, Eckhardt may have been influenced by his perception that procedural compromise was needed if a rulemaking provision was to pass the House. More importantly, though, he sincerely believed in the virtues of due process. This was probably because he, along with other consumer advocates, had relied on the courts to achieve results in the past. (As an aside, it is interesting that no less a consumer advocate than Ralph Nader was unable to reconcile himself to informal procedures for the same reason.)²⁰

Eckhardt, as a liberal who nevertheless supported "supra-informal" procedures, was instrumental in helping to achieve a degree of consensus on the Subcommittee on Commerce and Finance. There was considerable polarization among those subcommittee members with an active interest in FTC rulemaking. Congressman Moss was a liberal consumer advocate who favored informal procedures, while Congressmen Broyhill and Ware were pro-business conservatives who favored formal procedures (in the event that the FTC must have rulemaking authority). By acting as an intermediary, and through his own work and leadership, Eckhardt helped forge a rulemaking provision that both sides could support.²²

As reported, H.R. 20 contained a unique package of rulemaking procedures. Some of its requirements were carry overs from previous bills, while others were novel. One new feature was that oral hearings must be held. S. 986 and H.R. 4809 had only required oral hearings if requested. Rulemaking hearings under H.R. 20 were to be conducted informally, with the exception that an opportunity would be provided for cross-examination

"to the extent and in the manner necessary and appropriate in view of the nature of the issues involved, as determined by the Commission." These limitations on cross-examination represented a compromise between the original version of S. 986 (which made no mention of cross-examination) and the version finally passed by the Senate (which required formal hearings with no limitations on cross-examination). Like previous legislation, H.R. 20 required that rules be based on the substantial evidence in the record. In addition to hearing transcripts and written submissions, the bill expanded the definition of the record to include "any other information which the Commission deems relevant to the rule."²³

A completely new provision of H.R. 20 was the requirement that the Commission include in its statement of basis and purpose accompanying a TRR a statement about the extent to which the proscribed acts or practices had been taking place, and the extent to which they were unfair or deceptive. The agency was also required to estimate the costs its rule would impose on manufacturers and other affected persons. The first of these requirements was partially designed to ensure that the FTC did not use rulemaking to attack relatively narrow practices that should be treated through adjudication. Also, by forcing the Commission to consider the extent of deception as well as the economic effects of rules, the drafters of H.R. 20 hoped to prevent the FTC from imposing remedies more harmful than the diseases they were designed to cure.²⁴

The Subcommittee on Commerce and Finance held six days of hearings on H.R. 20 in March of 1973. A by then familiar array of industry and consumer representatives was on hand. As would be expected, opponents of FTC regulation argued that the bill's procedures did not offer sufficient protection against the possible abuse of agency discretion, while

proponents held that its requirements would cripple the FTC's rulemaking process. The FTC and consumer advocates attacked the new requirements that the Commission issue an economic impact statement, and statements concerning the extent of proscribed practices and the degree to which such practices were unfair or deceptive. They argued that such determinations would be extremely difficult to make, and would be unnecessarily time consuming and costly in terms of agency resources.

It should be added that, as it had in the Senate, the Commission requested the House to delete rulemaking from its legislation in the 93rd Congress, both before and during subcommittee hearings on H.R. 20. A popular anecdote is that FTC Chairman Engman telephoned Congressman Eckhardt for this purpose late the night before H.R. 20 was to be introduced. Understandably, Eckhardt was less than sympathetic to Engman's plea, since he and other Commerce Committee members had devoted so much time and effort to developing a sound and mutually acceptable rulemaking provision. Aside from sunk costs, there was a more important reason why members of the House Interstate and Foreign Commerce Committee did not want to forget about FTC rulemaking. By the 93rd Congress a majority of its members had, for one reason or another, come to feel that FTC rulemaking should be constrained by something more than the APA's informal requirements.²⁵

After subcommittee hearings, Representative Moss introduced H.R. 7917 to the full Interstate and Foreign Commerce Committee. H.R. 7917 was a modification of H.R. 20 and H.R. 5021, a similar bill that had been considered by the Subcommittee on Commerce and Finance. The rulemaking provisions of H.R. 7917 were identical to those of H.R. 20. This reflects the great care that had been taken in drafting the rulemaking provisions of H.R. 20, as well as the fact that practically all of the arguments expressed

in subcommittee hearings had been aired in previous Congresses, and thus anticipated.

The full committee reported H.R. 7917 to the House on June 13, 1974. The bill's procedural requirements were changed somewhat during markup. Interested parties were given an additional right to submit rebuttal evidence at hearings. An attempt was also made to define more specifically the Commission's power to limit cross-examination. Whereas H.R. 20 (and thus the original version of H.R. 7917) had stated that the agency must allow cross-examination "where appropriate in view of the nature of the issues involved," the marked-up version of H.R. 7917 required cross-examination "as may be required for a full and true disclosure of all disputed issues of material fact." Finally, as a catch-all provision to help expedite proceedings, the Commission was empowered to make rulings "as may be required to avoid unnecessary costs and delays" during hearings. H.R. 7917 was passed by the House by a vote of 384 to 1, with 49 abstaining on September 19, 1974. No amendments were added on the floor.

After H.R. 7917 passed, its text was submitted for that of S. 356, which had passed the Senate a year earlier. Since the Senate version contained no rulemaking provision, the bill as reported from conference paralleled H.R. 7917 with respect to rulemaking procedure. However, some important modifications were added. As mentioned, the Senate Commerce Committee was dominated by liberal, pro-consumer sentiment, whereas its House counterpart contained a fairly representative sample of the political spectrum. Understandably therefore, the concessions made to the Senate in conference were intended to mitigate the judicial elements of the bill's procedural requirements. Senator Frank Moss was a prime mover in achieving the procedural concessions to be discussed below. In pressing for more

lenient requirements he was joined by his Senate colleague Warren Magnuson, and by Representative John Moss. An important factor which enabled the conference committee to reach a solution was the willingness of Congressmen Eckhardt and Broyhill to compromise on the procedures they had worked so hard to shape.²⁶

Several modifications were added in conference to help the Commission limit the possible abuse or overuse of cross-examination. Whereas H.R. 7917 had required cross-examination on "disputed issues of material fact," the version reported out of conference stipulated "disputed issues of material fact which were necessary to resolve." The Conference Report (although not the bill itself) further attempted to define appropriate issues for cross-examination and rebuttal as issues of "specific fact," as opposed to issues of "legislative fact." This distinction was taken from the work of Professor Kenneth Culp Davis, a pre-eminent authority on administrative law who argued that issues of legislative fact were not suited for judicial procedures.²⁷ Another addition was that presiding officers were empowered to conduct cross-examination for participants when they deemed it appropriate. This provision was designed primarily to protect witnesses from hostile treatment by industry attorneys.

Aside from limitations on cross-examination, the Conference Committee also added a provision to limit judicial review of rules to issues of material fact. This was intended to mitigate the requirement that agency decisions be based on the substantial evidence in the record. Since legislative facts or policy considerations were often difficult to substantiate with hard evidence, pro-regulation legislators hoped that this exemption would give the agency more policy-making freedom and flexibility. A final significant amendment to the procedures of H.R. 7917

was language indicating that the Commission could include in its rules requirements designed to prevent proscribed acts or practices. In other words, the FTC was specifically empowered to prescribe remedial actions to achieve its policy goals.

There was little floor debate on S. 356 as reported out of the Conference Committee. The bill came out on December 16, 1974, and passed the Senate and House on 18 and 19 December, respectively. The name given to S. 356 was the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.²⁸

The FTC's Choice of Procedures Pursuant to Magnuson-Moss

Magnuson-Moss is not the sole determinant of the rulemaking procedures used by the FTC. The statute established general procedural requirements that the agency must fulfill, but the Commission has had the discretion to choose its own specific procedures within the constraints of the Act. This subsection examines the "rules of practice" adopted by the FTC pursuant to Magnuson-Moss. The next subsection looks at the way the agency has actually behaved, in a procedural sense, within the constraints imposed by its own rules of practice.

After the passage of Magnuson-Moss, the FTC published in the Federal Register its intention to issue rules of practice, which would establish explicit standards for the promulgation of TRR's. This notice contained tentative rulemaking procedures, upon which interested parties were invited to submit written comment. The Commission was not required to use notice and comment in developing rulemaking procedures pursuant to Magnuson-Moss, and in fact, its solicitation of views for this purpose was quite unorthodox. Agency officials probably felt it prudent to do so because of the controversial, politically-charged nature of the procedural

issue.

The comment received by the Commission came overwhelmingly from industry and from members of the Washington "trade bar." The gist of these submissions was that the FTC should promulgate more judicialized procedures than it had proposed. For example, there was strong objection to the provision that would enable FTC officials to limit cross-examination, and alternative language was suggested which would limit the agency's discretion in this regard to a narrower range of issues.²⁹ As finally promulgated, the FTC's rules of practice differed little from those proposed. However, this should not be taken as an indication that the agency ignored the views of those desiring judicialized procedures. As will be seen, the agency's rules of practice are quite rigorous-- more so than they "had to be" within the general directives imposed by Magnuson-Moss.

The FTC's rulemaking procedures consist of a number of stages. The Commission issues two, separate notices before hearings take place. The first, termed an "initial notice of proposed rulemaking," lays out the terms of and the basis for the proposed rule. It also invites interested parties to propose disputed issues of material fact to be designated for consideration at the hearing. This relates, of course, to the Magnuson-Moss requirement that cross-examination and rebuttal be held on "disputed issues of material fact which are necessary to resolve." A Presiding Officer is assigned to conduct rulemaking proceedings at the time initial notice is published. The Presiding Officer, who belongs to a separate office within the Commission, performs a number of important functions, among them deciding what will be designated as disputed issues of material fact.

The next step in FTC rulemaking proceedings is the "final notice of proposed rulemaking." Final notice specifies the time and place for an oral hearing, and lists the disputed issues which the Presiding Officer has designated. Final notice also informs interested parties that they must submit notification of their desire to cross-examine on specific designated issues. This is to enable the Presiding Officer to group together participants with common interests for the purpose of avoiding redundancy.

After final notice comes the hearing itself. The FTC's rules of practice add little beyond the terms of the Magnuson-Moss Act with respect to hearings. The broad power which the statute gives the Commission to avoid unnecessary costs and delay is redelegated to the Presiding Officer. The rules of practice also state that parties wishing to cross-examine and rebut must show particularized need, and that they establish criteria for Presiding Officers to apply when deciding upon such requests.

Perhaps the most significant initiative taken by the agency when writing its rules of practice was made with respect to post-hearing procedures-- a topic upon which Magnuson-Moss was silent. After the hearing, the Presiding Officer must submit a report to the Commission which summarizes the record and which offers his analysis of the way in which its evidence bears on each of the designated issues. The FTC staff section responsible for developing the proposed rule must also prepare a report for the Commission. Their report must analyze the record, as well as "make recommendations as to the form of the final rule."

After the staff report there ensues a second period during which interested parties may offer written comment. This period must last for at least sixty days. As the rules of practice were originally promulgated,

the second comment period ended rulemaking proceedings. However, in 1977 the D.C. Circuit Court ruled against ex parte communications between the Commissions and interested parties after the conclusion of the second comment period. Industry argued that this gave the agency staff, which was not barred from such communication, an unfair advantage. To quell this objection, the Commission added to its rules of practice a provision enabling interested parties to make oral presentations to the commissioners during the interim between the completion of the second comment period and the promulgation of a final rule.³⁰

The Commission's discretion in adopting specific rules of practice within the broader procedural constraints of Magnuson-Moss bears re-emphasis. A comparison of the FTC with the EPA, which operates under almost identical statutory constraints, illustrates the significance of this discretion. For example, EPA rules of practice provide for only one notice of proposed rulemaking, and do not require staff and Presiding Officer reports upon the completion of hearings. Additionally, they place strict limits upon the designation of issues for cross-examination and rebuttal.

The FTC's self-infliction of rigorous operating procedures may seem anomalous in view of the Commission's intense opposition to formal, judicialized rulemaking. The fact that the agency exercised its discretion in this way can be attributed to its perception of congressional ambivalence on important but vaguely-defined procedural requirements. Most specifically, the requirements that cross-examination and rebuttal be allowed on "issues of material fact which are necessary to resolve," and that decisions be based on the "substantial evidence in the rulemaking record" were far from clear. Since Congress, the courts, and the balance of public opinion in general seemed ambivalent with regard to FTC rulemaking, the Commission

deemed it prudent to play cautiously on procedural issues.

Ad Hoc Procedural Discretion

The discussion above focused on the FTC's choice of rules of practice within the context of the Magnuson-Moss Act. The agency also exercises considerable discretion within its rules of practice. Most important are its decisions concerning designated issues and the limitation of cross-examination.

To date, Presiding Officers have been very liberal in designating issues of material fact. Sometimes they have designated many, narrow issues in a proceeding, and sometimes they have designated a few, very broad issues. However, the end result has typically been the same: practically all of the premises for proposed TRR's under Magnuson-Moss have been subject to cross-examination and rebuttal.³¹ Likewise, Presiding Officers have been reluctant to use their power to select a designated representative to cross-examine and rebut for a group of participants with common interests.³² In practice, therefore, the provisions of Magnuson-Moss which were intended to limit the exercise of these "judicial devices" have proved to be of little consequence.

The same general factors responsible for the Commission's promulgation of rigorous rules of procedure also account for its failure to limit cross-examination and rebuttal more effectively. The phrase "issue of material fact which is necessary to resolve" is quite ambiguous. Although the Conference Committee report on S. 356 sought to clarify Congress' intentions by distinguishing issues of "specific fact" from issues of "legislative fact," it has been of little help. This is primarily because Professor Davis' notion of legislative fact is, itself, nebulous and highly controversial (some authorities feel that the concept is useless

as a practical tool).³³ Presiding Officers have found "common or similar interest" to be equally vague as a guide for grouping together participants.

By itself the vagueness of Magnuson-Moss with regard to the FTC's discretionary "limiting powers" could theoretically have had the opposite effect. That is, Presiding Officers could have interpreted the statute's language as a license to severely limit cross-examination and rebuttal. One might even expect this to have happened, given the agency's expressed dislike for judicialized procedures. The reluctance of the Commission to use its discretionary powers forcefully can be traced to the political environment within which FTC rulemaking takes place. The Commission has probably construed the vagueness of Magnuson-Moss as evidence that, in an aggregate sense, Congress is not sure of what it wants. Rulemaking has remained a controversial and politically-charged issue, and the agency has felt a need to proceed with caution. Presiding Officers have been loathe to define "issue of material fact" too narrowly or to group together participants too broadly out of fear that 1) the courts will overturn TRR's on procedural grounds and 2) Congress, which seems ambivalent towards FTC regulation, will side with industry and react against the Commission.

Conclusion

The legislative history of Magnuson-Moss reveals that participants in the legislative struggle perceived that Congress' choice of rulemaking procedures would have important policy consequences, and that they exerted their influence accordingly. The business community favored formal, judicialized procedures, ostensibly because it wanted protection from unfair or capricious agency decisions. Actually, it was widely believed that the real motive of industry groups was to impose procedures so burdensome that the Commission would not be able or willing to issue rules.³⁴

This had apparently been the effect of formal procedures on other agencies. On the other hand, the FTC and its supporters feared that formal procedures would impose substantial resource costs and delay.

Ironically, the Commission had originally proposed adding rule-making authority to FTC improvement legislation, but later sought to drop the provision. This change in posture was, of course, due to the evolution of a consensus in Congress that such a grant be accompanied by procedural requirements more judicialized than those of the APA's section 553. As finally passed, the Commission viewed the rulemaking provisions of Magnuson-Moss as a clear defeat.

There are two related reasons why Congress saw fit to impose more judicialized procedures on the FTC. First, the procedures represented a convenient way to strike a compromise. The imposition of requirements more formalized or stringent than the APA's informal rulemaking represented a concession to business interests who opposed the delegation of rulemaking authority under any circumstances. Lowi and others have remarked that pluralistic bargaining and compromise tend to characterize regulatory policy making. In this case, the compromise involved the way FTC decisions were to be made, rather than the actual substance of the Commission's policy. It should be added, of course, that those involved in the struggle clearly perceived that Congress' choice of rulemaking procedures would have substantive effects in the future. Interestingly, then, when regulated interests felt that they had "lost" on the issue of rulemaking itself, they fell back on procedure as an alternative strategy and succeeded to a large extent.

Relatedly, Magnuson-Moss procedures can also be traced to a conflict of systemic goals. Political systems need to be both effective and legitimate.³⁵ Congress' delegation of rulemaking authority helps govern-

ment respond effectively to modern society's numerous and complex policy needs. At the same time, however, the exercise of legislative authority by non-elected officials runs contrary to the supposed principles of representative democracy. The imposition of more rigorous rulemaking procedures on the FTC is indicative of Congress' growing concern over the legitimacy of administrative policy making-- a skepticism supported by a good deal of popular sentiment.

After the passage of Magnuson-Moss the FTC promulgated rules of practice implementing the Act's procedural requirements. The fact that the Commission exercised its discretion to institute rather involved, burdensome procedures may seem strange in view of its arguments against formal rulemaking. Its choice of procedures was influenced by uncertainty over "how much due process" it had to provide. The Commission's choice was also influenced by its perception that it was operating in a controversial area, where Congress or the courts might intervene should it overstep its bounds. These same factors account for the FTC's circumspection as it has exercised case-by-case discretion in grouping participants and defining issues of material fact.

THE EFFECTS OF MAGNUSON-MOSS PROCEDURES

This section examines the effects Magnuson-Moss procedures have had on FTC rulemaking. As will be seen, the procedures have justified the fears of the FTC and consumer groups by contributing to delay, although perhaps not entirely for the reasons anticipated. In addition, Magnuson-Moss procedures have had substantive effects on the Commission's decision-making capabilities, its policy environment, and relatedly, its output.

As just discussed, the FTC has had an appreciable role in shaping its own rulemaking procedures within the guidelines established by the Magnuson-Moss Act. To avoid confusion, therefore, it is good to mention that the term "Magnuson-Moss procedures" will refer to the rulemaking procedures actually used by the Commission pursuant to the statute.

Delay in the Promulgation of Rules

As anticipated by many, Magnuson-Moss procedures have contributed to considerable delay in FTC rulemaking. None of the nine TRR's proposed in 1975 (the first year Magnuson-Moss procedures were effective) have been issued as final rules. Only three final rules have been promulgated under the Commission's new procedures, and one of these was begun before the Act took effect. In contrast, the average time between initial notice and final promulgation for the 24 pre-Magnuson-Moss rules was 20.3 months. Moreover, this latter figure is somewhat misleading, since the Commission's rulemaking activities almost came to a standstill during litigation over the Octane rule and the subsequent anticipation that Congress would change FTC procedures.³⁶ Excluding the seven proceedings that were probably affected in these ways, the average time per pre-Magnuson-Moss rule drops to 14.1 months. If we further exclude the anomalous Light Bulbs proceeding, which lasted over six years, the remaining pre-Magnuson-Moss rules took an average of 10.4 months to promulgate.

Of course, the fact that delay has occurred since the imposition of Magnuson-Moss requirements is not proof that the Act's rulemaking procedures have been a source of delay. There is a strong alternative explanation that must be considered before we proceed to an analysis of procedurally-imposed delay. As discussed in the previous chapter, TRR's proposed since Magnuson-Moss have generally been more ambitious than their predecessors.

Table 6.1

Time Required to Promulgate Pre-Magnuson-Moss Rules
(From Notice of Proposed Rulemaking in Months)

(1-6)	(7-12)	(13-18)	(19-24)	(25 & over)
4	9	3	1	7*

Average Time/Rule-- 20.3 Months
Median Time/Rule--- 14.2 Months

*Four of the proceedings in this category took place during a period in which they can be presumed to have been affected by either the Octane case or Congress' pending imposition of new procedures on the FTC. These four rules took 33.3, 39.8, 57.8, and 48.8 months to promulgate.

Source: Data Appendix to the Boyer Report (unpublished)

That is, they have tended to be broader in scope and to rely on "less apparent" interpretations of the unfair-or-deceptive mandate. Other things being equal, more ambitious rules should take longer to promulgate for at least two reasons. Rules which subsume more issues naturally tend to place heavier demands on agency resources. In addition, the more controversial a rule and the broader its effects, the more circumspect and deliberate the Commission must be, and the longer it takes to arrive at a final rule that is politically acceptable.

Despite its probable importance, however, it is very unlikely that the nature of the rules proposed under Magnuson-Moss is the only major explanation for delay. Obviously, it is difficult to operationalize and control for something as subjective as the presently-discussed property of ambitiousness. Nevertheless, it seems apparent that some TPR's proposed under Magnuson-Moss are less sweeping and controversial than the most

ambitious pre-amendment rules. For example, the recently-promulgated Ophthalmic Rule is relatively narrow in scope, embracing a single industry and essentially two or three practices. It also involves a fairly straightforward application of the unfair or deceptive doctrine, and does not involve the prescription of remedial actions. Nevertheless, it took twenty-nine months to promulgate.³⁷

Perhaps a more meaningful comparison can be made by examining the most ambitious pre-amendment TRR's. One list of such rules includes: Games of Chance (1969), Octane Rating (1969), Care Labeling (1969), Retail Food Advertising (1969), Use of Negative Option Plans (1970), Door-to-Door Sales (1970), Billing Practices (1970), and Undelivered Mail Order Merchandise (1971).³⁸ Deleting those rules that were likely delayed by the Octane case or by the subsequent anticipation of new rulemaking procedures, we find that, while these TRR's took almost half again as long to promulgate as their pre-amendment brethren, none of the proceedings lasted more than eighteen months. Recognizing the great difficulty of controlling for ambitiousness, the disparity between even the most lengthy of these informal proceedings and post-Magnuson-Moss proceedings suggests that something in addition to the substantive nature of post-amendment rules has contributed to delay.

The other explanation for delay in Magnuson-Moss rulemaking is the procedures imposed by the Act. Barry Rubin, Chief Counsel for the Commission, cites the statute's requirements as a "tremendous source of delay."³⁹ Likewise, Commissioner Dixon summarized agency sentiments when responding to congressional criticism of FTC "lethargy."

I think it was a sad mistake to seek the so-called Magnuson-Moss bill. We were doing quite well. We were operating under the Administrative Procedure Act under... [informal rulemaking]

instead of... [formal rulemaking].... Now that is a heck of a lot of difference, I want to tell you.⁴⁰

Other observers, such as law professors and consumer representatives, have also noted the delay imposed by Magnuson-Moss.⁴¹ The following several pages will seek to explain why the Act's procedural requirements have had this effect.

Merely negotiating the mechanics of the FTC's involved rules of practice has proved time consuming. The time required for each of the phases (described in the preceeding section) varies from case to case, depending on the amount of participation the agency expects or encounters, and/or the difficulty of analyzing the evidence presented and coming to a decision. Minimum lengths have been established for some of the stages in order to ensure adequate opportunity for participation or deliberation. One expert has estimated that, under the smoothest circumstances imaginable, three hundred days is about the minimum in which the entire process can be completed.⁴²

Of course, all Magnuson-Moss proceedings have considerably exceeded three hundred days in length. Taking place within their context but beyond the mechanics of the process, several more important factors help explain delay under the statute's requirements. One is the multitude of requests, petitions, motions, etc. available to participants which can inundate Presiding Officers and staff. Consider the following list of typical motions which must be processed by the agency:

- request for public funding
- request to designate issues
- request for addition, modification, or deletion of designated issues
- request to compel Presiding Officer to compel attendance of persons or production of documents, or to obtain responses to written questions
- request for data pursuant to the Freedom of Information Act

- request for Presiding Officer's permission to examine or cross-examine witnesses, or to present rebuttal submissions
- motion to disqualify the Presiding Officer
- motion that all written comments and oral testimony be submitted under oath
- motion to establish standards for the admissability of evidence
- petition for extension of time to file post-record comments
- motion to invite oral argument before Presiding Officer subsequent to hearings
- motion to invite oral argument before commissioners subsequent to hearings⁴³

Much of the importance of motions under Magnuson-Moss derives from the fact that, because the courts review TRR's on procedural grounds, it is incumbent for Presiding Officers to consider and respond to them carefully. An out-of-hand denial may be adjudged a breach of due process. As can be seen, motions can be made with respect to a variety of matters throughout a rulemaking proceeding. There is no definitive list of possible motions, and the ones offered here are only a sample of some that have been made. Participants are limited by little more than their imaginations in coming up with procedural motions.

Although it would be an exaggeration to contend that delay is always a sole motive, it is universally accepted among those acquainted with FTC rulemaking that industry attorneys intentionally file motions to prolong proceedings. The incentive to do this is very often substantial, since delaying the promulgation of a rule can often save millions of dollars for their clients, while simultaneously adding to their total of "billable hours."⁴⁴ The fact that the Practicing Law Institute has published a book entitled FTC Rulemaking Procedures and Practice: Strategies for Private and Corporate Practitioners, which is an almost undisguised discussion of delaying motions and how they should be presented, bears testimony to the value of these devices to the legal profession.⁴⁵ It is not uncommon for as many as fifty motions to be filed during the course of

a single proceeding.⁴⁶

Another source of delay under Magnuson-Moss has been hearings, which have lasted much longer than those under the Commission's old, informal procedures. Whereas an average of about $3\frac{1}{3}$ days of hearings were held on pre-Magnuson-Moss TRR's, hearings since the Act became effective have lasted an average of about $30\frac{1}{2}$ days.⁴⁷ Of course, the time they consume, per se, is not the only way in which hearings contribute to delay. The transcripts generated by testimony, cross-examination, and rebuttal also contribute to the record, which the Commission must study and use as a basis for its decisions. Although it was not required to do so, the agency usually compiled transcripts of its pre-Magnuson-Moss hearings. These averaged 409 pages in length. In contrast, Magnuson-Moss hearings have produced transcripts fifteen times as large, averaging 6134 pages.⁴⁸

Table 6.2

Rulemaking Hearings

	Days/Hearing	Witnesses/Hearing	Transcript Pages
Pre-Magnuson-Moss Rulemaking	$3\frac{1}{3}$	27	409
Magnuson-Moss Rulemaking	$30\frac{1}{2}$	142	6134

Source: Data Appendix to the Boyer Report

There are probably several reasons for longer hearings and hearing transcripts under Magnuson-Moss. One is undoubtedly the greater ambitiousness of the rules proposed. The more controversial a rule and the more wide-ranging its effects, the more demand there will be to

participate in hearings. Thus, an average of about 27 witnesses participated in pre-amendment hearings, whereas an average of 142 witnesses have participated since the Act became effective.⁴⁹ However, this increase in the number of participants accounts for only about half of the increase in the number of days devoted to hearings, and about 35% of the increase in the size of transcripts. Much of the "remaining" change is likely due to the increased opportunity to propose motions, and to the addition of cross-examination and rebuttal, which have necessitated the expenditure of more time and paper per witness. As discussed in the previous section, the exercise of cross-examination and rebuttal have been extensive.

Interestingly, however, hearings under Magnuson-Moss have not proved to be the bete noire the FTC and its allies feared. Those closest to the process feel that cross-examination has lengthened hearings roughly two weeks in most cases, and perhaps has contributed a few thousand pages to rulemaking records.⁵⁰ Moreover, even if we attribute all of the increase in hearing time and transcript length to Magnuson-Moss procedures, their contribution seems minor in the overall context of delay. That is, while an increase in average hearing time from $3^{1/3}$ to $30^{1/2}$ days seems striking, it is a minor contributor to delay of the magnitude experienced under Magnuson-Moss. Likewise, the great increase in the size of hearing transcripts under Magnuson-Moss procedures nevertheless constitutes a small component of the overall growth in rulemaking records, as we shall see shortly.

Far and away the biggest component of delay in Magnuson-Moss proceedings is the time spent by the agency deliberating on its decisions. As mentioned, the Presiding Officer and the FTC staff personnel responsible for a rule must issue reports to the commissioners reviewing the evidence,

and recommending and explicitly justifying courses of action following the completion of oral hearings. The average time required for the submission of these documents has been almost twenty months. Of course, the final responsibility for promulgating rules is borne by the commissioners, once they have reviewed the records, staff and Presiding Officer reports, and subsequent public comment. Based on the limited evidence available so far, there is good reason to believe that this stage of the rulemaking process may be quite time consuming as well. The commissioners have deliberated for twelve and twenty-two months in the two proceedings completed so far under Magnuson-Moss.

This "deliberative delay" in Magnuson-Moss proceedings has essentially two, interrelated sources. One is that decision makers have had much more evidence to consider since the Act took effect. Pre-Magnuson-Moss rulemaking produced records averaging just over 3,000 pages in length. The comparable figure for the first sixteen Magnuson-Moss TRR's has been about 65,000 pages, and half of these are incomplete to one degree or another. As discussed above, cross-examination and rebuttal have contributed somewhat to this increase in the form of lengthened hearing transcripts. Much more important has been the felt need for participants to support or refute the premises for TRR's more heavily under the "substantial evidence" standard. The Commission, itself, has felt the greatest burden in this regard. Thus, agency staff has become far and away the largest contributor to rulemaking records, even if one considers "industry" as a single source. Staff submissions have comprised approximately 62% of the records in the first sixteen Magnuson-Moss proceedings.

Not only has the FTC had to consider more record material, but it has had to consider it more carefully. Again, this has resulted from the

Table 6.3

Size of Rulemaking Records (pages)

	Average Length	Median Length	% Staff Submissions
Pre-Magnuson-Moss Rulemaking	3,123	2,077	34%
Magnuson-Moss Rulemaking	64, 850*	51,829*	62%

*These figures represent the records accumulated so far in the first sixteen Magnuson-Moss proceedings. As mentioned, eight of these records are incomplete.

Source: Data Appendix to the Boyer Report

fear that, under the substantial evidence standard, the courts will overturn rules which overlook relevant submissions. Agency staff reports reflect the pains that have been taken to justify FTC decisions soundly. These documents, which are carefully reasoned arguments extensively based on the record, have averaged over seven hundred pages in length. When one considers that records typically involve a good deal of technical, economic, and sociological data-- evidence from areas in which FTC attorneys have little or no professional training-- it is understandable why staff reports take so long to produce.

Given that delay exists, it ultimately reduces the effectiveness of the FTC in accomplishing its consumer-protection mission. It does so in two general ways. As any organization, the FTC possesses limited resources, and manhours spent promulgating one rule are manhours that cannot be used for other purposes. Thus, delay restricts the range of issues the Commission can deal with, either through adjudication or other means. This problem is exacerbated by the fact that the FTC has so much to do-- that it has such a sweeping mandate and that it polices such a

broad area.

Obviously, delay also affects the timeliness of FTC decisions. As a result, practices which the agency feels are unfair or deceptive may go on for years pending the promulgation of a final rule. In an individual case, the practical consequence of this can be to save millions of dollars of revenue for the industry in question (while perhaps consumers continue to be victimized to a like degree). Also, since commercial practices change so rapidly in keeping with advancing technology and evolving competitive practices, the remedies of a proposed TRR may be outmoded by the time the rule becomes finalized and legally binding. Ironically, Congress' foremost justification for delegating policy-making authority to the FTC and other regulatory agencies has been that they, unlike a legislature, possess the expertise and flexibility to respond quickly to unforeseen and ever-changing commercial practices.

The Qualitative Effect of Magnuson-Moss Procedures on FTC Rulemaking

Although delay has been the most apparent consequence of Magnuson-Moss procedures, the Act's requirements have had other effects on FTC policy making as well. The "judicialization" of rulemaking has affected the Commission's decision-making capabilities, as well as the nature and sources of the decisional input it has received. Thus, Magnuson-Moss procedures are likely to have a qualitative impact on TRR's as they are promulgated.

"Judicialized" and "judicialization" are words that writers on administrative law often use but seldom define. Basically, however, these terms are a short hand way of referring to a process that combines several elements. Lon Fuller has conceptualized judicialization as a matter of

degree. It is implicit in his work that a pure or "ideal type" judicial process satisfies the following requirements:

- there must be an adversary presentation
- the arbiter may not act on his own motion in initiating the case
- the decision must be accompanied by a statement of the reasons for it
- the arbiter must rest his decision on grounds argued by the parties
- the arbiter must be impartial
- the decision must be retrospective⁵¹

Obviously, FTC rulemaking does not satisfy all these requirements. The Commission, which plays the role of arbiter in rulemaking proceedings, initiates its own cases (although often at the request of outside parties). Also, TRR's are prospective rather than retrospective in their effects, and many would argue that the FTC is less than impartial. At the same time, however, it is apparent that Magnuson-Moss rulemaking is much more judicialized than rulemaking under the agency's old, informal procedures. Specifically, there is now a good deal of adversary presentation, and decisions must be accompanied by reasons for them and must be based to a great extent on grounds argued by the parties (as reflected in the record). These elements, which were largely missing from informal rulemaking, have had a significant impact on FTC decision making.

As FTC rulemaking has become more judicialized, the fundamental nature of the agency's decision making-process has changed. As discussed, Presiding Officers designate issues of material fact before hearings begin. Theoretically, these are rule premises which lend themselves to verification or refutation through the submission and testing of evidence in a trial-like setting. Although it was intended that issues be designated selectively, in practice all of the important rationale for TRR's have typically been treated in this fashion.⁵²

Consider, for example, the TRR on Ophthalmic Goods and Services (which has recently been finalized). Essentially, the proposed rule had two aims. One was to outlaw restrictions on the advertising of goods (eyeglasses, contact lenses, etc.) and services (examinations, fitting, etc.) by ophthalmologists, optometrists, and opticians. The other was to require ophthalmologists and optometrists to give copies of prescriptions to their patients. It had been a common practice for examiners to withhold prescriptions as a means of ensuring that patients came to them for eyewear and fitting. It was hoped that these proposed measures would enable consumers to comparison shop, and that they would enhance competition within the eye care industry. In order to evaluate the efficiency of the proposals for achieving the Commission's objectives, the Presiding Officer's designation of issues included the following questions to resolve:

- a) How prevalent were the advertising restrictions within the eye care industry, and how had they affected consumer knowledge?
- b) How had such restrictions affected competition within the eye care industry?
- c) What would be the effect of removal of price restrictions on competition?
- d) Would the removal of advertising restrictions reduce the quality of goods and services in the eye care industry?
- e) What would be the economic effect on small businesses and consumers of removing advertising restrictions?
- f) What would be the effect of requiring that examiners provide prescriptions on competition, the consumer's ability to comparison shop, and the quality of goods and services?⁵³

The essential rationale concerning the likelihood that the proposed eye care rule would achieve its stated objectives, as well as the rule's possible costs, were subsumed within this set of questions. Designated issues have been similarly inclusive in other Magnuson-Moss proceedings.

The principle variation in this regard has been that some Presiding Officers have designated many, narrow issues, while others have designated fewer, but broader issues.⁵⁴

Of course, the significance of designated issues is that they are treated differently than issues which might come up in an informal, legislative context. A practical effect of the liberal use of designated issues, coupled with the substantial evidence standard, has been a greatly increased effort to introduce more rigorous evidence in TRR proceedings. Rule proponents and opponents have made extensive use of expert witnesses. Also, there has been an emphasis on scientific studies and surveys which bear on designated issues. The studies used have often been conducted expressly for the rulemaking proceedings. These developments have occurred with respect to technical issues, as well as socioeconomic issues.

Again, the Ophthalmic TRR proceeding provides a good illustration. Empirical studies were introduced in response to all of the designated issues. For instance, economic studies were cited which compared prices of eyewear in states which allowed advertising with prices in states where advertising was forbidden, and several rather elaborate surveys were brought out which measured the knowledge of various categories of consumers concerning the availability of ophthalmic goods and services. Technical issues were also treated in a rigorous fashion. Studies were cited which measured the effects of faulty or misprescribed lenses in response to the contention that requiring examiners to give prescriptions to their patients would prove harmful.

This is not to say that the Ophthalmic record consisted solely of the presentation and examination of empirical evidence. Some "sub-issues" did not lend themselves to such treatment, as for example, the question

of whether or not advertising would lead to a loss of professionalism within the eye care industry. In such cases, an extensive effort was made to marshall expert opinion. The commitment to rely on harder evidence where available, however, was illustrated in the staff's post-hearing report to the commissioners. In commenting on the failure of the eye care industry to support its claim that the prices of goods and services was positively related to their quality, the staff stated:

The scant evidence presented in support of the notion that low cost is indicative of low quality in the current eye care market consisted primarily of anecdotal testimony alleging that certain discount optical establishments provided inferior goods and services. In spite of the fact that advertising and lower prices currently exist in several regional ophthalmic markets, the industry chose not to empirically test their assumptions regarding the relationship between price and quality in those areas.

Other participants in this proceeding did attempt to measure the relationship between the prices and quality of ophthalmic goods and services. Three separate studies found that the prices paid for eye examinations and eyeglasses bear no direct relationship to the quality of those services and commodities....55

The judicialization of FTC rulemaking has had several practical effects. One salutary result has been to impose more rationality on the FTC's rulemaking process. The agency has been forced to articulate its goals and the premises which link its proposed rules to the achievement of those goals, and the rationale for proposed rules have been subjected to much more rigorous examination than under informal procedures. At the same time, the designation of issues has served to focus the comment received from interested parties. Even some agency staff personnel, who should feel most frustrated by the delay and other burdens imposed by Magnuson-Moss, admit that the agency's procedures encourage thorough investigation and lead to sound decisions. They point out that few congressional decisions are similarly well-researched and empirically justified.

A corresponding effect of the judicialization of FTC rulemaking

has been to limit the Commission's decision-making discretion. This has resulted from the fact that the agency has been constrained to base its decisions largely on the evidence presented in the record. The Commission has been reluctant to make rules which cannot be so justified out of fear that the courts will overturn its decisions. This development has, in turn, probably had several important implications.

According to the traditional concept of bureaucracy, administrators often rely on their own expertise in carrying out legislative mandates. It has been argued that this is good, since impartial experts are able to implement policy goals efficiently once they have been defined. The expectation that administrators will bring their knowledge to bear on problems has been and continues to be a prime rationale for the delegation of administrative authority. This has especially been true with respect to the FTC and other independent regulatory commissions. Beyond expertise in a factual sense, authors such as Dror have argued that intuition is also an essential element of administrative decision making. That is, some decisions defy empirical or even rational analysis, and administrators must proceed on the basis of "feeling." Presumably, sound intuition is partially a function of an administrator's experience on the job.⁵⁶

Expertise and intuition carry little weight when a court reviews the basis for a decision as expressed in the record. As a result, the Commission's ability to rely on these considerations has declined under Magnuson-Moss. This, in turn, has constrained the FTC in carrying out its statutory mandate, since not all of the issues the agency has felt a need to deal with have lent themselves to empirical analysis (especially within reasonable time and cost constraints). At the same time, it would be wrong to contend that the FTC has been completely stripped of the ability

to rely on its own judgement, for a certain amount of discretion undoubtedly exists. The degree to which the Commission has been constrained in this way is difficult to determine for at least two reasons. First, we are dealing with ephemeral concepts, and it is hard to determine where factual justification ends and agency expertise and intuition begin. Second, it is of course impossible to compare what the Commission would have done in the absence of such constraints with what it has done. Nevertheless, FTC officials and other close observers feel that the effect of judicialization has been significant in this regard.⁵⁷

Perhaps an instance in which the Commission has used its own judgement in making a decision will help illustrate how, in other instances, it has likely been constrained by Magnuson-Moss procedures. This example concerns the revised Care Labeling TRR, dealing with requirements that manufacturers place permanent tags on goods specifying how they should be cleaned and cared for. During hearings on the rule, the enterprising Chlorox Corporation petitioned that words to the effect that clothes were "bleachable" should be added to labels stating that clothes were "washable." Chlorox marshalled a good deal of factual evidence demonstrating that most people were unaware that washable implied bleachable. Despite this, the Commission chose to disregard the request on the premise that such a label would cause many who did not know how to use bleach properly to ruin their clothing. Although this claim was quite plausible, the Commission could offer no evidence in its support. The point in bringing up this example is that the Commission's exercise of unsubstantiated judgement was controversial and apparently did not come easily. Furthermore, there is still a possibility that the rule will be overturned on these grounds once it has been promulgated in final form. It is almost certain to be challenged

in the courts.⁵⁸

Of course, it can be argued that the constraint of the FTC's decision-making discretion cuts both ways. If agencies must have some flexibility to be effective, it is also true that what amounts to administrative policy making is at odds with the concept of representative democracy. The question of how much discretion agencies should have has long been a crucial source of conflict. In the case of the FTC, which operates under an exceedingly broad and vague grant of authority, it might be argued that unusually strong procedural constraints are warranted. Biased, capricious, or misinformed FTC decision making might have graver consequences than in the case of an agency administering a narrower or more detailed statute. Also, expertise may provide less justification for delegating decision-making discretion to the FTC. Administrators in agencies that deal with narrowly-defined areas, such as the SEC for example, may be expected to possess a fairly thorough knowledge of the industries they regulate. On the other hand, it would be foolish to suppose that FTC administrators can be experts on more than a few areas of commerce.

Closely related to the limitation of agency discretion, the judicialization of rulemaking has also altered the FTC's fundamental decision-making goals. As discussed in an earlier chapter, informal rule-making is designed to resemble the legislative process. In addition to consideration of factual questions, legislative decision making involves the expression and reconciliation of values. So it was with the FTC under its old, informal procedures, although the relative weight of value considerations may have been less than in Congress.⁵⁹

Magnuson-Moss procedures have served to practically eliminate

value considerations from FTC decision making. Just as the requirement that decisions be based on the substantial evidence in the rulemaking record has curtailed the Commission's ability to rely on expertise and intuition, it has also greatly limited the viability of the values and preferences of affected interests as a justification for TRR's. Understandably, this has also militated against the expression of values in written and oral comment. As the Executive Summary of the Boyer Report states:

The statute's emphasis on reasoned decision making and opportunities to challenge the factual basis for the rule seems to focus the attention of the agency almost exclusively on the question of whether a proposed rule is logically and factually supportable rather than on its acceptability to affected interests.⁶⁰

A final effect of Magnuson-Moss requirements that bears mention is that they may have altered the relative abilities of various types of groups to participate effectively in FTC rulemaking. Effective participation in informal rulemaking can be relatively cheap, since the mere expression of a preference or an opinion is a relevant datum. In contrast, formal proceedings place a premium on legal expertise and the ability to marshal expert testimony. Many feel that this gives large industry a significant advantage. For example, Michael Pertschuk stated that, "As for the distribution of legal talent [between corporate interests and consumer groups], it's like the New York Yankees taking on the Bushwick Little League irregulars...."⁶¹ Expenditures for single industry representatives participating in Magnuson-Moss rulemaking have often run upwards of a million dollars.⁶² While large industries can afford outlays of this magnitude, such costs tend to be prohibitive for other participants, such as small businesses and consumers.

Congress recognized the participation costs that would be imposed

by Magnuson-Moss. To promote more balanced input, it included in the Act a novel provision allowing a certain amount of compensation for those who could not afford to participate effectively. Congress authorized the Commission to spend up to \$1 million annually for this purpose, and appropriated \$500,000, \$500,000, and \$750,000 in fiscal years 1976, 1977, and 1978, respectively.

It is difficult to determine how effective the compensation program has been. On the one hand, the FTC has stated in a report to Congress that such grants have allowed poorly-funded groups and individuals to make significant contributions to rulemaking proceedings.⁶³ On the other hand, compensation extended to individual groups has not approached the amount reportedly spent by industry participants. To date, only nine groups have received more than \$50,000 for a proceeding, and only one has received more than \$100,000. This comparatively low funding has been due to the fact that the Commission has had to distribute the limited funds at its disposal among ninety-one worthy applicants in eighteen different proceedings.⁶⁴

Conclusion

The FTC's experience has confirmed the fears of many that Magnuson-Moss requirements would reduce the efficiency of agency rulemaking by creating delay and placing heavy demands on staff resources. In addition, the Act's procedures have had a significant effect on the substance of FTC policy. Using the familiar systems metaphor, the judicialization of rulemaking has altered decision-making capabilities "within the box" by leaving the FTC less free to rely on its own informed judgement as a basis for decisions. By militating against the expression of opinions and

values, Magnuson-Moss has also had a consistent qualitative effect on the decisional input received by the Commission from its environment. The procedures have even changed the environment itself to the extent that poorly-funded groups have lost the ability to participate effectively in rulemaking. In a sense, the Act's requirements have made the FTC behave more in accordance with the classical conception of bureaucracy, for the agency has found itself constrained more narrowly to factual as opposed to value or policy considerations. This analogy is not perfect, however, for Magnuson-Moss has also reduced the Commission's ability to rely on expertise as a decisional base.

FOOTNOTES

¹Mark Silbergeld, attorney for the Consumers Union of the United States, Testimony before the Subcommittee on Commerce and Finance of the House Interstate and Foreign Commerce Committee, Hearings on H.R. 20 and H.R. 521, "Consumer Warranty Protection," Comm. Ser. No. 93-17.

²Arthur Earl Bonfield, "Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts," University of Pennsylvania Law Review, CXVIII (1970) p. 542.

³Barry B. Boyer, Trade Regulation Rulemaking Procedures of the Federal Trade Commission: A Report to the Administrative Conference of the United States by the Special Project for the Study of Rulemaking Procedures Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Washington, D.C.: Administrative Conference of the United States, 1979) ch. 2, pp. 2-3. Hereafter cited as Boyer Report.

⁴Ibid.

⁵Conversation with Sutcliffe, Washington, D.C., August, 1979.

⁵Boyer Report, ch. 2, pp. 2-3.

⁶Winston H. Pickett on behalf of the Chamber of Commerce of the United States, Hearings on the Product Warranties and FTC Improvement Act of 1971, Before the Senate Commerce Committee, S. 986. Comm. Ser. No. 92-8. March 22, 1971.

⁷FTC Chairman Lewis Engman, Hearings on H.R. 20, March 19, 1973.

⁸Ibid.

⁹Ibid.

¹⁰FTC Chairman Miles Kirkpatrick, Hearings on S. 986, March 19, 1973.

¹¹See for example, Robert W. Hamilton, "Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking," California Law Review, LX (1972) pp. 1283-93.

¹²Statement of Gilbert Weil, quoted from Boyer Report, ch. 2, p. 10.

¹³Ibid.

¹⁴Ibid., p. 3.

¹⁵Ibid., p. 18.

¹⁶Senate Report no. 83-151, 93rd Cong., 1st Sess. 6 (May 14, 1973).

¹⁷Ibid.

¹⁸Boyer Report, ch. 2, p. 21.

¹⁹Conversation with Calvin Collier, August, 1979. At the time Magnuson-Moss was in conference committee, Mr. Collier was Chief Counsel for the FTC. He later became FTC Chairman before retiring to private law practice.

²⁰Boyer Report, ch. 2, pp. 24-25.

²¹Conversation with Peter Kintzler, staff attorney for the House Interstate and Foreign Commerce Committee, August, 1979.

²²Ibid.

²³Boyer Report, ch. 2, p. 26.

²⁴Kintzler.

²⁵Collier.

²⁶Ibid.

²⁷Kenneth Culp Davis, Administrative Law (St. Paul: West Publishing Co., 1969)

²⁸Named for Representative John Moss.

²⁹For example, the Gulf Oil Company argued that the broad discretion left to Presiding Officers for limiting cross-examination lead to capriciousness. "Each called hearing will be unique unto itself and the procedure governing the conduct of the hearing will depend on the individual mood and whim of whatever Presiding Officer is appointed by the Commission.... Whatever procedural rules are adopted should guarantee to every interested party the rights to a full and fair hearing.... Because there is no clear definitive standard set forth in the rules by which an objective party can determine what is appropriate, Gulf suggests that the Commission reject the proposal as written and require that such standards be set forth in any new proposal." Letter from Gulf to FTC, May 2, 1975.

³⁰Boyer Report, ch. 1, p. 12.

³¹Conversation with Henry Cabel, Acting Chief Presiding Officer of the FTC, August, 1979.

³²Ibid.

³³See for example, Glen O. Robinson, "The Making of Administrative Policy: another Look at Rulemaking and Adjudication and Administrative Procedure Reform," University of Pennsylvania Law Review, CVIII (1970)

³⁴Conversation with Barry Rubin, Chief Counsel for the FTC, August, 1979. Also, conversation with Collier.

35 Joseph Cooper, unpublished article on the legislative veto,
p. 4.

36 Cabel.

37 Ibid.

39 Rubin.

40 Statement of William Rand Dixon, Oversight Hearings Into the Federal Trade Commission-- Bureau of Consumer Protection (Delays in Rulemaking-Regulation of Advertising), held before the Commerce, Consumer, and Monetary Affairs Subcommittee of the House Government Operations Committee, 25 February, 1976. p. 41.

41 See for example, Kestenbaum, "Rulemaking Beyond the APA: Criteria for Trial-Type Procedures and the FTC Improvement Act," George Washington Law Review, XLIV (1976) pp. 816--

42 Statement of Margery Smith, Oversight Hearings, March 9, 1977.

43 Stephen A. Nye and Eric M. Rubin, FTC Rulemaking Procedures and Practice: Strategies for Private and Corporate Practitioners (New York: Practicing Law Institute, 1977) pp. 87-100.

44 Conversation with Terry Latanich, FTC staff attorney, Washington, D.C., August, 1979.

45 Nye and Rubin

46 Conversations with Cabel, Latanich, and William Dixon, former Chief Presiding Officer for the FTC, Washington, D.C., August, 1979.

47 Data Appendix to the Boyer Report (unpublished document prepared by the Administrative Conference of the United States)

48 Ibid.

49 Ibid.

50 Cabel, Dixon, Latanich.

51 Lon Fuller, "The Forms and Limits of Adjudication," Harvard Law Review, XCII (1978) pp. 381-93.

52 Boyer Report, ch. 4. Also, Cabel, Dixon.

53 Henry B. Cabel, Report of the Presiding Officer on Proposed Trade Regulation Rule Regarding Advertising of Ophthalmic Goods and Services (FTC Document)

54 Conversation with Cabel.

⁵⁵Advertising Ophthalmic Goods and Services: Staff Report to the Federal Trade Commission and Proposed Trade Regulation Rule, pp. 184-85 (FTC document)

⁵⁶Yehezkel Dror, Public Policymaking Reexamined (San Francisco: Chandler Publishing Company, 1968)

⁵⁷Rubin, Dixon, Cabel, Latanich.

⁵⁸Latanich and conversation with Micheal Bowers, head of Boyer Staff, Washington, D.C., August, 1979.

⁵⁹Cabel.

⁶⁰Executive Summary to the Boyer Report, p. 23.

⁶¹Statement of Michael Pertschuk, Oversight Hearings, p. 33.

⁶²Dixon.

⁶³Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Report to Congress by the Federal Trade Commission, June 1979, pp. 63-83.

⁶⁴Ibid.

Chapter 7

CONCLUSION

One purpose of this chapter is to summarize some of the more important causes and effects of rulemaking and rulemaking procedure in the Federal Trade Commission. Another purpose is to develop the broader implications of the Commission's rulemaking experience. Obviously, rulemaking is used by many different types of agencies to implement many different types of policy. Furthermore, it takes place within a wide array of environmental situations. Such contextual diversity makes generalization difficult. Nevertheless, the study of the FTC yields some useful general propositions about rulemaking and rulemaking procedure.

THE USE AND EFFECTS OF FTC RULEMAKING

FTC rulemaking can be conceptualized as having both administrative and political causes and effects. As used here, "administrative" refers to mechanical, legalistic, logically-derived considerations concerning fairness, effectiveness, and efficiency in the achievement of given policy ends. On the otherhand, "political" connotes that rulemaking, as a means of implementation, affects ends (or policy results), and therefore carries value implications. Obviously, the administrative and political implications of FTC rulemaking are not truly separable. For example, it is largely because rulemaking has important administrative effects that it influences the ultimate form and impact of policy. Nevertheless, the administrative-political distinction provides a useful framework for

discussing and developing the broader implications of the causes and effects of FTC rulemaking.

Administrative considerations have consistently favored the issuance of TRR's. Most importantly, rulemaking has been perceived as a more flexible, effective, and forceful means of carrying out the FTC's statutory mission. Agency officials and other interested observers have felt that rulemaking would enable the Commission to achieve desired policy results more quickly and with less resource expenditure than alternative means of implementation. In addition, rulemaking has been advocated as fairer to affected parties in several respects.

On the other hand, the FTC has received mixed and fluctuating signals from its political environment concerning its use of rulemaking. The most important elements of the Commission's political environment-- those most directly affected by and interested in its decisions-- have been industry groups (the objects of regulation), consumer groups (the beneficiaries of regulation), Congress, the Executive, and the courts. These latter institutions have served as focal points for and have registered the influence of consumers and industry.

The ongoing struggle between the business community and consumer groups, as reflected in the formal branches of government, largely explains the Commission's erratic use of rulemaking since 1962. Periods of high rulemaking activity have resulted from strong pressure on the Commission, Congress, and the Executive for forceful regulation. Thus, the agency's initial decision to issue TRR's was prompted by the growing strength of the consumer movement, and by visible signs of presidential and congressional sympathy. Similarly, the decision to issue the "meaningful" Cigarette Rule in 1964, and the resurgences of rulemaking activity

in the late-1960's and again in the mid-1970's can be traced to clear signs of support for consumer regulation.

By the same token, lulls in rulemaking can be traced to business-inspired reaction against FTC regulation. Congress, at the behest of the tobacco industry, passed milder legislation to supersede the Cigarette Rule in 1965, and the FTC reacted by assuming a much less vigorous rule-making posture for several years. Business interests effectively stemmed the next surge in rulemaking activity through the courts in the early-1970's. Most recently, regulated industry has persuaded Congress to intervene against the Commission through a legislative veto and other measures as a response to the wave of ambitious rules proposed after Magnuson-Moss. As a result of this obvious legislative disfavor with its rulemaking, the FTC has placed a moratorium on further proposed rules.

Thus, in spite of the fact that administrative considerations have consistently favored the use of rulemaking, political considerations have proved to be of dominant importance. In this sense, political "causes" and "effects" have not been separable, since positive and negative reactions from the Commission's political environment have both resulted from rulemaking (or the prospect thereof) and have determined its subsequent use. It should be added that administrative causes and effects have certainly not been insignificant. As mentioned, they are not truly separable from political considerations. The fact that rulemaking has been a more effective means of implementation, or at least that it has been perceived as such, explains the reactions it has evoked from affected interests. As ultimate determinants, however, effectiveness and other administrative considerations, per se, have been subordinate to political influences.

The FTC's experience demonstrates the importance of incorporating political considerations in the study of rulemaking. Writers such as Shapiro, Friendly, and Robinson observe a general reluctance by regulatory agencies to issue rules. The failure of these authors to adequately explain this phenomenon can be attributed to their narrow analytical perspectives, which ignore the fact that agencies implement statutory directives within political environments. As several writers note, America is ambivalent towards economic regulation, which is perceived as necessary to some degree, yet runs contrary to the principles of free enterprise. Freedman states:

To the present day, Americans have failed to develop or agree upon a coherent philosophy of governmental activism in economic matters. A majority of the American people seek a more powerful role for the government in the planning of economic growth at the same time, paradoxically, that they fear the consequences of a more powerful government for a free enterprise economy. The nearest approach our society has made to achieving a philosophy in such matters has been to secure general agreement for the proposition that the appropriate extent of governmental activism in planning and controlling the economy lies somewhere between the polarities defined by Adam Smith and Karl Marx, between the polemical positions of... Milton Freedman and John Kenneth Galbraith.¹

Because of this ambivalence towards regulation, political support for rulemaking, which is viewed as a more forceful way of implementing regulatory statutes, is often tenuous. The FTC's rulemaking history is probably most instructive in this regard. When problems resulting from "unrestrained" economic activity become sufficiently serious, a balance of forces may emerge favoring rulemaking. This may account for the fact that practically all regulatory agencies have grants of rulemaking authority. However, the reality or even the possibility of strong, effective rules (which represent "more regulation") often triggers an opposite reaction. Just as the FTC, other regulatory agencies must

necessarily be wary of issuing rules under these circumstances, since their continued viability and even their existence depends upon maintaining a favorable balance of support over opposition from their political environments.

Resistance from members of agencies' political environments may discourage rulemaking in non-regulatory areas as well. Just as rules represent "more regulation," they tend to strengthen non-regulatory policy as it is administered in the "direction of statutory intent." This is partially because rules are highly visible as compared with case-by-case decision making, and because they are easily reviewable by the courts. Members of an agency's political environment who oppose the general thrust of a statute may feel that, in the absence of rules, they can exert influence to reshape policy as it is administered. Bailey and Mosher suggest that various influential educational groups discouraged the Office of Education from issuing rules pursuant to the Elementary and Secondary Education Act of 1965, essentially because they disagreed with Congress' desire that funds be used to benefit underprivileged children rather than for general support. In the absence of binding rules, funds could be administered more at the discretion of local and state agencies, and could more easily be diverted for general purposes. "Dissident" educational groups were successful in discouraging rulemaking by the OE because the agency valued their support as directed towards Congress and the Executive.²

As a generalization, then, agencies often implement congressional directives in conflictual political environments. Some environmental members will favor the issuance of rules as a measure to further statutory objectives. However, "losers" at the congressional level will oppose

rulemaking because it is perceived as a more powerful means of implementation. Losers often retain considerable political influence which expend in future situations, and often comprise a significant component of an agency's power base. Deference to losers, who often enjoy good prospects of gaining dominance in the future, partially explains the reluctance of many agencies to issue rules.

It should be added that not all agencies face serious pressure against rulemaking from their political environments. Freedman notes, for instance, that this is not the case with respect to the environment of the Securities and Exchange Commission, in which both buyers and sellers of securities benefit from and support regulation.³ In stable, consensual environments, the administrative effects of rulemaking remain the same as in conflictual environments. In both cases, rulemaking is a more powerful, effective means of implementing policy. However, environmental response to rulemaking-- its political effect-- differs in these two contexts. One would expect agencies to be much more willing to issue rules in consensual environments, where there are no "losers." Indeed, this has been the case with the SEC.

Another, related political effect of rulemaking that probably discourages its use throughout the federal bureaucracy is that rules bind agencies in future situations. In some instances, it is illogical to speak of "winners" and "losers," and of statutory intent. Statutes are often vague and delegate broad discretion because Congress is unable to reconcile conflict. In cases such as these, agencies often feel compelled to remain flexible-- to retain the ability to respond to political exigencies as they arise. Rulemaking may be perceived as imposing severe disadvantages in this regard, since rules foreclose future decisional

options that would be available under a purely ad hoc approach. The importance of this dynamic is enhanced by the fact that the balances of forces in agencies' political environments are often unstable. Therefore, a rule which seems a good resolution of conflicting interests at one point in time may be inadequate in the future.

Fear of commitment plausibly helps account for the FTC's reluctance to issue TRR's. Beyond the FTC, the binding effect of rules probably discourages their use in many areas of government activity, regulatory and service-oriented alike. In his study of six major policy areas (business regulation, agriculture, housing and urban programs, the War on Poverty, civil rights, and foreign policy), Lowi concludes that agencies and other government institutions typically feel the need to balance interests through compromise on individual issues as they arise, and that this discourages the articulation of standards for implementation.⁴

Given that it may be impolitic for an agency to issue rules which limit its flexibility in balancing interests, an obvious factor that may serve to discourage or encourage rulemaking is the vagueness or specificity of enabling legislation. The more specific the criteria which accompany a delegation of authority, the easier it is for an agency to issue rules. This is because Congress will have effectively "diffused" controversial issues at a higher level, leaving rulemaking less dangerous to an agency in a political sense. Thus, a specific enabling statute may mitigate or preclude the political constraints on rulemaking discussed above. Of course, it should be added that, as a practical matter, the more conflictual the policy environment, the less incentive Congress has to legislate in detail.

The extreme vagueness of the FTC's enabling legislation helps

account for the agency's reluctance to rely on rulemaking as a means of implementation. In effect, Congress has allowed or encouraged conflict at the administrative level by failing to define what is unfair or deceptive. The Environmental Protection Agency provides a good contrast to the FTC. Although environmental protection is a highly conflictual policy area, Congress has established clear criteria for EPA rulemaking in the Toxic Substances Act. The EPA has issued rules quite readily as a consequence.

The caveat should be added that vague statutes and the failure of agencies to issue rules are not always the result of unwillingness to confront controversial issues with detailed policy. The failure to articulate clear standards at both the congressional and administrative levels may owe to inadequate experience or knowledge concerning the problem at hand. Some issues may never lend themselves to the articulation of clear standards. In addition, Congress often does not legislate in detail simply because it lacks the time and other resources to do so. These are essentially administrative (rather than political) considerations in the sense the term is used here.

The preceeding discussion suggests several general statements with respect to the political effects and causes of rulemaking. As discussed, political effects and causes are inextricably linked, due to the "cyclical" nature of the policy process. That is, feedback concerning the effects of rules (or their anticipated effects) helps determine the subsequent use of rulemaking. For the purposes of clarity and organization, effects are listed below as "hypotheses," while causes or determinants of rulemaking are presented as "corollaries."

hypothesis 1: As a more forceful means of implementing policy, rulemaking elicits support from those who agree with the general thrust of enabling legislation, and opposition from those who disagree.

hypothesis 2: The issuance of rules at one point in time limits the breadth of decisional alternatives available to an agency in the future, and thus limits an agency's ability to respond to political exigencies as they arise.

corollary 1: A conflictual political environment, in which significant members of an agency's constituency oppose the thrust of enabling legislation, is not as conducive to the use of rulemaking as a consensual environment.

corollary 2: An unstable political environment, in which the balance of political forces shifts over time, is not as conducive to rulemaking as a stable environment.

corollary 3: The specificity of an agency's enabling legislation has a direct bearing on its willingness to issue rules.

The political effects associated with hypotheses 1 and 2 obviously stem from mechanical, administrative effects of rulemaking. Rules, by their nature, limit future discretion and are more rapid and forceful ways of implementing policy than the case-by-case approach. The hypotheses state what are felt to be important political implications of these administrative effects. Going full cycle, the political effects of rulemaking (or of anticipated rulemaking) help determine its subsequent use. This is the sense in which causes and effects merge.

The corollaries present intervening, contextual factors which help determine how, or the degree to which, the political implications of rulemaking bear on its use. Corollary 1 traces most directly to hypothesis 1, and corollary 2 to hypothesis 2. Obviously, there is a close relationship between corollaries 1 and 2, for conflictual environments tend to be unstable and vice versa. Not surprisingly, therefore, hypotheses 1 and 2 also support corollaries 2 and 1, respectively. Corollary 3 follows equally from hypotheses 1 and 2. The more specific the statute, the less opportunity losers at the congressional level have to block or alter policy

as it is administered, and the less the agency will have to worry about reconciling future conflict in its implementing decisions.

THE REASONS FOR JUDICIALIZED RULEMAKING PROCEDURES

Just as rulemaking is significant as an alternative way of implementing statutory policy, so rulemaking procedures are significant as alternative means of arriving at rules. This section summarizes the reasons for Congress' imposition of judicialized procedures on the FTC, and develops the broader significance of the Commission's experience. The same general forces and rationale which led to Magnuson-Moss procedures have become increasingly important in recent years, and have shaped the rule-making procedures of other agencies.

Congress' decision to impose judicialized procedures on the FTC was due to two related factors. First, the procedures were a convenient way to strike a compromise. Business interests were adamantly opposed to the FTC's use of rulemaking, which they viewed as a more forceful regulatory tool. When industry realized that it had lost on the issue of rulemaking, it turned its attention to the rulemaking procedures the FTC was to be required to use. Ostensibly, industry groups sought judicialized procedures as a safeguard against capricious or poorly-reasoned decisions, and Congress seems to have bought this argument to a large extent. However, most close observers feel that the true motive of the business community was to hamstring the FTC. Judicialized procedures had proved a tremendous source of delay in other agencies, and had ultimately served as a disincentive for rulemaking.

Magnuson-Moss procedures can also be viewed as a response to a conflict of systemic goals. On the one hand, Congress felt that it was

necessary to delegate legislative authority to the FTC in order that government be able to protect consumers adequately. Congress itself lacked the time to legislate with specificity against unfairness and deception in the market place. Given the need to delegate this responsibility, rulemaking was viewed as a more expedient way of developing policy. Thus, rulemaking was perceived as a means of achieving the political system's goal of effectiveness. On the other hand, lawmaking by administrators was at odds with the principle of representative democracy. This problem was viewed as being especially serious in the case of the FTC, due to the scope and vagueness of the agency's enabling legislation.

Congress saw judicialized rulemaking procedures as a way of mitigating this goal conflict. Cross-examination, rebuttal, and decision making on the record would help ensure the soundness of the FTC's reasoning, and would theoretically make it more difficult for the Commission to issue rules which deviated from statutory intent. These objectives would be accomplished by forcing a more rigorous examination of decisional premises, and relatedly, by facilitating judicial review of rules. Magnuson-Moss procedures would tend to limit the Commission to factually-verifiable issues in its decision making. Thus, the agency would be constrained to a more "traditional bureaucratic role" in its rulemaking.

There has been a growing trend over the last decade or so for Congress to impose judicialized procedures on regulatory agencies (or perhaps more accurately, agencies performing regulatory functions). Since 1965, Congress has prescribed judicialized procedures of various formats for the Food and Drug Administration, the Department of the Interior, the Occupational Safety and Health Administration, the Environmental Protection Agency, the Department of Transportation, the Federal Maritime Commission,

the Department of Justice, and the Department of Agriculture, among others. Although these procedures vary in terms of specific format, all provide the elements of cross-examination, rebuttal, and decision making on the record, which are, of course, foreign to informal rulemaking. (These provisions are "limited" in some instances, as with the FTC.)⁵

The FTC's experience provides broad explanations for the trend towards judicialized procedures. Hamilton, who has done brief studies on most of the agencies listed above, lends support to the notion that the need to compromise with regulated industry has typically been a prime congressional motive. As he states:

Congress has become the battleground for these opposing views when a new statute granting rulemaking authority is being considered. To a surprising extent, Congress has been sympathetic to the fears expressed by persons who may be subject to regulation by a broad grant of rulemaking authority. As a result, Congress has sometimes required the agency to conduct a full scale formal on-the-record proceeding before promulgating rules.⁶

This general characterization of the influences which have led to judicialized procedures precisely describes what took place during the formulation of the Magnuson-Moss Act. It may well be that the exertion of pressure for judicialized procedures has become a standard response by industry representatives confronted with the prospect of unwanted delegations of regulatory rulemaking authority.

Similarly, the perceived illegitimacy of administrative legislation by the FTC can be applied broadly as an explanation for judicialized procedures in other agencies. Freedman notes that,

If the doctrine of separation of powers is one of the fixed stars in the constellation of American values, the trial-type procedures by which the judicial process decides disputes are another. The American people have traditionally regarded the adversary procedures of the judicial process as one of the finest achievements of Anglo-American legal development.... Because the

administrative process makes significant and unfamiliar departures from judicial norms, it has aroused a sense of uneasiness as to its fundamental fairness.⁷

Freedman emphasizes that Americans have always felt uneasy about the exercise of legislative authority by administrators. This has owed to the perceived unconstitutionality of such authority, to ambivalence towards regulation, to skepticism of claims for administrative expertise, and to a number of other misgivings. By the same token, the imposition of judicialized procedures on administrators has always enjoyed support as a way to "live with" the delegation of legislative authority. However, the author feels that the rise of judicialized rulemaking procedures in the 1960's and 1970's can be traced to developments which have intensified the perceived illegitimacy of the administrative process. Vietnam and Watergate eroded public confidence in public authority generally. Also, the growing influence of bureaucracy on the lives of Americans generated increased resentment of what was perceived as impersonalism and the "insolence of office."⁸

Thus judicialized procedures, which have a high place in the American pantheon, have been used frequently to mitigate the illegitimacy associated with the delegation of legislative authority. It is important to note that Congress has not been the only source of judicialization (although it has been responsible for the procedures used by all the agencies listed above). Freedman points out that the courts have also seen fit to impose judicialized procedures on agencies in recent years.⁹ Also, the perceived illegitimacy of rulemaking has spawned other devices designed to mitigate conflict of systemic goals. Foremost among these has been the legislative veto, which Congress has enacted as insurance against possible unwanted rulemaking by a variety of agencies, regulatory

and non-regulatory alike.¹⁰ In fact, Congress has recently reserved veto authority for FTC rulemaking. Veto provisions take a variety of forms. For example, some require disapproval of a rule by one house, while others require both houses. A common feature is that rules, as finally promulgated, must be submitted to Congress (to relevant oversight committees) to be scrutinized for a given period of time. Rules become effective if Congress fails to act within that period.

Two hypotheses can be offered in the way of summarizing the reasons for judicialized rulemaking procedures. First, the presence of such procedures can be explained partially as the raw result of group pressure. Judicialized procedures are widely perceived to significantly limit the effectiveness of agencies in the implementation of regulatory statutes. Naturally, therefore, opponents of regulation will favor and proponents of regulation will oppose judicialized procedures.

hypothesis 3: Judicialized rulemaking procedures are partially attributable to the strength of opponents of regulation, since they represent concessions to, and hence victories for, such groups.

Judicialized procedures are also due to sincere ideological misgivings concerning the delegation of legislative authority to agencies.

hypothesis 4: Judicialized procedures, which are revered as a way of promoting just decision making, are used to mitigate the perceived illegitimacy of administrative rulemaking.

Of course, these causes of judicialized procedures typically work alongside and reinforce each other. In the case of the FTC, for example, industry representatives couched their arguments for formal procedures in ideological terms relating to the unconstitutionality and undesirability of allowing the Commission to make rules in the same way that Congress makes laws. However, these two influences can operate quite distinctly

from one another. Thus, such advocates of consumer regulation as Ralph Nader and Bob Eckhardt, who certainly did not want to stifle FTC rule-making, nevertheless supported Magnuson-Moss procedures out of their belief in the virtues of the judicial process.

EFFECTS OF JUDICIALIZED PROCEDURES

Congress' imposition of judicialized procedures on the FTC has had very significant effects on the agency's rulemaking. One has been great delay in the promulgation of TRR's. Pre-amendment proceedings averaged less than a year in duration, and very seldom took more than two years. In contrast, the only two rules promulgated thus far under Magnuson-Moss took well in excess of two years to promulgate. More importantly, fifteen or so current proceedings have been going on for three years or more, with still others that have lasted in excess of two years. In this respect, the hopes of industry groups that Magnuson-Moss procedures would greatly delay rulemaking and the corresponding fears of the Commission and consumer groups have been realized. Some congressmen, who perceived Magnuson-Moss procedures as a device that would legitimize and improve the quality of TRR's, have been surprised by the difficulty the agency has encountered under the Act.¹¹

Magnuson-Moss procedures have contributed to delay in a number of ways. The Commission has adopted a rather elaborate and time-consuming series of procedural stages in order to ensure compliance with the Act's requirements, and heightened expectations concerning due process have provided opportunities for participants to offer delaying motions at practically every stage of the agency's rulemaking proceedings. Also, cross-examination and rebuttal have served to draw out hearings and have

contributed significantly to the length of hearing transcripts. However, the most important source of delay under Magnuson-Moss has been the stipulation that TRR's be based on the substantial evidence in the record. Because of this, the FTC has felt compelled to base its decisions on factually-verified premises. Careful attention to this requirement (under the threat of judicial review) has drawn out the decision-making phases of rulemaking considerably.

Magnuson-Moss procedures have had other effects on FTC decision making in addition to delay. On the positive side, judicialized procedures have forced more rigorous scrutiny of decisional premises. This is because the bases for TRR's have been treated as issues of fact, subject to proof or disproof. The Commission has feared that the courts will strike down rules felt to be improperly substantiated, and as a result, has typically introduced extensive technical, and economic and other social science data to substantiate its proposed rules. In this regard, the Commission has become more "scientific" in its decision making.

At the same time, however, Magnuson-Moss procedures have constrained FTC decision making in several respects. If the decision-making-on-the-record requirement has improved the quality of the evaluation of premises, it has also tended to limit rulemaking to proposals which lend themselves to rigorous treatment. That is, the Commission has felt constrained to propose rules which involve only factually-verifiable issues, whereas before Magnuson-Moss the agency was freer to base its decisions on value judgements and unsubstantiated predictions. Thus, the FTC's ability to respond to perceived problems has been reduced. Relatedly, the agency has felt much less free to rely on its own expertise, experience, and intuition as decisional bases, since these carry little weight as evidence

in a factually-oriented court of law.

Just as judicialized rulemaking has limited the scope of the FTC's decision-making capabilities, it has also limited the range of decisional input the agency receives from its environment. Only factually-oriented written and oral comment tends to be relevant in Magnuson-Moss proceedings, to the exclusion of values and preferences, as such. Of course, this is an eluctable result of the fact that premises or issues (which provide the context for debate) have been framed in factual terms. The effect of this development is that the FTC is no longer an arena for the reconciliation of social values in its rulemaking as it once was (or at least to the same extent that it once was).

The fact that judicialized rulemaking requirements have become increasingly common enhances the significance of the FTC's experience. The effects of judicialized procedures on rulemaking are probably similar to those of Magnuson-Moss in most cases. Hamilton clearly demonstrates the delaying effect judicialized procedures have had on rulemaking in the FDA and other agencies. He also argues, with a good deal of supporting evidence, that the ultimate consequence of such procedures is to discourage rulemaking altogether, or to cause agencies to issue only non-controversial rules (which evoke little resistance, and hence, little effort on the parts of regulated groups to exploit procedural rights for the purpose of causing delay). Thus, Hamilton states that "... the principle effect of imposing rulemaking on a record has often been the dilution of the regulatory process rather than the protection of persons from arbitrary action."¹²

There is less evidence bearing on the qualitative effects of judicialized rulemaking procedures on other agencies. However, it seems

very probable that the FTC's experience is instructive in this regard as well. The very existence of widespread delay, coupled with extensive records and hearing transcripts, indicates that rulemaking participants in other agencies are preoccupied with questions of fact, and are struggling to support their positions with hard evidence. Given this, judicialized procedures should logically be having the same substantive effects on decision making in other agencies as they have had in the FTC. Specifically, other agencies have likely been constrained by judicialized procedures in their ability to frame rules based on value premises, to use expertise and intuition as a basis for decisions, and to solicit preferences as such from interested parties. Crampton lends evidence which helps substantiate this latter effect.¹³ At the same time, judicialized procedures have probably also lent rigor to the consideration of decisional premises.

An important point to add, however, is that not all agencies have suffered under judicialized procedures. For example, both the Agricultural Marketing Service (of the USDA) and the Environmental Protection Agency have turned out rules quite expeditiously under procedures similar to those used by the FTC. For instance, the AMS promulgated 321 rules between 1966 and 1970.¹⁴ This observation suggests that a contextual factor or factors may intervene to help determine the effects of judicialized procedures.

A contextual factor common to the AMS and the EPA is that both agencies tend to deal with narrow, detailed issues in their rulemaking. In contrast, judicialized procedures have usually been imposed by Congress in areas where agencies have been given "broad and largely undefined powers to regulate... industry."¹⁵ AMS rules regulate prices paid to farmers for various commodities. The issues relevant to its decisions are narrow

questions of supply and demand such as: "Where does a dairy obtain most of its milk and at what prices?" and, "What is the anticipated production of tomatoes in Florida during a period beginning with the third week of May?"¹⁶ Likewise, the EPA's rulemaking under the Toxic Substances Control Act takes place within narrow, technical constraints which are defined for the most part by chemical formulas. As discussed earlier, this is due to the fact that Congress has chosen to spell out detailed criteria to guide the EPA in its rulemaking.

Of course, "narrowness of issues" is a rather vague concept, and leaves much to be desired in the way of theorizing about the differential effects of judicialized procedures. There have been few attempts to offer more pleasing explanations in this regard. One exception is Davis' oft-cited contention that trial-like procedures are good only for dealing with issues of "adjudicative fact"-- questions of "who did what, when, where, how, and with what motive or intent."¹⁷ Davis feels that judicialized procedures are inappropriate for treating "legislative facts," which "do not concern immediate parties, but are general facts which help decide questions of law and policy and discretion."¹⁸

Unfortunately, Davis' scheme has several shortcomings. His definition of legislative fact is so vague as to be of little use in categorizing particular issues, as the experience of FTC presiding officers attests. Moreover, the implicit argument that only adjudicative facts lend themselves to judicialized procedures cannot be supported empirically. The ABE, for example, has used cross-examination, rebuttal, and decision making on the record successfully in dealing with questions of aggregate behavior and probable social or economic effects. Most importantly, Davis provides no explanation of why issue type intervenes as it does to

determine the effect of judicialized rulemaking procedures.

A more useful generalization is that judicialized procedures become increasingly inappropriate the more "complex" the issues an agency must confront in its rulemaking. As used here, complex does not necessarily refer to issues that are technical or recondite. Many of the issues the EPA confronts in its rulemaking are complex in these respects. The term instead connotes problem areas in which the effects of alternative policies cannot be neatly measured along a single dimension. Each policy alternative in a complex issue area will impinge on two or more competing objectives. As an abstract example, a decision maker might be confronted with a choice between policy A, which yields relatively more of values w and x and relatively less of y and z, and policy B, which maximizes y and z at the expense of w and x. In reality, many policy choices involve more than four competing values.¹⁹

There are two, related explanations for the fact that judicialized procedures are inappropriate for dealing with complex policy issues. First, the premises of proposed rules, which are tested under the judicialized format, are statements to the effect that certain measures (or "means") are best suited for achieving certain policy objectives (or "ends"). Cross-examination and rebuttal, as well as other forms of comment, are devices to test such means-ends reasoning. Rulemaking on a record is designed to ensure that final decisions are empirically supported-- that the stated means-ends relationships in proposed rules are, in fact, true. This decision-making framework bears important similarities to what Lindblom has described as the classical, rational model.²⁰ Lindblom and others argue convincingly that the rational approach is inappropriate for dealing with complex policy issues. This is largely because the value implications

of a given policy alternative are typically so numerous, interwoven, and/or subjective that it is impossible for the human mind to come to grips with them in a rational, comprehensive way. Relatedly, even assuming that policy consequences could be comprehensively predicted, total alternative "packages" of effects could not be rationally compared at any rate.²¹

The tremendous delay that typically accompanies the use of judicialized procedures in complex policy areas can largely be attributed to the fact that decision makers are struggling to use comprehensive, rational analysis where it is unworkable. For example, this accounts for the large records generated by the FDA, FTC, and other agencies required to use judicialized procedures. (Again, the biggest component of FTC records is not comment from affected groups, but evidence presented by agency staff.) More importantly, the unrealistic expectation of rational justification accounts for the great delay in the deliberative stages of judicialized proceedings.

A second, related reason that judicialized procedures are inappropriate for complex issues is that they are not designed for reconciling competing values. By definition, solutions to complex problems involve various combinations of effects with respect to two or more competing values. But judicialized procedures are designed to deal only with questions of fact. The premises stated in rules under this format tend to be confined to factually-verifiable, cause-and-effect relationships, and the expression of values or preferences by interested parties during comment is irrelevant as decisional input. This anti-value bias affects the content and quality of agency decision making, as discussed. Moreover, the conflict between what sorts of considerations judicialized procedures allow and what considerations are necessary for sound decision making

probably also contribute to delay. Frustrated agency officials likely spend a good deal of time and effort attempting to "fit" value considerations into factual contexts.

The foregoing discussion leads to the following hypothesis:

hypothesis 5: The effectiveness and efficiency of judicialized rulemaking procedures vary inversely with the complexity of the issues an agency must confront.

Judicialized procedures lead to ineffectiveness in dealing with complex issues in the sense that they limit the ability of agency policy makers to shape the most workable solutions to problems. This is essentially because they preclude the use of values, both as premises for proposed rules and as input during rulemaking proceedings. Relatedly, judicialized procedures are an inefficient means of decision making in complex areas because they lead to considerable delay. Of course, the converse of hypothesis 5 is that, the less complex the issue an agency must confront, the more workable judicialized procedures are.

The degree of complexity an agency must confront in its rulemaking is obviously a function of the policy area in which it works. It is worth noting, however, that complexity at the administrative level can sometimes be manipulated by Congress. It is possible for the legislature-- at least in some instances-- to establish factual parameters for agency decision making. To do this, it is necessary for Congress to confront and reconcile competing interests so that the agency only has to maximize values along one dimension. Practically speaking, of course, Congress is often reluctant to legislate in detail due to considerations of political expediency, or to uncertainty as to how specific problems within a broader policy area will develop in the future.

If judicialized procedures are inappropriate for dealing with complex issues, how should such problems be confronted? Writers such as Lindblom, Fuller, and Wildavsky argue convincingly that a sort of "experimental approach" is best. That is, the most workable strategy is for decision makers to "try out" various solutions and to secure feedback from society concerning their relative desirability. Such experimentation need not always be carried out through the actual implementation of policy, but can at least partially be accomplished through the proposal of alternative policies, debate, and bargaining among those representing competing values.²²

It is also emphasized that program goals should not be defined rigidly in advance. Rather, as Fuller states:

... the decision often proceeds most helpfully when the purposes, which serve as the "premises" or starting points, are stated generally and are held in intellectual contact with other related or competing purposes. The end result is not a mere demonstration of what follows from a given purpose, but a reorganization and clarification of the purpose that constituted the starting point of the inquiry.²³

This recognizes the fact that all those interested in a given policy area may not share exactly the same objectives. In fact, means to some may represent ends to others.

Given the need for flexibility, value input, and bargaining during deliberation, informal or "legislative" rulemaking procedures are clearly superior to judicialized procedures for handling complex issues. Legislative procedures are designed to elicit value as well as factual input, and lend themselves well to bargaining and compromise. Also, unlike judicialized procedures, in which decisional premises must remain fixed throughout, legislative procedures allow and even encourage the redefinition of policy objectives as more valuational and factual information becomes available. This suggests a final hypothesis.

hypothesis 6: In terms of effectiveness and efficiency, informal rulemaking procedures are superior to judicialized procedures for dealing with complex policy issues.

Hypotheses 5 and 6 bear several advantages over Professor Davis' assertion that informal rulemaking is superior to formal procedures for dealing with legislative facts. First, the concept of issue complexity is more precise and more easily applicable to real situations than the notion of legislative fact as Davis defines it.²⁴ Second, some agencies (the EPA and AEC, for example) use judicialized procedures quite expeditiously for resolving issues that are clearly not adjudicative facts (a category that is delineated with more precision). If all issues must be either legislative or adjudicative facts, as is implied, then Davis' argument cannot be substantiated empirically. On the other hand, the notion of issue complexity allows for the fact that a problem may be general in nature, involving classes of individuals and behavior, yet may still lend itself to judicialized proceedings. Finally, issue complexity lends itself to explaining the appropriateness and inappropriateness of judicialized procedures for various issues, as is hopefully evidenced by the preceding text. A similar explanation is missing from Davis' work.

A question that remains at this point concerns the desirability of judicialized procedures in relative terms. Although judicialized procedures appear to be workable for non-complex issues, are they preferable to informal rulemaking in such cases? Hamilton thinks not, arguing that rule-making on a record is merely "less inappropriate" in some cases.²⁵ Even in the best of circumstances, judicialized procedures may involve wasted motion. Moreover, the practical point can be made that, although an agency may sometimes decide issues that lend themselves to judicialized procedures,

all of its decisions are not likely to fall in this category. Therefore, statutory imposition of trial-like procedures may be a mistake. To counter these arguments, one might point out the potential values of judicialized procedures. These include the protection of individual rights against arbitrary or capricious decisions, and the insurance of a more rigorous consideration of factual issues which do lend themselves to empirical treatment.

CONCLUSION

The study of the FTC, supplemented by observations from other agencies, has contributed to a better understanding of the "causes" and "effects" of rulemaking and rulemaking procedure. In the latter case, general propositions have been offered only with respect to judicialized procedures. Nevertheless, informal versus judicialized rulemaking is the significant procedural choice in the regulatory policy area, and judicialized procedures have become increasingly common (and, hence, increasingly important) in recent years.

Anderson's observation with regard to the importance of formal structures and processes is certainly true of rulemaking and rulemaking procedure. The selection of rulemaking as an alternative means of implementing statutory directives, and the selection of specific rulemaking procedures as alternative means of promulgating rules are not neutral in their impact. These choices "tend to favor some interests in society over others, some policy results rather than others."²⁶

At the same time, rulemaking and rulemaking procedure do not operate in a political vacuum. The significance of these formal processes

can only be appreciated in terms of their interaction with contextual, environmental factors. Rulemaking and rulemaking procedure are "administrative tools," the utility and effects of which are dependent upon such interrelated factors as the type of policy being implemented, the specificity of enabling legislation, and the consensuality and relative balance of forces within an agency's political environment. Within the same sorts of contexts, those who are affected by the policies an agency administers perceive the tools of rulemaking and rulemaking procedure as having differential effects with regard to their interests. As a result, they exert what influence they have accordingly. This explains the use and non-use of rulemaking and the selection of specific rulemaking procedures in many instances.

Thus, rulemaking and rulemaking procedure have "effects of their own." The controversy and struggle that often surrounds the choice of these administrative tools bears testimony to their importance. At the same time, however, their effects are conditioned by informal, environmental factors. One might surmise that other sorts of administrative procedures also have effects which are conditioned by contextual factors.

FOOTNOTES

¹James O. Freedman, Crisis and Legitimacy: The Administrative Process and American Government (London: Cambridge University Press, 1978) p. 33.

²Stephen K. Bailey and Edith K. Mosher, ESBA: The Office of Education Administers a Law (Syracuse: Syracuse University Press, 1968)

³Freedman, pp. 97-100.

⁴Theodore J. Lowi, The End of Liberalism (New York: W.W. Norton & Company, Inc., 1969)

⁵For a description and discussion of these statutory requirements see Robert W. Hamilton, "Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rule-making," California Law Review, LX (1972), p. 1369.

⁶Ibid., p. 1314.

⁷Freedman, p. 21.

⁸Ibid., pp. 26-30.

⁹Ibid.

¹⁰For a discussion of the legislative veto, where it has been applied, and what its effects have been see Harold E. Bruff and Ernest Cellhorn, "Congressional Control of Administrative Regulation: A Study of Legislative Vetoes," Harvard Law Review, XC (1977), p. 1369.

¹¹See, for example, Federal Trade Commission Oversight-- Rulemaking, Advertising, and Consumer Access, Fourth Report by the Committee on Government Operations. U.S. Government Printing Office, June 30, 1977.

¹²Hamilton, pp. 1312-13.

¹³Roger C. Crampton, "The Why, Where, and How of Broadened Participation in the Administrative Process," Georgetown Law Journal, LX (1969)

¹⁴Hamilton, p. 1293.

¹⁵Ibid., pp. 1311-12.

¹⁶Ibid., p. 1299.

¹⁷Kenneth Culp Davis, Administrative Law and Government (St. Paul, Minnesota: West Publishing Co., 1975) p. 135.

¹⁸Ibid.

FOOTNOTES (continued)

¹⁹This abstract example is suggested by a similar one in Charles E. Lindblom, "The Science of Muddling Through," Public Administration Review, XIX (Spring 1959), p. 35.

²⁰Ibid.

²¹See also, Lindblom, The Intelligence of Democracy (New York: Macmillan, 1964); The Policy-Making Process (Englewood Cliffs, New Jersey: Prentice-Hall, 1963); and with David Braybrooke, The Strategy of Decision (New York: Free Press, 1963)

²²Ibid.; Lon Fuller, "The Forms and Limits of Adjudication," Harvard Law Review XCII (1978); Aaron Wildavsky, The Politics of the Budgetary Process (Boston: Little, Brown, and Company, 1964)

²³Fuller, p. 401.

²⁴As discussed in Chapter 6, for example, ITD officials have found it impossible to identify issues of legislative fact for practical purposes.

²⁵Hamilton, pp. 1299-1302, 1311-13.

²⁶James E. Anderson, Public Policy-Making (New York: Praeger Publishers, 1975) p. 24.

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