CHAPTER – 5
ADMINISTRATIVE DISCRETION AND FUNDAMENTAL FREEDOMS IN USA

1. ORIGIN OF JUDICIAL REVIEW:

The origin of judicial review of agency action establish a tradition that is somewhat peculiar to Anglo-American jurisprudence and that is too quickly taken for granted. This tradition is that ordinary, generalist judges-action on the petition of ordinary citizens-stand ready to assure that administrative power is exercised according to law and in light of permanent community interests.[1]

Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination... When the courts act continually within these constitutionally imposed boundaries... their ability to perform their function as a balance for the peoples' protection against abuse of power by other branches of government remains unimpaired.[2]

While both are similarly grounded in separated powers and a sensible division of work between courts and agencies, the availability and the timing of review are, nonetheless separately identified. Questions about the availability of judicial review are expressed as matters of jurisdiction, standing, and sovereign immunity. Availability of review also includes questions highlighted by the Administrative Procedure Act, of the extent to which Congress has "precluded" review or has so "committed" a matter to agency discretion that it is beyond review. Timing of review is identified by reference to the pendency and maturity of agency of ripeness and exhaustion of administrative remedies. It also involves the doctrine of primary jurisdiction, whether an action is best initiated in an agency or a court.[3]

Our study is limited to judicial review of Agency is discretionary powers in relation to fundamental rights.

2. The purposes of judicial review-an overview:

Administrative agencies are created by Congress to carry out certain statutorily defined duties, goad and functions. A primary purpose of judicial review is to ensure that agencies do not go beyond their statutory powers in carrying out their tasks. If an agency could freely take actions that were ultra vires, that is beyond its statutory authority, its decisions would completely undermine the separation of powers principles upon which the Constitution is based.

Judicial review thus serves as an important check on the legality of the action that agencies may undertake. It also serves as an important check on Congress, as well. An agency must act within the statutory authority provided by Congress, but that authority must be in accord with the Constitution. Congress cannot, for example, authorise an administrative program that violates the First Amendment rights of individuals. Nor may it delegate its legislative powers in so diffuse a manner as to provide agencies with no legislative guidance at all.

This presumption, however, does not prevent a court from looking closely at haw and agency exercises its judgment and, specifically, the procedures and agency uses to exercise its power. The purpose of this kind of judicial review is not substantive quality control. It is, rather, to ensure that the agency has not abused its power in the process of making its decisions. It assumes that, in most cases, proper procedures will yield reasonable results. Thus courts rarely substitute their judgment for that of the agency, provided the agency has used the proper procedures in making those judgments.

Whenever a public authority is invested with the power to make an order which prejudicially affects the rights of an individual, then, whatever may be the nature of the power, whatever may be the procedure prescribed and whatever may be the nature of the authority, the proceedings of the public authority must be regulated by the analogy of rules governing judicial determination of disputed questions.

In the US, besides the judicial review of administrative discretion which is available in the "due process clause" and the general grant of constitutional judicial power, the Administrative Procedure Act, 1946, in Section 10, provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". This entails that if administrative discretion is exercised arbitrarily or capriciously, the courts would intervene. Section 10 also provides for a dangerous exception to the rule of judicial review in cases "where agency action is by law committed to agency discretion". However, courts have interpreted this exception in a manner not to cover arbitrary or capricious exercise of discretion. In ***Citizens to Preserve Overton Park Inc.*** **v.** ***Volpe***[4], the Secretary of Transportation had authorised the use of federal funds for the construction of a highway through the public park. The statute gave discretion to the Secretary to allow such a construction only if a "feasible and prudent" alternative route did not exist. The Supreme Court did not accept the contention of the Secretary that the determination of "feasible and prudent" alternative route is committed to his absolute discretion and hence is not subject to judicial review. The court did not allow the exception to Section 10, Administrative Procedure Act, 1946 to reign supreme. In the same manner, in ***Barlow*** **v.** ***Collins***[5] where the statute authorised the Secretary of Agriculture "to prescribe such regulations as he may deem proper to carry out the provisions of this Chapter", the court did not accept the contention that the contents of the regulation were committed to the absolute discretion of the Secretary which was not subject to judicial review.

In the US, judicial activism has entered the area of administrative discretion also, and courts not only substitute their discretion to the discretion of administrative authority but sometimes exercise discretion which is vested in an administrative authority. In ***Boreta Enterprises Inc***. v. ***Deptt. of Alcoholic Beverage Control***[6], the agency revoked the liquor licence because the licencee employed topless waitresses. The agency exercised its discretion on the ground that the licencee's conduct was contrary to public morals and might lead to socially deleterious conduct. The California Supreme Court held the exercise of

discretion invalid on the ground that it is not a legal exercise of discretion covered within the requirement of the "good cause" clause for revocation of licence. In the same manner in ***United States*** v. ***Professional Air Traffic Controllers' Organisation***[7], the court ordered the controllers of air traffic to end a strike and return to work. The order of the court also laid down that the Federal Aviation Authority (FAA) will impose no penalty of suspension or dismissal, no matter that the question of discipline in case of strike was within the sole discretion of the FAA.

3. The "Meaningful Standards" Criteria :

Administrative decisions generally involve discretions, and those actions are ordinarily reviewable.[8] The administrative Procedure Act follows this convention of reviewability. Respecting the "scope of review," the Act provides for judicial review of "abuse of discretion."[9] However, the Act's committed to agency discretion" exception to judicial review also establishes a "narrow" zone of discretion that is unreviwable.[10] The problem is finding that zone.

Courts ordinarily judge the propriety of agency action according to whether it is consistent with some legal standars.[11] Where no such standards are available, review would mostly be futile. The absence of standards may, therefore, be considered an indicia of the committed to agency discretion limitation to judicial review. Accordingly, in Heckler u. Chaney the Supreme Court explained that this limitation applies where there is "no meaningful standard against which to judge the agency's exercise of discretion."[12] No such standard would likely be available in our previous illustration, about the courts being in no position to say that one kind of x-ray plates is better than the other.

Nor was such a "meaningful standard" available in ***Heckler V. Chaney***. The peculiar circumstances of that case were that inmates sentenced to death by an injection of lethal drugs were not in compliance with laws administered by the Food and Drugs administration and that the agency should therefore take various investigatory and enforcement action.[13] The Food And Drug Administration refused to do so. That refused was seen by the Court as an instance of

prosecutorial discretion unbounded by standards, and thus not susceptible to meaningful judicial review.[14]

The meaningful standards criteria of Heckler v. Chaney was drawn from the "no law to apply" formula of the Court's earlier opinion in Citizen's to Preserve Overton Park v. Volpe.[15] A citizen's group had challenged the Secretary of Transportation's decision to allocate federal funds for the construction of an interstate highway through a public park in Memphis. The Secretary, however, claimed that the decision was unreviewable as it had been committed to agency discretion. The Supreme Court disagreed. The committed to agency discretion exception, the Court explained, is "very narrow," and only "applicable in those rare instances where 'statutes are drawn in such broad terms the in a given case there is no law to apply."[16] by statute, the Secretary's approval of funds was subject to the absence of "prudent and reasonable" alternative routes. Considering this "prudent alternative route" standard, the Court held that the agency action was reviewable, according to whether the secretary's decision was based on the factors that Congress had made relevant to determining alternative routes. "Plainly" there was "law to apply," and thus the funding decision had not been "committed to agency discretion so as to be unreviewable."[17]

The case of open-ended statutes, agency discretion is not unlimited. Today, courts review agency action under those statutes so as to assure a degree of rationality be the agency.[18] Accordingly even under wholly open-ended statutes the agency must operate according to "traditional standards of rationality and fair process." and in these standards there would seem, be law to apply.

4. Limitations to judicial review:
Committed To Agency Discretion

To what extent should a court defer to an agency action within the scope of its lawful authority? Should a court treat that action deferentially, as, for example, an appellate court might defer to the discretionary judgments of lower court? This question is not new in England. In Dr. Bonham's Case, Lord Coke found that a medical board's finding that Dr. Bonham was "insufficient and inexpert in the art of medicine" was reviewable.[19] But this part of the case, an assumption that courts

might fully review agency discretion, did not thrive. Rather, the practice that soon developed was that English courts deferred to administrative discretion so long as the officials operated within limits set by law. The court's practice was stated thusly: "they are enabled by statute to proceed according to their discretions" and "if they proceed secundum, aequum & bonum, we cannot correct them' but if they proceed where they have no jurisdiction... then they are to be corrected here."[20] This statement of judicial review of agency discretion is not far off modern practice, as established by the Administrative Procedure Act and the "meaningful standards" principle of Heckler v. Chaney.[21]

The administrative Procedure Act provides that judicial review may be limited "the the extent that statutes preclude review." In the same section it also provides that review may be barred when "an agency action is committed to agency discretion by law."[22] As this proximity indicates, these two limitations- preclusions of review and committed to agency discretions- to judicial review are related.[23] Still, they differ in signify ant respects.

A. Optimising Decisional Resources: Functional Considerations

In practice, the committed to agency discretion exception to judicial review has not turned solely on the presence or absence of standards against which the agency action might be judged. Application of the exception has also included purely functional considerations respecting optimal allocations of decisional responsibility between agencies and courts.[24]

Langevin v. Chengango Court, Inc. involved the reviewability if an FHA approval of a rent increase by a federally subsidized landlord.[25] Because standards were available against which the increse might be judged, the court felt that review of a rent increase was not "beyond judicial competence."[26] Nonetheless, the court held that the decision had been committed to agency discretion and was therefore unreviewable. Writing for the court, Judge Friendly emphasized "the managerial nature" of the decision and the "need for expedition to achieve the congressional objective."[27]

5. The standards and scope of judicial review-the APA:

The basic purposes of judicial review set forth above are embodied in the APA.[28] This section will examine, in particular, the various legal standards set forth in section 706 of the APA and applied by federal courts when reviewing the substance of agency decisions and the procedures used in reaching them. These standards imply a particular scope of review. The ultimate scope of that review determines how far a court can go in overturning or remanding an agency decision.

Section 706(2) (c) gives courts the power to focus on what agencies actually do and to set aside agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights,"[29] In addition, to provide protections against those rare occasions when an agency's failure to act may be unlawful, section 706 allows the court to "compel action unlawfully withheld or unreasonably delayed."[30] in yet other contexts, an agency might act within its statutory authority, but its actions may nevertheless violate a constitutional provision. The APA authorises the Court to hold unlawful or set aside agency action found to be "contrary to constitutional right, power, privilege, or immunity."[31]

Section 706 also provides for judicial review of how agencies exercise their power-that is, the processes that agencies use. The APA and agency enabling acts provide for certain procedural requirements when agencies make rules,[32] formally adjudicate[33] a dispute of take more informal action.[34] Pursuant to the APA, courts can set aside agency action that is "without observance of procedure required by law."[35]

In ***O'Leary*** *v.* ***Brown-Pacific-Maxon***,[36] the Supreme Court reviewed a compensation award made pursuant to the Longshoremen's and Harbor Workers' Compensation Act. The Court had to decide whether an employee's drowning occurred in the course of his employment. If so, his survivors were entitled to compensation under the Act. The decedent was at a company recreation center which was located near a body of water clearly marked as off-limits and dangerous who apparently had ventured beyond the zone of safety. The Deputy Commissioner found as "fact" that the drowning required compensation because

the death arose of and in the course of employment." The Court of Appeals reversed, but the Supreme Court affirmed the agency, holding that whether the injury was received "in the course of employment" was a question of "fact." The agency's determination in this regard was supported by substantial evidence and thus was reasonable.[37]

6. Judicial review of questions of fact:

In ***Crowell*** *v.* ***Benson,***[38] the Supreme Court rejected the constitutional argument that Congress could not vest fact-finding authority in an administrative agency without violating Article III of the Constitution. It impliedly upheld such fact-finding authority subject to judicial review of the reasonableness of the findings.[39] Except for so-called jurisdictional facts, the Court rejected any Article III requirement of de novo reviews.[40]

The APA provides three different standards of judicial review applicable to agency findings of fact. In a few cases, Section 706(2) (F) allows a court to review the facts dev novo, as if it were the finder of fact in the first instance.[41] In on the record adjudicatory and formal rulemaking proceedings, section 706(2) (E) provides for "substantial evidence" review of agency fact finding.[42] If there is substantial evidence in the record, a court will affirm an agency's findings of fact, even if it might not have made those same findings were it the initial decision maker. By statute, the substantial evidence test sometimes applies to findings of fact made in the context of hybrid rulemaking proceedings. In informal rulemaking proceedings conducted under section 553 of the APA, however, as well as other informal agency actions subject to judicial review but falling outside of the specific procedural provisions of the APA, the arbitrary and capricious standard of review applies.[43] This standard thus applies to proceedings that are not on the record proceedings in the same sense as those to which the substantial evidence standard applies. As we shall see, however, the very possibility of judicial review of agency actions of this sort has, over the years, required the compilation of at least some kind of record upon which to judge the agency's decision.

In ***Association of Date processing Service Organisations, Inc.*** *v.* ***Board of Governors of the Fed. Reserve System,***[44] the court explicitly adopted the convergence theory in an opinion by Judge, now Justice Scalia. The court reviewed and order of the Federal Reserve Board approving Citicorp's application to establish a data processing subsidiary. A trade association sought review of the Board's order entered after notice and comment rulemaking, amending portions of the regulation[45] dealing with the performance of data processing by bank holding companies. As a result of consolidating appeals, the court was required to review both on-the-record adjudication and informal notice and comment rulemaking. Petitioners contended that what they viewed as the relatively more demanding substantial evidence test applied to both orders. An intervenor, Citicorp, argued for applying the substantial evidence test to the informal rulemaking portion of the case. The Court stated that this difference would not matter:

> "[I]n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same. The former is only a specific application of the latter, separately recited in the APA not to establish a more rigorous standard of factual support but to emphasize that in the case of formal proceedings the factual support must be found in the closed record as opposed to elsewhere."[46]

The court further noted that the arbitrary and capricious test is a catch-all provision, "picking-up administrative misconduct not covered by the other more specific paragraphs."[47] In cases not governed by $$ 556 and 557 of the APA, the arbitrary and capricious test covers the need for factual support:

> When the arbitrary or capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a "non arbitrary factual" judgment supported only by evidence that is not substantial in the APA sense.[48]

A. Questions of Law Questions of Law Application:

The judicial review of agency action usually involves at least three distinct questions- of fact, questions of law and questions of law application.[49] The

application of law to facts results in what are commonly referred to as questions of mixed fact and law. Given agreement on the basic facts involved, as well as the interpretation of the relevant law to be applied, courts generally defer to the result reached by the agency when it applies this law to the facts before it. The penchant of some courts, however, to collapse the law application stage of their analysis with the law formulation part of the process, particularly when they agree with the results reached by the agency, can make the judicial use of deferential language confusing and often misleading.

NLRB v. Hearst Publications, Inc.[50] demonstrates this potential for confusion. Hearst is often cited to support a limited judicial role in dealing with certain kinds of questions of law, particularly law application. Justice Rutledge, writing for the majority, stated:

> ..... where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Worker's Act, that a man is not a "member of a crew" ..... or that he was injured "in the course of his employment" ..... and the Federal Communications commission's determination that one company is under the "control" of another..., *the Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis law.*[51]

On closer examination, however, the Court engages in a much more through and independent analysis of the law than this quote might indicate.

Hearst arose from the refusal of four Los Angeles newspapers to bargain collectively with a union representing newsboys who distributed their papers from newsstands on the streets. The newspapers argued that "newsboys" were not employees within the meaning of the National Labor Relations Act. Though the union was properly certified, the newspapers refused to bargain with it. The Board found that newsboys were employees and that the newspapers had, therefore, violated the National Labor Relations Act. It ordered them to cease and desist in

these violations and to bargain collectively with the union upon request. The newspapers appealed. Though they were successful at the Circuit Court, the Supreme Court ultimately upheld the NLRB decision.

The principal question is the Supreme Court was whether the newsboys were "employees." Before concluding that the Board's legal conclusion was correct, the majority carefully examined whether the Board had, in fact, used the appropriate legal test in making its determination. The Court first discussed, but rejected, the argument that employees should be defined by resort to "common law standards."[52] the Court than then discussed whether state law should govern an issue such as this and rejected that possibility. Instead, the issue was one that had to be "answered primarily from the history, terms and purposes"[53] of the National Labor Relations Act itself. In the case at hand, "it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evil the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation."[54] Having independently determined that the Board's approach was consistent with the view, the Court then deferred to the result reached by the Board's application of the statute to the facts of this case.

7. Judicial deference to agency interpretations of law:

If a reviewing court is satisfied that there is no clear congressional intent respecting the precise question at issue, a reasonableness test applies to the agency's interpretation of the statute involved. As the majority in Chevron "the court may not substitute its own construction for a reasonable interpretation" by the agency.[55] This is the case, even if the Court would have reached a different conclusion in a judicial setting.[56] Reasonableness review usually involves "the agency's textual analysis (broadly defined, including where appropriate resort to legislative history) and ..... the compatibility of that inquiry with the congressional purposes informing the measure."[57] Though it may be argued that an agency interpretation must be accepted by a reviewing court if it is deemed reasonable,[58]

courts continue to discuss reasonableness questions in terms of degrees of deference.[59]

The court's involvement in Clean Air Act cases escalated in ***International Harvester Co. V. Ruckelshaus***.[60] In that case, three major automobile manufacturers challenged an EPA decision denying them a one year suspension of the Clean Air Act emission standards promulgated by the agency. The auto makers prevailed because the court concluded that the agency's technical methodology for measuring emission standard should have been subject to comment by industry. Failure to open up this aspect of the decision to public comments, the court held, undermined an informed decision-making process. To correct this the court not only reversed and remanded the case to the agency, but it specified that the parties were to be given an opportunity to comment on matter not previously set out for the public by EPA. In addition, they were to have a chance to cross-examine. Agency officials concerning the old and the new materials.[61]

In ***Portland Cement Ass'n v. Ruckelshaus,***[62] another important Clean Air Act case, the D.C. Circuit went further, mandating additional agency procedures. The court required the agency not only to reopen its rulemaking proceedings and to give manufacturers the opportunity to see and comment upon certain evidence involving agency test results and procedures, but it also required an agency response to petitioners complaints about methodology. The agency had failed to allow parties to comment on EPA's methodology, even though the agency had published some additional materials presumably supporting its rules governing the emission of cement dust.

The court invoked what it called a hard look approach, nothing that: "This agency, particularly when its decisions can literally mean survival of persons of property, has a continuing duty to take a 'hard look' at the problems involved in its regulatory task, and that includes an obligation to comment on matters identified as potentially significant by the [earlier] court order remanding for further presentation"[63] The court was quick to add that not all comments required

a response, but only those "significant enough to step over a threshold requirement of materiality....."[64]

These kinds of procedural innovations were eventually incorporated in toe legislation governing the EPA. The 1977 amendments to the Clean Air Act essentially condified many of the D.C. Circuit's rulemaking innovations.[65] This kind of creative judicial supervisory role was at the heart of the dispute in *Vermont Yankee Nuclear Power Corp. v NRDC.*[66] In that case, the Supreme Court, in no uncertain terms, made clear that if procedures other than those required by the APA were necessary, mandating that these new procedures be used was the job of Congress, not the D.C. Circuit Court of Appeals. *Vermont Yankee* was thus a judicial attempt to put an end to the development of administrative common law.[67] Implicitly, cases such as *Portland Cement, Kennecott Copper*, and *International Harvester* rest either on the assumption that courts can create a kind of administrative common law or that such additional procedural requirements were, in fact, constitutionally based. In *Ethyl Corp. v EPA*,[68] Judge Leventhal had argued that:

> [i]n the case of legislative enactments, the sole responsibility of the courts is constitutional due process review. In the case of agency decision-making the courts have an additional responsibility set by Congress. Congress has been willing to delegate its legislative powers broadly-and courts have upheld such delegation-because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.[69]

This substantive basis for closer judicial review survived the Court's decision in *Vermont Yankee;* however, the ability of courts to control agency discretion solely by the imposition of procedures not found in the APA, the agency's enabling act, its own regulations or mandated by the Constitution clearly did not.

In *Overton Park,* Secretary of Transportation Volpe approved the construction of a six lane interstate highway through Overton Park in Memphis, Tennessee. He thus authorise federal funds for the project even though the

Federal-Aid Highway Act of 1968 required that he not approve such construction if a "feasible and prudent" alternate route existe.[70] That act also required that all possible planning be undertaken to minimize harm to the pard.[71] The Secretary did not provide any reasons or findings in support of his decision. His action was challenged by a number of private citizens and local and national environmental groups. Their main procedural contention was that the Secretary should be required to make formal findings showing that he had acted in accord with the statute. They also challenged the merits of Secretary Volpe's decision.[72]

The challengers lost in both the District Court and the Court of Apeals.[73] The Supreme Court, however, ruled that Congress clearly intended that "protection of parkland was to be given paramount importance."[74] It further state: "If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems."[75]

Though the Court did not required formal findings of fact, it did hold that the Secretary's action could properly be reviewed for arbitrariness, stating that it "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[76]

The Court additionally noted that even though the "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one."[77] But along the way, the Court used a variety of other standards as well to describe the scope of review a court must utilize. The court must "engage in a substantial inquiry."[78] Nevertheless, we are also told that the Secretary's decision is "entitled to a presumption of regularity."[79] Yet, "that presumption is not to shield his action from a through, probing, in-depth review."[80] There is language in this opinion to satisfy a variety of scope of review positions, from narrow to searching. The Court ultimately concluded that even though no formal findings were required, the Secretary had to provide additional information to substantiate his decision. It held that the Secretary's decision had to be evaluated (1) on the basis of the "record" before the agency at the time of the decision; (2) by testimony given by the Secretary if necessary; and (3) on the basis of any formal findings the

Secretary chooses to make.[81] In short, an inquiry into whether Volpe had acted in an arbitrary or capricious manner had to be centered on rationalizations either provided or easily inferred from whatever "record" existed at the time the decision was made.

The *Overton Park* decision can be viewed in three separate ways: (1) as a failure of the Secretary to follow clear congressional intent; (2) as a failure to meet the arbitrary and capricious standard of judicial review; and (3) as failure to generate some form of record by which courts could adequately review the agency's decision. Depending on which of these aspects of the opinion is emphasized, *Overton Park* has more or less to say about the arbitrary and capricious standard of judicial review.

One way to read this decision is to emphasize the first aspect of the case and argue that the primary issue in the case was whether Secretary Volpe had failed to give consideration to factors clearly set forth by statute. This issue raises a question of law. The language in the opinion that suggests "close scrutiny" may, therefore, be read as applying to questions of law and thus, requiring essentially *de novo* judicial review.[82] Emphasizing the questions of law present in this case would also explain the strong language employed by the Court at other points in the opinion. This language should not, therefore, necessarily be read as an attempt to re-define the arbitrary and capricious standard. It is, in fact, a response to the legal issues posed in this case.

An emphasis on the second aspect of this opinion, however, would lead to the opposite conclusion. *Overton Park* arguably did have something to say about defining the arbitrary and capricious standard. For those who favor strong review, there is the "clear error," and "searching and careful" language used by the Court.[83] On the other hand, for those favoring a more restrained judicial approach, there is the language stating that the inquiry is a "narrow" one.[84] Both rhetorical stands of this case have been used in subsequent cases challenging the rationality of agency action under the arbitrary and capricious standard.

The third aspect of the *Overton Park* opinion is its assumption that an agency record was in existence at the time Secretary Volpe made his decision.

This, in turn, implied that informal agency action of this sort should be based on a record. Carrying this assumption over to judicial review of agency rules, as many courts have done, arguably strains what the drafters of the APA intended in such cases.[85] The APA says very little about informal action and nothing about the kind invoked in *Overton Park.* As far as informal rulemaking is concerned, the APA simply states that an agency, upon promulgation of new rules "shall incorporate in the rules adopted a concise general statement of their basis and purpose."[86] By remanding for the generation of a record in the context of such informal agency action, *Overton Park* became an important precedent enabling courts to demand a *de facto* record requirement in informal adjudicatory and informal rulemaking settings.[87]

No legal system in world history has been without discretionary power. None can be. Discretion is essential for individualized justice, for creative justice, for new programs in which no one yet knows how to formulate rules, and for old programs in which some aspects cannot be reduced to rules. Eliminating discretionary would paralyze governmental processes and would stifle individualized justice.

The proper goal is to eliminate all *unnecessary* discretionary power. That will in volve truly major surgery, for the cancerous growth of unnecessary discretionary power permeates the entire body politic. Unnecessary discretionary power involves not merely the excessive delegations by legislative bodies, but it also involves the huge undelegated power of selective enforcement, which probably accounts for far more unnecessary discretionary power than all the unnecessary discretionary power that has been intentional.

8. Some Negative Propositions about Control of Discretion: What we must avoid doing:

Affirmative proposals for moving toward control of discretion, largely in the nature of a framework for further study, are advanced throughout this book, in other chapters as well as this one. Experience has shown that in this pioneer territory even the most precise phrasing of proposals leaves room for misunderstanding. As a special precaution against such misunderstanding, this

section draws together a dozen negative propositions here set forth is in any degree inconsistent with any affirmative proposal, but the emphasis here is in each instance on the negative.

A. We should *not* try to eliminate discretionary power. The governmental and legal system cannot operate without discretion. We should try to eliminate unnecessary and excessive discretion.

B. We should *not* aim at the ideal of a government of laws and not of men. No government in world history has been a government of laws and not of men. None can be. What we want is a government of laws and of men. The goal is to achieve the right balance between law and discretion, between government by law and government by men.

C. Standards are *not* desirable to guide administrative discretion on all questions in all circumstances, whether the standards are prescribed by statute or by administrators through rulemaking. We need more standards than we have, and such standards as we have often need to be further clarified. But on new and complex problems we can often do better by trying to formulate the guiding standards through case-to-case determinations than by formulating them in general. The goal is not elimination of unguided discretion; it is to limit unguided discretion to circumstances in which it is necessary or desirable.

D. Unchecked discretionary power should *not* be eliminated. Checking is desirable but not always feasible. A statement from the Supreme Bench that "Where discretion is absolute, man has always suffered" stimulates a healthy emotion but overshoots. Discretion is often properly absolute. The power of pardon is absolute. The power to be lenient or not to be lenient is often absolute. Our system is shot through with absolute power and it probably will always be. We should whittle down absolute discretionary power as far as we can without undue sacrifice of competing interests.

That It is clear that though some discretion is necessary to keep the giant wheels of administration moving in this age of an intensive form of government, if the power is misused the arms of the court are long enough to reach it.[88]

References

1. As interpreted by Dicey, these origins of judicial review exclude "the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the oridinary tribunals." Dicey, Law of the Constitution 202 (9th ed. 1945). See generally, Henderson & Jaffe, Judicial Review and the Rule of Law, 72 Law Quarterly 345 (1956).
2. United Public Workers v. Mitchell, 330 U.S. 75, 90-91, 67 S.Ct. 556, 564-65, 91 L.Ed. 754 (1947).
3. These questions of availability and timing or review generally relate to court actions initiated by a private individual. At times, these questions and the impediments they present can be substantially avoided should a person act more passively and defensively, to await an "enforcement action." By an enforcement action, the agency proceeds against the individual in court, to gain the assistance of the court in forcing the individual to do whatever it is that the agency wants of him. See se. 12.3, infra.
4. 401 US 402 (1971).
5. 25 L Ed 2d 192: 397 US 159 (1969).
6. 2 Cal 3d 85: 84 Cal Reptr 113 (1970).
7. 438 F 2d 79 (2nd Cir 1970).
8. For a review of the various forms of agency discretion, see Kock, Judicial Review of Administrative Discretion, 54 Geo. Wash.L.Rev. 469 (1986).
9. 5 U.S.C.A. $ 706.
10. 5 U.S.C.A. $ 701. See Heckler v. Chaney, 470 U.S. 821, 838, 105 S.Ct. 1649, 1659, 84 L.Ed.2d 714 (1985). See also Davis, Administrative Arbitrariness Is Not Always Reviewable, 51 Minn.L.Rev. 643 (1967).

Contra see Berger, Administrative Arbitrariness, A Reply to Prof. Davis, 114 U.Pa.L.Rev. 763 (1966)

11. Standards may be drawn from a variety of sources, such as applicable statutes, the agency's own rules, and constitutional requirements. In this relation of standards, "Judicial review is available when the plaintiff alleges a violation of 'constitutional, statutory, regulatory, or other legal mandated or restrictions.'" Merrill Ditch-Liners, Inc. v. Pablo, 670 F.2d 139 (9th Cir. 1982.)

12. Heckler v. Chaney, 470 U.S. at 830, 105 S.Ct. at 1655. See also City of Santa Clara v. Andrus, 572 F.2d 660, 666 (9th Cir.1978), cert. denied 439 U.S. 859, 99 S.Ct. 176, 58 L.Ed.2d 167 (1978) ("If, however, no law fetters the exercise of administrative discretion the courts have no standard against which to measure the lawlessness of agency action. In such cases no issues susceptible of judicial review are prescribed....."). Florida v. United States, 768 F.2d 1248 (11th Cir. 1985) ("If there are judicially manageable standards available for judging how and when an agency should exercise its discretion, then it is impossible to determine even whether the agency abused its discretions"). This latter case, *Florida v. United States,* involved a land acquisition decision for the benefit of the Seminole Indians. In finding that this decision was unreviewable, the court noted that the relevant statute stated that the land acquisition was within the discretion of the Department of Interior and that the statute at the same time "does not delineate the circumstances under which exercise of this discretion is appropriate." 768 F.2d at 1256. From a functional point of view, the court added that decision to buy the land included factors such as budgetary consideration, the particular needs of the Indians, governmental resources for overseeing the land, and securing the cooperation of state and local officials, and that for these reasons the agency decision to buy the land should not be reviewed. (This functional approach to the reviewability of agency discretion is discussed in the next preceding section.).

See generally, Koch, Judicial Review of Administrative Discretion, 54 Geo. Wash. L.Rev. 469, 494ff (1986).

13. The injury possibly caused by noncompliance with federal drug laws was a tortured rather than a quick and painless death. Chaney v. Heckler, 718 F.2d 1174, 1177 (D.C.Cir.1983), rehearing denied 724 F.2d 1030 (1984).

14. As stated by the Court, the reasons for "this general unsuitability for review" were that:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, an agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all.

470 U.S. at 831, 105 S.Ct. at 1655. See generally Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). See also Investment Co. Institute v. FDIC, 728 F.2d 518 (D.C.Cir. 1984) (A "simple exercise of 'prosecutorial discretion'" is unreviewable because "there are no general standards to govern the agency exercise of discretion.").

In *Heckler v. Chaney,* the Court distinguished its previous decision in Dunlop v. Bachowske, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975) where it held that an act of prosecutorial discretion was reviewable. In that case, the Court explained, there was "statutory language which supplied sufficient standards to rebut the presumption of unreviewability...." 470 U.S. at 833, 105 S.Ct. at 1656.

The matter of prosecutorial discretion is also considered in sec. 12.6.4, infra, dealing with the reviewability of agency inaction or delay.

15. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

16. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971) quoting S.Rep. 752, 79th Cong., 1st Sess. 26 (1945).

17. 401 U.S. at 413, 91 S.Ct. at 822. See also Greenwood Utilities Commission v. Hodel, 764 F.2d 1459 (11th Cir. 1985). In that case the Flood Control Act Congress gave the Department of Energy authority to distribute excess power generated by flood control dams, and a municipality questioned the amount of power allocated to it by the Department. The Eleventh Circuit found that the Department's decision was unreviewable under $ 701(a)(2) because the act merely established a "series of general directives" and did not create a standard by which a court could review the agency's distribution decision. Thus there was "no law to apply." 764 F.2d at 1465. See also Southern Railway Co. v. Seaboard Allied Milling Corp., 444 U.S. 890, 100 S.Ct. 194, 62 L.Ed.2d 126 (1979).

Somewhat inconsistent with the Overton Park "law to apply" formulation is the Court's earlier decision in Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1958). In that case shipping companies claimed that tolls set by the agency, the Panama Canal Co., were inconsistent with legislation concerning the operation of the canal. The question, as described by the Court, "involve[d] problems of statutory construction and cost accounting: whether an operating deficit in the auxiliary or supporting activities is a legitimate cost in maintaining and operating the Canal....." Although it probably could be said that in light of pertinent statutory directions there was "law to apply" in this situation, the Court nonetheless found that the agency action was unreviewable under the Administrative Procedure Act "committed to agency discretion" exception to judicial review. 356 U.S. at 317, 78 S.Ct. at 757. On the other hand, the Court was dealing with unfamiliar matter, such as the Canal's business management. The Court stated that "where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound

exercise of discretion..... We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision." 356 U.S. at 318, 78 S.Ct. at 758. Regarding the relevance of functional consideration (such as deference to the managerial skills of agencies) to the committed to agency discretion exception, see the succeeding section.

18. This rationality has been described as "Whether the decision making process incorporated reasonably discoverable facts and, weighed all relevant factors", and generally, that the conclusions reached by the agencies were consistent with the evidence before it. Koch, supra note 12 at 475. See FCC v WNCN Listener Guild, 450 U.S. 582, 101 S.Ct. 1266, 67 L.Ed.2d 521 (1981).

19. 8 Co.Rep. at 121, 77 Eng.Rep. at 658. Coke distinguished between the office of a judge, which was recognized by statute, and the office of administrative officials, which were not so recognized. In this regard, Coke stated that "the record of force made by a justice of peace is not traversable, because he doth it as judge, by the statutes of 14 Ric. 2. and 8 Hen. 6 and so there is a difference when one makes a record as a Judge and when he doth a thing by special authority (as they did in this case at bar) and not as a Judge.: Id. While Coke apparently meant that medical board factual findings were reviewable, still, the error that the board was charged with was one of law, whether Dr. Bonham was statutorily exempted from the board's jurisdiction, rather than a factual matter that would be more particularly a matter of administrative discretion.

In Rooke's Case, 77 Eng.Rep. 209, 5 Co.Rep.99a (C.P., 1599), property had been taken to satisfy a Sewer Commission assessment to pay for improvements to the Thames. The property owner, arguing that the assessment was improper in that the Commission erred in limiting assessments to the property on the banks of the Thames rather than assessing all benefited property, brought an action in replevin against it. In defense, the Commission argued that under the appropriate statute it was to

act according "to their discretions", and that this discretion was not reviewable by the courts. Lord Coke, finding against the Commission, disagreed, saying that:

> [Y]et these proceedings ought to be limited and bound within the rule of reason and law. For discretion is a science or understanding to discern between shadows and substance, between equity and colorable glosses and pretenses, and not to do according to their wills and private affections.....

77 Eng.Rep. at 210, 5. Co.Rep. at 100.

20. Commins v. Masson. 82 Eng.Rep. 473 (K.B. 1643). See also Groenvelt v. Burwell, 1 Ld.Raym. 454; 1 Salk 144 (1700) (in denying that a board finding of malpractice was traversable, Lord Holt stated that "The judges do not understand medicine sufficiently to make a judgment").

21. 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985).

22. 5 U.S.C.A. $ 701(a)(2).

23. When a statute says that "the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness or a rate" we certainly may say that the statute sommits the matter to agency discretion, and that therefore the matter is "committed to agency discretion by law" within the meaning of $ 701(a)(2) of the Administrative Procedure Act. See Southern Railway C. v. Seaboard Allied Milling Corp., 444 U.S. 890, 100 S.Ct. 194, 62 L.Ed.2d 126 (1979). At the same time, we might also say that the statute by that same token precludes review within the meaning of $ 701(a)(1) as it refers to "statutes that preclude review." For this reason, the Supreme Court has commented that "one might wonder what difference exists between sec. (1)(1) and sec. (a)(2)." Bus as the Court went on to say and as wer discuss in the above text, the two subsections are different.

24. As one court has put it "in practice the determination whether there is law to apply necessarily turned on pragmatic considerations as to whether the

agency determination is the proper subject of review." Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1034 (D.C.Cir.1979).

25. 447 F.2d 296 (2d Cir. 1971).

26. By regulatory agreement, rent increases were limited to those "necessary to compensate for any net increase..... in taxes ..... and operating and maintenance expenses over which owners have no effective control." 447 F.2d at 303.

27. Id.

28. 5 U.S.C.A. $$ 701-706.

29. 5 U.S.C.A. $ 706(2)(c). See, e.g., Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990), on remand 911 F.2d 1312 (8th Cir. 1990) (agency cannot enact policy which conflicts with statute).

30. 5 U.S.C.A. $ 706(1).

31. 5 U.S.C.A. $ 706(2)(B).

32. See chapter 4, supra.

33. See chapter 8, supra.

34. See chapter 9, supra.

35. 5 U.S.C.A. $ 706(2)(D).

36. 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483 (1951).

37. Justice Frankfurter, writing for the majority, argued that this case did not involve a determination of the existence or nonexistence of "simple external, physical event" but "a combination of happenings and inferences ..... Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as "'questions of law.'" 340 U.S. at 507-08, 71 S.Ct. at 472.

Three justices dissented, arguing that the employee had voluntarily initiated the rescue attempt and that it, thus, did not arise in the course of his employment. There was, they argued, no causal connection between his employment and his death. 340 U.S. at 509. For a case with similar issues

and results, see O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc., 380 U.S. 359, 85 S.Ct. 1012, 13 L.Ed.2d 895 (1965).

38. 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932). See also United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 47 S.Ct. 302 71 L.Ed. 560 (1927).
39. 285 U.S. at 46, 52 S.Ct. at 290.
40. 285 U.S. at 46, 52 S.Ct. at 290.
41. 5 U.S.C.A. $ 706(2)(F). See sec. 13.6, infra.
42. 5 U.S.C.A. $ 706(2)(E).
43. 5 U.S.C.A. $ 706(2)(A).
44. 745 F.2d 677 (D.C.Cir.1984).
45. Id. at 680. See Bank Holding Company Act, 12 U.S.C.A. $ 1848.
46. 745 F.2d at 683. In conclusion, the Court held that the distinction is largely semantic. "The distinctive function of paragraph (E) substantial evidence-what it achieves that paragraph (A) [arbitrary and capricious] does not-is to require substantial evidence to be found *within the record of closer-record proceedings* to which it exclusively applies." Id. at 684 (emphasis in original).
47. Id. at 683.
48. Id. The court also held that it could not apply a more rigorous review of the individual adjudicatory determination than it applied to the informal rulemaking decision which was a general determination with nationwide impact. Id. at 685.
49. See sec. 13.3, supra.
50. 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), rehearing denied 322 U.S. 769, 64 S.Ct. 1148, 88 L.Ed. 1595 (1944).
51. Id. at 131, 64 S.Ct. at 861 (emphasis added (Citations and footnotes omitted).
52. Id. at 122, 64 S.Ct. at 856.
53. Id. at 124, 64 S.Ct. at 857.
54. Id. at 127, 64 S.Ct. at 858.

55. Chevron, U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). See also, Japan Whaling Ass'n v. American Catacean Soc., 478 U.S. 221, 233-34, 106 S.Ct. 2860, 2867-68, 92 L.Ed.2d 166 (1986); United States v. Fulton, 475 U.S. 657, 666-67, 106 S.Ct. 1422, 1427-28, 89 L.Ed.2d 661 (1986); Hillsborough County, Fla. v. Automated Medical La., Inc., 471 U.S. 707, 714, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985), on remand 767 F.2d 748 (1985); Chemical Manufactures Ass'n v. NRDC, 470 U.S. 116, 125-25, 105 S.Ct. 1102, 1107, 84 L.Ed.2d 90 (1985).

56. See Council of Commuter Organizations v. Thomas, 799 F.2d 879, 886 (2d Cir. 1986).

57. Continental Air Lines, Inc. v. DOT, 843 F.2d 1444, 1449 (D.C.Cir. 1988). For reasonableness cases in general, see International Union, UMW v. FMSHRC, 840 F.2d 77, 81 (D.C.Cir. 1988); NRDC v. Thomas, 805 F.2d 410, 420 (D.C.Cir. 1986); FAIC Securities, Inc. v. United States, 768 F.2d 352, 361 (D.C.Cir. 1985). See also, Rust v. Sullivan, __ U.S. __ 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991).

58. See Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. on Reg. 283, 296 (1986).

59. See, e.g., Chevron v. NRDC, 467 U.S. at 844, 104 S.Ct. at 2782 (Justice Stevens speaks of the "considerable weight" courts should give to an agency construction); Lukhard v. Reed, 481 U.S. 368, 381, 107 S.Ct. 1807, 1815, 95 L.Ed.2d 328 (1987); FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 437, 106 S.Ct. 1931, 1938, 90 L.Ed.2d 428 (1986); Montana v. Clark, 749 F.2d 740, 745 (D.C.Cir. 1984), cert. denied 474 U.S. 919, 106 S.Ct. 246, 88 L.Ed.2d 255 (1985). For a discussion of the role that procedural contexts should play in the weight accorded agency interpretations of law, see Anthony, Which Agency Interpretations Should Bind the Courts and the Public?, 7 Yale J. on Reg. 1, 33 (1990).

60. 478 F.2d 615 (D.C.Cir. 1973).

61. Id. at 649.

62. 478 F.2d 615 (D.C.Cir. 1973), cert. denied 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974).

63. Id. at 394.

64. Id. at 394. On remand the Administrator reaffirmed the regulation and added a more complete response. This rule was later upheld in Portland Coment Ass'n v. Train, 513 F.2d 506 (D.C.Cir. 1975), cert. denied 423 U.S. 1025, 96 S.Ct. 469, 461 L.Ed.2d 399 (1975), rehearing denied 423 U.S. 1092, 96 S.Ct. 889, 47 L.Ed.2d 104 (1976).

65. See, e.g., 2 William H. Rodgers, Jr., Environmental Law. Air and Water, 36-45 (1986).

66. 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), on remand 685 F.2d 459 (D.C.Cir. 1982). This case is discussed in detail in chapter 2, sec. 2.2, supra.

67. The opinion, itself, however, leaves open the possibility that the agencies themselves may have additional procedures to assure meaningful judicial review. See, e.g., Independent United States Tanker Owners Committee v. Lewis, 690 F.2d 908 (D.C.Cir. 1982); Illinois v. United States, 666 F.2d 1066 (7th Cir. 1981), appeal after remand 698 F.2d 888 (1983); Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C.Cir. 1980), cert. denied 449 U.S. 1042, 101 S.Ct. 621, 66 L.Ed.2d 503 (1980); National Lime Ass'n v. EPA, 627 F.2d 416 (D.C.Cir. 1980). See also Howarth, supra note 8, at 892, noting that some lower courts have ignored the spirit of *Vermont Yankee,* citing, e.g. Connecticut Light and Power Co. v. NRC, 673 F.2d 525 (D.C.Cir. 1982) cert. denied, 459 U.S. 835, 103 S.Ct. 79, 74 L.Ed.2d 76 (1982); National Lime Ass'n v. EPA, 627 F.2d 416 (D.C.Cir. 1980); East Texas Motor Freight Lines, Inc. v. United States, 593 F.2d 691 (5th Cir. 1979); Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C.Cir. 1978). See generally, Note, Counter Revolution in the Federal Courts of Appeals-The Aftermath of *Vermont Yankee,* 15 U.Rich.L.Rev. 723-730 (1981).

68. 541 F.2d 1 (D.C.Cir. 1976), cert. denied 426 U.S. 941, 96 S.Ct. 2662, 49 L.Ed.2d 394 (1976).

69. Id. at 68 (footnotes omitted).

70. 401 U.S. at 404-05, 91 S.Ct. at 817-18.

71. Id. at 405, 91 S.Ct. at 818.

72. Id. at 408, 91 S.Ct. at 819.

73. Citizens to Preserve Overton Park, Inc. v. Volpe, 432 F.2d 1307 (6th Cir. 1970).

74. 401 U.S. at 412-13, 91 S.Ct. at 821-22.

75. Id. at 413, 91 S.Ct. at 822.

76. Id. at 416, 91 S.Ct. at 824.

77. Id.

78. Id. at 415, 91 S.Ct. at 823.

79. Id.

80. Id.

81. Id. at 420, 91 S.Ct. at 825.

82. See generally sec. 13.7, supra.

83. "[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." 401 U.S. at 416, 91 S.Ct. at 824. "[T]his inquiry into the facts if to be searching and careful" Id. butsee, NAACP v. FCC, 682 F.2d 993, n. 4 (D.C.Cir. 1982) (court specifically states that the "clear error of judgment" language in *Overton Park* was not to be equated with "clearly erroneous" standard in Rule 52 of the ERCP).

84. "[T]he ultimate standard of review is a narrow one." 401 U.S. at 416, 91 S.Ct. at 824.

85. Yet, it should be noted that prior to *Overton Park,* as early as 1968, 5 U.S.C.A. $ 553(c) was being invoked to demand an apparently more detailed agency explanation: 'We do not expect to agency to discuss every item of fact or opinion included in the submissions made to it in informal rule making. We do expect that, if the judicial review which Congress had thought it important to provide is to be meaningful, the 'concise general statement of ... basis and purpose' mandated by [5 U.S.C.A. $ 553(c)] will

enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." Automotive parts & Accessories Ass'n v. Boyd, 407 F.2d 330. (D.C.Cir. 1968).

For other cases arguably expending the APA concise statement requirement in informal rulemaking, see United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C.Cir. 1973), cert. denied 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974); Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C.Cir. 1972). See sec. 13.9.1, supra.

86. 5 U.S.C.A. $ 553(c).

87. Subsequently, the Supreme Court affirmed the *de facto* record requirement for informal agency actions in Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) discussed in detail supra in chapter 9, sec. 2. The Supreme Court also appeared to approve this same approach for judicial review of informal rulemaking in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defence Council, Inc., 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), on remand 685 F.2d 459 (D.C.Cir. 1982).

88. Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 294: AIR 1978 SC 597.