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# Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability

GREGORY L. OGDEN\*

*This article discusses three current trends in administrative law: delay reduction, increased public participation, and increased agency accountability. These trends are first discussed individually, isolated from the others; then the interaction between these divergent trends is explored. The author's conclusion is that delay reduction will often conflict with expanded participation and increased accountability. He suggests that conflicts among these trends can best be understood and dealt with by a system of goal analysis. Five general goals which administrative agencies should strive to effectuate are established. Some of these goals are then identified to the three different trends. This allows conflicts among the three trends to be analyzed from the perspective of conflicts in these basic goals. Professor Ogden suggests several integrating principles which can be applied to resolve the conflicts. Chief among these are requirements that agencies prioritize their goals and, to the extent such prioritizing*

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doesn't resolve the conflict, require agencies to make tradeoffs among conflicting goals. Finally amendments to the APA and legislative standards are suggested to implement this approach.

## I. INTRODUCTION<sup>1</sup>

Delay in administrative decisionmaking<sup>2</sup> is an intractable problem.<sup>3</sup> The Senate Committee on Governmental Affairs in a recent, major study stated that "[m]ost federal regulatory proceedings are characterized by seemingly interminable delays."<sup>4</sup> Agency delay adds additional costs and imposes additional burdens on the industries regulated and on the consuming and tax-paying public.<sup>5</sup> Were delayed decisionmaking the only problem facing American administrative agencies in the 1970's, the solution would be much simpler. However, that is not the case.<sup>6</sup> Dissatisfaction with administrative agencies is strong enough to have triggered two other powerful trends: expanded public access to, and public participation in, administrative agency proceedings, and a demand for increased accountability of the agencies to the Legislature and the public.<sup>7</sup>

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1. This article is the final part of a study by the author on the problem of administrative delay. Other aspects of this subject are discussed in Ogden, *Judicial Control of Administrative Delay*, 3 U. DAY. L. REV. 345 (1978) [hereinafter cited as *Judicial Control*] and Ogden, *Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedures, Procedural Reform, and Legislative Oversight*, 4 U. DAY. L. REV. 71, (1979) [hereinafter cited as *Administrative Delay*].

2. The Administrative Procedure Act [hereinafter cited as APA] defines *agency action*. Administrative Procedure Act § 2, 5 U.S.C. § 551(13) (1966). It states "'agency action' includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; . . . ." For purposes of this article, *decisionmaking* will be used in this sense.

3. See STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., IV STUDY ON FEDERAL REGULATION, DELAY IN THE REGULATORY PROCESS (Comm. Print 1977) [hereinafter cited as IV RIBICOFF REPORT].

4. IV RIBICOFF REPORT *supra* note 3, at v.

5. IV RIBICOFF REPORT *supra* note 3, at 8-10.

6. See SCHWARTZ, ADMINISTRATIVE LAW 49-72 (1977) [hereinafter cited as SCHWARTZ] in which the author highlights current efforts to reform the administrative process; e.g., sunset laws, in particular the Colorado sunset statute, *id.* at 59-63, enacted in 1976 and cited as COLO. REV. STAT. § 24-34-104 (1976).

7. For a discussion of the public access and public participation trend see Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969); Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972); Leighton, *The Consumer Advocacy Agency Proposal . . . Again*, 27 AD. L. REV. 149 (1975); Lenny, *The Case for Funding Citizen Participation in the Administrative Process*, 28 AD. L. REV. 483 (1976); Murphy & Hoffman, *Current Models for Improving Public Representation in the Administrative Process*, 28 AD. L. REV. 391 (1976); Williams, *Public Participation in Locating Facilities Dedicated to Public Use*, PUB. UTIL. FORT., Sept. 16, 1971, at 101; Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702 (1972); and Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 HARV. L. REV. 1815 (1975). See also, STAFF OF HOUSE SUBCOMM. ON

This article discusses the interrelationship between current efforts to reduce administrative delay,<sup>8</sup> to expand public participation, and to increase agency accountability to the legislature and

OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94th CONG., 2d SESS., FEDERAL REGULATION AND REGULATORY REFORM 469-72 (Comm. Print 1976) [hereinafter cited as the MOSS REPORT].

STAFF OF SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, III STUDY ON FEDERAL REGULATION, PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, S. RES. 71, 95th CONG., 1st SESS. at vii-xiv (1977), [hereinafter cited as III RIBICOFF REPORT]; Houseman, *Recent Developments on Legislative Proposals to Improve Access to Federal Courts and Administrative Agencies*, 11 CLEARINGHOUSE REV. 25 (1977); Trister, *Legislative Proposals to Improve Access to Federal Courts and Administrative Agencies*, 10 CLEARINGHOUSE REV. 1023, 1036-40 (1977).

The trend has developed sufficiently for current administrative law casebooks to discuss the subject of public participation. See SCHWARTZ, *supra* note 6, at 391-404, discussing, *inter alia*, the case of United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir. 1966); W. GELLHORN, C. BYSE, AND P. STRAUSS, ADMINISTRATIVE LAW § 3, at 634-59 (7th ed. 1979) [hereinafter cited as GELLHORN, BYSE AND STRAUSS]; R. STEWART AND S. BREYER, ADMINISTRATIVE LAW AND REGULATORY POLICY 1013-58 (1979); and G. ROBINSON AND E. GELLHORN, THE ADMINISTRATIVE PROCESS 808-24 (1974) [hereinafter cited as ROBINSON AND GELLHORN]. See also DAVIS, *Public Participation and Ways of Encouraging It*, in ADMINISTRATIVE LAW TREATISE § 6.33, at 601-03 (2d ed. 1978). On accountability see SCHWARTZ, *supra* note 6, at 23.

8. On the subject of administrative delay, see Prettyman, *Reducing the Delay in Administrative Hearings*, 39 A.B.A.J. 966 (1953); Davis, *Administrative Law of the Seventies* § 8.08 (1976). See also Cramton, *Causes and Cures of Administrative Delay*, 58 A.B.A.J. 937 (1972); Freedman, *The Uses and Limits of Remand in Administrative Law: Staleness of the Record*, 115 U. PA. L. REV. 145 (1966); Kaufman, *Have Administrative Agencies Kept Pace with Modern Court-Developed Techniques Against Delay? - A Judge's View*, 12 AD. L. BULL. 103 (1959-60); Gellhorn, *Administrative Procedure Reform: Hardy Perennial*, 48 A.B.A.J. 243 (1962); Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968); Long, *Administrative Proceedings: Their Time and Cost Can Be Cut Down*, 49 A.B.A.J. 833 (1963); Rothman, *Four Ways to Reduce Administrative Delay*, 28 TENN. L. REV. 332 (1961); Note, *Judicial Acceleration of the Administrative Process: The Right to Relief From Unduly Protracted Proceedings*, 72 YALE L.J. 574 (1963); Comment, *Judicial Control of Administrative Inaction: Environmental Defense Fund, Inc. v. Ruckelshaus*, 57 VA. L. REV. 676 (1971). See also Tomlinson, *Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing or Clearance Functions and Rulemaking*, prepared for the ACUS. This report represents only the views of the author, not necessarily those of the Conference. Recommendation 78-3: Time Limits on Agency Action, The Administrative Conference of the United States, 1 C.F.R. § 305.78-3 (1979); G. ROBINSON AND E. GELLHORN, *supra* note 7, at 830-36; GELLHORN AND BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS 29-31 (6th ed. 1974); Marzloff, *Delay in Review of Initial Decisions: The Case for Giving More Finality to the Findings of Fact of the Administrative Law Judge*, 35 WASH. & LEE L. REV. 393 (1978); Morgan, *Toward a Revised Strategy for Ratemaking*, 1978 U. ILL. L.F. 21 (1978); Note, *Administrative Law - Right to Administrative Hearing: Within Ninety Days of Request by Social Security Disability Benefit Claimant*, 82 DICK. L. REV. 810 (1978); Note, *Administrative Delay in Providing Hearings for Social Security Disability*, 6 HOFSTRA L. REV. 565 (1978).

the public.<sup>9</sup> First, the three trends, delay reduction, participation expansion, and increased accountability, will be described separately. Then the interaction between the trends will be explored. Three positions on delay and public participation will be examined. Included are the positions that delay reduction impedes participation expansion, that delay reduction enhances participation expansion, and that delay reduction does not significantly affect participation expansion. A similar examination of the interaction of delay reduction and increased accountability, will be undertaken. Thereafter, the goals served and standards utilized to implement these trends will be compared and contrasted.

The thesis of this article is that achievement of delay reduction may be compromised by achievement of expanded participation and increased accountability. Similarly, achievement of participation and accountability goals can be neutralized because of delay reduction efforts. This article will conclude with discussion of possible solutions, including tradeoffs among disparate goals and standards, integrating principles at the agency level and on judicial review, and methods of structuring citizen and legislative intervention in the administrative process.

## II. ADMINISTRATIVE REFORM TRENDS

### A. Reducing Administrative Delay

The first trend in administrative reform efforts to be examined is one which stems from a widespread dissatisfaction with the intractable problem of administrative delay.<sup>10</sup> Typical responses to this problem have included judicial enforcement of timeliness standards<sup>11</sup> and advocacy of adequate budgetary and personnel resource allocations to agencies.<sup>12</sup> Additionally, several authori-

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9. Professor Schwartz explores the interrelationship between the processes of expanding public participation and reducing administrative delay in SCHWARTZ, *supra* note 6, at 391-404. The interrelationship of delay reduction and accountability of agencies to Congress is indicated in IV RIBICOFF REPORT, *supra* note 3, at 182.

10. The scope of the problem is discussed in *Administrative Delay* *supra* note 1, at 77-78.

11. For a discussion of jurisdiction, substantive standards and remedies see *Judicial Control*, *supra* note 1, at 348-53, 357-85; for a discussion of timeliness standards, procedural review, reform, and legislative oversight see *Administrative Delay*, *supra* note 1, at 73-136.

12. See W. GELLHORN AND C. BYSE, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 29-31 (6th ed. 1974), commenting on *NLRB v. Maestro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965). Professor Gellhorn has reiterated these comments in a letter to the author dated November 21, 1978. It states:

[S]ometimes delay is simply a factor of inadequate staffing. I recall having recorded the fact, some years ago, that at a moment when the National Labor Relations Board was being particularly criticized for its lethargy in pursuing charges of unfair labor practices, the appropriations for the

ties have made more specific reform recommendations.<sup>13</sup> For example, in the Ribicoff report eleven specific recommendations<sup>14</sup> aimed at reducing administrative delay are made. Similarly, The Administrative Conference of the United States (ACUS) formulated a response to the delay problem.<sup>15</sup> After acknowledging the tenacity of the problem,<sup>16</sup> the Conference adopted several specific recommendations. For example, it was suggested that "reasonable timetables or deadlines can help reduce administrative delay. Generally it is preferable that such limits be established by the agencies themselves, rather than by statute."<sup>17</sup>

In this regard, Congress has drafted statutes with relatively rigid timeliness standards contained in them. Of particular note are the Speedy Trial Act,<sup>18</sup> the Freedom of Information Act,<sup>19</sup> the

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agency and, therefore, the personnel resources available to it were being most severely limited.

13. See *Administrative Delay*, *supra* note 1, at 114-29.

14. IV RIBICOFF REPORT, *supra* note 3, at xiii-xv. It states generally that these eleven proposals are: (1) use informal rulemaking more frequently; (2) speed up decisions in such cases as "rate regulations" and "technical decisions," through substitution by APA amendment of a "modified procedure" for "formal adjudicatory procedures;" (3) amend the APA to allow restriction of oral proceedings in adjudicatory hearings; (4) strengthen the penalties available to ensure compliance by parties with agency information requests; (5) devise procedures that speed up the agency review process; (6) alter the process of recruiting Administrative Law Judges to get the best people available; (7) amend the APA to require agency development of deadlines for the completion of decisionmaking processes; (8) enhance the quality of "agency leadership and management;" (9) require agencies to develop "generic standards" and to state their "goals and priorities;" (10) establish a separate agency planning unit; and (11) strengthen legislative oversight of agency "goals and priorities." *Administrative Delay*, *supra* note 1, at 114-29.

15. *Time Limits on Agency Actions*, *The Administrative Conference of the United States*, 1 C.F.R. § 305.78-3 (1979).

16. *Id.* It stated:

Eliminating undue delay in administrative procedures has long been a public concern. . . . Frustration over the inability of agencies and courts to speed the course of administrative proceedings has occasionally led Congress to adopt a somewhat mechanistic approach to the problem. . . . Congressional expectations that statutory time limits would be effective have remained largely unfulfilled. . . .

17. *Id.* The conference's recommendations as to time limits are divided into seven categories.

18. 18 U.S.C. §§ 161-3174 (1976). The Speedy Trial Act applies to this discussion by analogy only because it governs criminal litigation. Section 3161(b) states in relevant part: "Any information or indictment charging an individual with the commission of an offense shall be filed *within thirty days from the date on which* such individual was arrested or served with a summons in connection with such charges. . . ." (emphasis added). *Administrative Delay*, *supra* note 1, at 76-77.

19. The FOIA requires an agency covered by the act to "determine *within ten days* (excepting Saturdays, Sundays, and legal public holidays) *after the receipt of*

Federal Privacy Act,<sup>20</sup> and the Federal Open Meetings Act (also known as the Government in the Sunshine Act),<sup>21</sup> all of which have specific timeliness standards whose purpose is primarily to reduce delay through stringent efficiency standards. Unfortunately, however, the effectiveness of many of these statutes may be impaired significantly by "escape clauses."<sup>22</sup>

Another approach to delay reduction has been to divide the solutions along functional lines by decisionmaking activity such as licensing. Professor Morgan utilized this approach in a recent article<sup>23</sup> wherein he discussed the causes of ratemaking delay<sup>24</sup> and

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*any such request* whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore. . . ." (emphasis added). Freedom of Information Act § 1, 5 U.S.C. § 552(6)(A)(i) (1976). The Act also provides, similarly, that an agency covered by the Act must "make a determination with respect to any appeal *within twenty days* (excepting Saturdays, Sundays, and legal public holidays) *after the receipt* of such appeal. . . ." (emphasis added). 5 U.S.C. § 552(6)(A)(ii) (1976).

20. Similar provisions are contained in the Federal Privacy Act. It states: Agencies covered by the act must permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal and *not later than 30 days* (excluding Saturdays, Sundays, and legal public holidays) *from the date* on which the individual requests such review, *complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30 day period. . . .* (emphasis added).

Federal Privacy Act § 1, 5 U.S.C. 552a(d)(3) (1974).

21. The Government in the Sunshine Act provides, in part, that "[e]ach agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section [enacted September 13, 1976] . . . promulgate regulations to implement the requirement of subsections (b) through (f) of this section. . . ." Government in the Sunshine Act § 3a, 5 U.S.C. § 552b(g) (1976). For a discussion of the Act, see Note, *The Government in the Sunshine Act - an Overview*, 1977 DUKE L.J. 565 (1977).

22. See *Administrative Delay*, *supra* note 1, at 76-77.

23. Morgan, *Toward a Revised Strategy for Ratemaking*, 1978 U. ILL. L.F. 21 (1978). Examining the ratemaking decision process at the Interstate Commerce Commission (ICC), the Federal Communications Commission (FCC), the Civil Aeronautics Board (CAB), and the Federal Energy Regulatory Commission (FERC) he states:

This article concerns itself with delay in a particular context—that of ratemaking by federal agencies. Ratemaking delay is neither more significant, more pervasive, nor even more troublesome than delay in other areas of administrative activity. However, while the causes and consequences of delay may be similar across many kinds of administrative proceedings, procedures are sufficiently different and consequences sufficiently specialized that separate examination of ratemaking has proved useful.

*Id.* at 23.

24. Ratemaking refers to agency setting of prices for regulated carriers. See SCHWARTZ, *supra* note 6, at 317. Morgan states four causes of ratemaking delay: 1) "Complexity of substantive issues;" 2) "agency preoccupation with other matters" or problems with priorities; 3) parties who benefit by delay don't discourage untimely decisionmaking; and 4) "conscious use of delay as a regulatory tool" to create an "incentive for efficiency." *Id.* at 24-26.

advocated solutions for those problems.<sup>25</sup> His study was the basis for a recommendation to the ACUS.<sup>26</sup> Similarly, Professor Verkuil advocates a unified administrative procedure in which the use of procedural incidents such as cross-examination will vary according to the type of decisionmaking activity involved.<sup>27</sup>

In brief summary, therefore, it can be seen that delay reduction is a well established current trend. This fact is evidenced by the existence of specific recommendations made by various authorities aimed at that end.

### *B. Expanding Public Access to, and Citizen Participation in Administrative Agency Proceedings*

The next trend to be discussed is that of expanding public access to, and citizen participation in, administrative agency proceedings. This trend is the result of dissatisfaction with administrative agencies, particularly federal regulatory agencies. This section will first look at several illustrative examples of this dissatisfaction. It will then examine the trend resulting therefrom, focusing on efforts in the following areas: 1) expanding public access to governmental information and to governmental agency meetings; 2) enhancing citizen participation in agency decisionmaking; and 3) easing "standing" requirements and other obstacles to judicial review. It should be noted that some of the developments here are also cognizable as attempts to increase agency accountability to the legislature and the public. Those developments will be discussed, hopefully with a minimum of overlap, in the following section.

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25. Morgan articulates three solutions for ratemaking delay; 1) "increased use of informal relemaking;" 2) "periodic submission of relevant data;" 3) increasing use of settlement as a means of deciding rate cases. *Id.* at 22, 55-76.

26. Reduction of Delay in Ratemaking Cases, The Administrative Conference of the United States, 1 C.F.R. § 305.78-1 (1979). The ACUS adopted his recommendation and noted that "(b) Delay in the ratemaking process occurs chiefly at two points: (1) Developing the underlying data, a task shared by the proposer of rates, the agency staff, and other participants in the proceedings, and (2) writing and issuing opinions to support the agency's decision when finally made." *Id.*

27. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978). Professor Verkuil identifies six types of decisionmaking activities: 1) imposition of sanctions; 2) ratemaking, licensing and other regulatory decisions; 3) environmental and safety decisions; 4) awards of benefits, loans, grants, and subsidies; 5) inspections, audits, and approvals; and 6) planning and policymaking. *Id.* at 294-303.



## 1. Dissatisfaction with Administrative Agencies

The third Ribicoff report notes, with a degree of clarity, some reasons for dissatisfaction with administrative agencies, and states that public participation in agency proceedings could improve the quality of agency decisionmaking.<sup>28</sup> The report emphasized that regulatory agencies are often "captured" by the industries that they represent. Additionally, it is pointed out, the agencies frequently tend to reflect the interests of these regulated industries, rather than those of the public.<sup>29</sup>

The report goes on to explicitly suggest that expanded public participation would be an effective medicine for the many ills of the administrative process. The report notes a need for more balanced representation so that members of the public can counter-balance the well financed industry lobbyists, who frequently are the only interests represented before the agencies.<sup>30</sup> The Ribicoff report concludes that greater public participation would improve the quality of administrative agency decisions, and would enhance regulation in the public interest.<sup>31</sup>

Similarly, other writers, reflecting dissatisfaction with the lack of representation of consumer interests,<sup>32</sup> have suggested a variety of solutions.<sup>33</sup> Dean Freedman, taking a deeper look at the problem, suggests that the administrative process is in a state of recurring and enduring crisis which, "is animated by a strong and persisting challenge to the basic legitimacy of the administrative process itself."<sup>34</sup>

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28. III RIBICOFF REPORT, *supra* note 7, at 1-2. The lack of public participation is criticized in Halpern & Cunningham, *Reflection on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869 (1971); Lazarus and Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971); and Nall, *The Economics and Politics of Regulation*, 57 VA. L. REV. 1016 (1971).

29. III RIBICOFF REPORT, *supra* note 7, at 1-2.

30. *Id.* at 2.

31. *Id.* at vii. It states:

(1) Full public participation in regulatory process is essential if regulatory agencies are to effectively discharge their mandate to regulate in the public interest.

(2) Increased public participation and input can provide regulators with a greater range of ideas and information, broaden the active constituency of the agency, and place greater emphasis on public interest concerns and viewpoints. A lack of such public participation, on the other hand, requires regulators to rely too heavily on input from the industry they are charged with regulating.

32. See RALPH NADER'S CENTER FOR STUDY OF RESPONSIVE LAW, (J. Michael and R. Fort ed. 1974); a 950 page book designed, according to Ralph Nader's introductory statements, to aid citizen access to federal administrative agencies.

33. *Id.* at 4-9.

34. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 6-10 (1978). Dean Freedman suggests four sources of legitimacy that would, if perceived by the public as resulting from the administra-

## 2. Expanding Public Access to Governmental Information and to Governmental Agency Meetings

Since "expanded public access" appears to be a popular and outwardly attractive response to the question of how to increase the effectiveness of administrative agencies, it would seem worthwhile to examine this response in some detail.<sup>35</sup>

Three federal statutes—the Freedom of Information Act (FOIA),<sup>36</sup> the Privacy Act,<sup>37</sup> and the Government in the Sunshine Act<sup>38</sup>—embody the trend<sup>39</sup> toward expanded public access to gov-

ernment process, reduce public dissatisfaction with administrative agencies. These four sources are: 1) "an indispensable position in the constitutional scheme of government;" 2) "political accountability;" 3) "effective performance;" and 4) "fair procedure." Freedman points out that public perception of these four sources would ensure the legitimacy of administrative agencies. *Id.* at 11.

35. See, e.g., *The Regulators, Federal Commission, Draw Increasing Fire, Called Inept and Costly*, Wall St. J., Oct. 9, 1974 at 1, col. 1.

36. 5 U.S.C. § 552 (1979). The case law and literature on the FOIA are vast and beyond the scope of this article. Some of the articles recently published are: Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 GEO. L.J. 103 (1978); Cox, *A Walk Through Section 552 of the Administrative Procedure Act: The Freedom of Information Act, the Privacy Act, and The Government in the Sunshine Act*, 46 U. CIN. L. REV. 969 (1978); Singleton and Hunter, *Statutory and Judicial Responses to the Problem of Access to Government Information*, 1978 D.C.L. REV. 51 (1978); Note, *Developments Under the Freedom of Information Act—1977*, 1978 DUKE L.J. 301 (1978) (9th Annual Administrative Law Issue 1978).

37. 5 U.S.C. § 552a (1979). See also Belair, *Agency Implementation of the Privacy Act and the Freedom of Information Act: Impact of the Government's Collection, Maintenance, and Dissemination of Personally Identifiable Information*, 10 J. MAR. J. 465 (1977); Gotherman, *Ohio Privacy Act*, 7 CAP. U.L. REV. 177 (1977); Recchie and Wayland, *Ohio's Privacy Act: An Analysis*, 10 U. TOL. L. REV. 159 (1979); Cox, *A Walk Through Section 552 of the Administrative Procedural Act: The Freedom of Information Act, The Privacy Act, and the Government in the Sunshine Act*, 46 U. CIN. L. REV. 969 (1978); Ward, *The Public's Access to Government—Freedom of Information, Privacy and Sunshine Acts: An Address*, 70 L. LIB. J. 509 (1977).

38. 5 U.S.C. § 552b (1979). Legal periodicals discussing state and federal "Sunshine or Opening Meeting Acts" include: Cox, *A Walk Through Section 552 of the Administrative Procedure Act: The Freedom of Information Act, The Privacy Act, and The Government in the Sunshine Act*, 46 U. CIN. L. REV. 969 (1978); Marbles-tone, *The Relationship Between the Government in the Sunshine Act and the Federal Advisory Committee Act*, 36 FED. B.J. 65 (1977); Markham, *Sunshine on the Administrative Process: Wherein Lies The Shade*, 28 AD. L. REV. 463 (1976); Recchie, *Government in the Sunshine: Open Meeting Legislation in Ohio*, 37 OHIO S.L.J. 497 (1976); Sussman, *Illinois Open Meetings Act: A Reappraisal*, 1978 SO. ILL. U.L.J. 193 (1978); *Administrative Law—Government in the Sunshine Act*, 1978 ANN. SURVEY AM. L. 305 (1978); Comment, *Where's the Sunshine? Inadequacy of Pennsylvania's Open Meeting Law*, 82 DICK. L. REV. 719 (1978); Note, *The Government in the Sunshine Act—An Overview*, 1977 DUKE L.J. 565 (1977); Comment, *Government in the Sunshine Act: A Danger of Overexposure*, 14 HARV. J. LEGIS. 620

ernment information and to governmental agency meetings. All of these are codified in Section 552 of the Administrative Procedure Act.<sup>40</sup> Moreover, a number of states have enacted Sunshine or open meeting laws.<sup>41</sup> Acts such as these attempt, respectively, to expand the public availability of governmental information,<sup>42</sup> to

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(1977); Comment, *The Federal "Government in the Sunshine Act": A Public Access Compromise*, 29 U. FLA. L. REV. 881 (1977).

39. Several articles treat these statutes as a trilogy. See, e.g., Cox, *A Walk Through Section 552 of the Administrative Procedure Act: The Freedom of Information Act, The Privacy Act, and The Government in the Sunshine Act*, 46 U. CIN. L. REV. 969 (1978); Ward, *The Public's Access to Government - Freedom of Information, Privacy, and Sunshine Acts: An Address*, 70 L. LIB. J. 509 (1977).

40. The three statutes are internally integrated. For example, the FOIA exemptions contained in 552(b) are, with three exceptions, the same exemptions as are contained in the Sunshine Act, 5 U.S.C. § 552b(c) (1979). The identical exemptions are: 1) national defense, 5 U.S.C. § 552b(1) and c(1); 2) internal personnel, 5 U.S.C. § 552b(2) and c(2); 3) exempted from disclosure by statute, 5 U.S.C. § 552b(3) and c(3); 4) trade secrets, 5 U.S.C. § 552b(4) and c(4); 5) personal information if invades personal privacy, 5 U.S.C. § 552b(6) and c(6); 6) law enforcement records, 5 U.S.C. § 552b(7) and c(7); and 7) financial institution regulatory reports, 5 U.S.C. § 552b(8) and c(8).

Similarly, the Privacy Act is coordinated with the FOIA in that 5 U.S.C. § 552a(b) (1979) *conditions of disclosure*, contains a specific exemption allowing nonconsensual disclosure when, (b)(2), "required under section 552 of this title," one of eleven exemptions. Absent one of the exemptions, 5 U.S.C. § 552a(b) (1974) *conditions of disclosure*, requires consent. It states: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains. . . ." *Id.*

All three statutes utilize a common and unique definition of the term "agency" which is defined differently than in 5 U.S.C. § 551(1). The common definition is contained in FOIA, and is incorporated into the Privacy Act, and into the Sunshine Act.

Finally, the Privacy Act provides under 5 U.S.C. § 552a(a) (1979) that the FOIA exemptions cannot be utilized offensively to deny an individual access to records about himself authorized under the Act. 5 U.S.C. § 552a(d) (1979). Under the Sunshine Act, requests to copy or inspect transcripts, recordings or minutes of closed meetings under subsection (f) are governed by the slightly different exemptions of 5 U.S.C. § 552b(c) (1979) rather than the 5 U.S.C. § 552(b) (1979) exemptions. See also 5 U.S.C. § 552b(k) (1979).

41. See, e.g., 12 ARIZ. REV. STAT. §§ 431-431.09 (1978) and CAL. GOV'T CODE § 9027 (West Supp. 1979).

42. The FOIA states that:

Each agency shall make available to the public information as follows: (1) required Federal register publication of five categories of information including 'substantive rules of general applicability,' general policy statements and agency interpretations, and rules of procedure (1)(A)-(E) & (2). Each agency, in accordance with published rules, shall make available for public inspection and copying (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and (C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and offered for sale.

Freedom of Information Act § 1, 5 U.S.C. § 552 (1979).

increase individual access to personal records kept by government agencies (while preventing some unauthorized disclosures),<sup>43</sup> and to ensure that agencies conduct their official business in meetings open to the public (except when there is statutorily sanctioned justification for a private meeting).<sup>44</sup> Their overall purpose is to ensure agency accountability to the public while preventing unfairness and aiding public participation in agency decisionmaking. This purpose is achieved by providing information on governmental activities and by affording opportunity for citizen monitoring of agency business meetings.<sup>45</sup>

The importance of openness as a protection against arbitrary action has been noted by Professor Davis. He states, "one valuable weapon against arbitrary action is openness."<sup>46</sup> He also notes that "although administrative hearings are generally open, *more than 90 per cent of the American administrative process is behind*

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43. The Privacy Act requires that individuals be allowed on request to review records on them compiled by governmental agencies. Privacy Act of 1966 § 1, 5 U.S.C. § 552a(d)(1) (1979). It provides several safeguards designed to protect against the unfair collection or use of government records against individuals including: 1) opportunities for the individual to request correction or amendment of a record held by an agency (5 U.S.C. § 552a(d)(2)-(5)); 2) limiting collection of information by government about individuals to "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President" (5 U.S.C. § 552a(e)(1)); 3) civil remedies for violations of the Act (5 U.S.C. § 552a(g)); 4) prohibition on nonconsensual disclosure of information about an individual with, unfortunately, eleven exemptions (5 U.S.C. § 552a(b)); and 5) criminal penalties for some violations of the Act including willful unauthorized disclosure of information (5 U.S.C. § 552a(i)). "Records" are defined in 5 U.S.C. § 552a(a)(4):

The term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history, and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

44. The Sunshine Act § 3, 5 U.S.C. § 552a(4) (1979), requires that "[e]xcept as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation." 5 U.S.C. § 552a(b); subsection (c) contains ten exemptions, and the Act applies only to two-or-more-member collegial body agencies. 5 U.S.C. § 552a(a)(1) excludes most cabinet level agencies. "Meetings" are defined in 5 U.S.C. § 552a(a)(2) and require "deliberations" by agency members on "official agency business." 5 U.S.C. § 552b (1979).

45. Openness in government is an important check on unfairness and arbitrary action. Justice Brandeis put it succinctly: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933) quoted in DAVIS, *ADMINISTRATIVE LAW, CASES—TEXT-PROBLEMS* 519 (6th ed. West, 1977).

46. DAVIS, *supra* note 45, at 518.

*closed doors*, even though the need for openness as a check upon arbitrariness is especially strong when discretionary action is taken without hearings.”<sup>47</sup> The reference here is to informal discretionary action, the “lifeblood” of the administrative process.<sup>48</sup>

### 3. Enhancing Citizen Participation in Agency Decisionmaking

It is generally recognized that expanded public participation in regulatory agency proceedings would produce a number of beneficial results. Such results would include well-balanced administrative decisions, representation of currently unrepresented interests, and increased public acceptance of, and confidence in, administrative decisions.<sup>49</sup> To achieve such an expansion, how-

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47. *Id.* at 519 (emphasis added).

48. *Id.* at 440. Examples of the types of actions Davis calls “discretionary” include a prosecutor’s choice whether or not to prosecute, or a policeman’s choice whether or not to arrest. . . . Professor Davis’ work in this area is brilliant. His major work on this subject is DAVIS, *DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY* (1969). In the preface of this book he notes:

I think the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism influence decisions, and where the imperfections of human nature are often reflected in the choices made.

*Id.* at v. See also Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

49. STAFF OF HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, 94th Cong., 2d Sess., *REPORT ON FEDERAL REGULATION AND REGULATORY REFORM*, (Comm. Print, 1976) [hereinafter referred to as the MOSS REPORT]. The MOSS REPORT strongly supports the need for expanded public participation and the mechanism by which to achieve it. The report states: “It is widely perceived that many federal regulatory agencies are closely identified with the industries they regulate.” *Id.* at 474. The MOSS REPORT recommends four ideas to enhance public participation. These are the consumer advocacy agency, the Office of Public Counsel (FCC, FPC, ICC), direct funding of intervenor’s participation costs, and expanded information about agency proceedings as well as reduction of costs of participation. The report rejects fee shifting as a recommendation because of insufficient standards, contingent nature of the fees, and uncertainty of public groups as to reimbursement. *Id.* at 475-83.

The ability of agencies so inclined to encourage public participation and pay for the cost of it is made easier by an opinion of the Comptroller General, dated May 10, 1976, in which it is stated that nine agencies have discretion to *encourage* and *fund* citizen participation in their decisionmaking processes consistent with their current statutory schemes. The nine agencies are the FCC, FTC, FPC, ICC, CPSC, SEC, FDA, EPA, and NHTSA. *Id.* at 599-602. See also discussion of experience of FTC under § 202(a) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act with funding citizen participation and in particular the hearing aid rulemaking proceeding. *Id.* at 101-09.

Lenny, *The Case For Funding Citizen Participation in the Administrative Process*, 28 AD. L. REV. 483, 491-93 (1976). Other benefits would include: 1) encouraging agency personnel to be more vigorous in their work; 2) greater articulation of administrative standards and reasoning; 3) an important double check on health and safety related regulations; 4) agency accountability; 5) citizen redress of grievances caused by federal agencies; 6) check on government illegalities.

ever, would require a confrontation with those obstacles to public participation which currently exist.

According to the third Ribicoff report, these obstacles include cost barriers and administrative barriers. With regard to the cost factor, the regulated industries dominate the proceedings not only in the level of participation, but also in the resources committed. Indeed, the cost involved is the primary reason that citizen representatives have been outmatched by industry.<sup>50</sup> Additionally, public participation may be severely hampered by such "administrative obstacles" as delay, inadequate notice of pending proceedings, inadequate time, agency use of informal negotiations with the regulated industries, and lack of uniform intervention standards.<sup>51</sup>

Recommendations for the solution of these problems have come from varied sources. For example, the authorizing statute for the Consumer Product Safety Commission contained a number of regulatory reform ideas.<sup>52</sup>

The Ribicoff report recommended changes in eight categories, all of which would enhance public participation. These recommendations include: 1) expanded intervention in agency proceedings; 2) elimination of administrative obstacles; 3) the establishment of an independent consumer agency; 4) the establishment of public counsel offices in regulatory agencies; 5) compensation to citizen intervenors for the cost of participation; 6) more effective handling of public complaints; 7) placement of public interest representatives on advisory committees; and 8) agency review of regulations.<sup>53</sup> Adoption of these proposals would en-

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50. III RIBICOFF REPORT, *supra* note 7, at vii, 12-22.

51. *Id.* at vii-ix, 41-60.

52. The MOSS REPORT, *supra* note 49, at 195-242. The report is critical of the effectiveness of the CPSC under its statutory mandate, but notes the innovations in regulatory procedures brought about in the CPSC statute. The report states:

The importance of this legislation lies not merely with its coverage of a pervasive field of commercial activity for the first time. Of equal importance is the innovative method of regulation it employs. At the time of its enactment, the Consumer Product Safety Act represented in many respects the most advanced congressional thinking on the techniques of Federal regulation. The Act incorporated a number of concepts of regulatory reform. Indeed, many current proposals for regulatory reform appear to be its progeny.

*Id.* at 195.

53. III RIBICOFF REPORT, *supra* note 7, at 41-162. See also Rody, *Governmental Financing of Citizen Participation in Federal Agency Proceedings: A Practitioner's Outline*, 31 AD. L. REV 81 (1979).

hance public participation at the agency level.<sup>54</sup>

#### 4. Easing Standing Requirements and Other Obstacles to Judicial Review

Efforts have also been made to reform standing requirements and to expand public access to judicial review of agency decisions. The third Ribicoff report discussed a number of recent United States Supreme Court "standing" cases<sup>55</sup> and criticized what it felt was the Court's unduly restrictive view of standing requirements. The report made several recommendations aimed at easing standing requirements.<sup>56</sup> Expanding access of citizens to judicial review of administrative action is equally important since reviewing courts serve (in part) to protect citizens from unfairness, arbitrary action, and mistreatment at the hands of administrative agencies. That protective purpose is clearly illustrated in the standards of review contained in Section 706 of the APA.<sup>57</sup>

The Moss report recommends relaxing class action require-

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54. Recent legal periodical literature discussing public participation, in addition to the articles cited *supra* note 7, includes: Goodman, *The Role of Consumer Advocacy Before the Public Utilities Commission of Ohio*, 8 CAPITAL U.L. REV. 213 (1978); Mogel, *Award of Attorney's Fees in Administrative Proceedings:—Is it in the Public Interest*, 49 MISS. L.J. 27 (1978); Comment, *Inducement of Public Participation in Administrative Proceedings Through the Award of Attorney's Fees*, 30 BAYLOR L. REV. 785 (1978); Note, *Funding Public Participation in Agency Proceedings*, 27 AM. U.L. REV. 981 (1978).

55. III RIBICOFF REPORT, *supra* note 7, at vii, 25-50, discusses, *inter alia*, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Simon v. Eastern Kentucky Welfare Rights Organization 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1974); United States v. SCRAP, 412 U.S. 669 (1972); Association of Data Processing Services Organization, Inc. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968). See also Note, *Recent Standing Cases and a Possible Alternative Approach*, 27 HASTINGS L.J. 213 (1975); Note, *Selection of Administrative Intervenors: A Reappraisal of the Standing Dilemma*, 42 GEO. WASH. L. REV. 991 (1974); Note, *Standing to Challenge Administrative Action: A Balancing Approach*, 25 U.C.L.A. L. REV. 1358 (1978).

56. III RIBICOFF REPORT, *supra* note 7 at vii, 25-50.

57. 5 U.S.C. § 706 (1977). It states (in part):

The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to Section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. . . .

ments by congressional action to make it easier for citizens with small economic interests at stake to aggregate their claims.<sup>58</sup> The report is critical of two United States Supreme Court decisions, *Zahn v. International Paper Co.*<sup>59</sup> and *Eisen v. Carlisle and Jacquelin*<sup>60</sup> for respectively requiring each plaintiff in a class to satisfy the requirement that a claim exceed \$10,000 (*Zahn*) and requiring the representative plaintiff to assume the cost of notifying the class members (*Eisen*).<sup>61</sup> In response to those decisions, the report recommends amending the statutes to allow aggregation of class members' claims to satisfy the federal amount in controversy requirements, and liberalizing notice requirements "so that notice by publication is adequate where the number of class members is large and where a significant number of individual class members receive personal notice."<sup>62</sup> The Moss report also recommends the liberalization of standing requirements, expanded use of small claims courts, and specific provision for class relief in, for example, breach of consumer warranty cases "where the amount of damages and nature of the loss make individual actions impractical."<sup>63</sup>

### *C. Increasing the Accountability of the Agencies to the Legislature and the Public*

This trend, like the others, is the result of current dissatisfaction with the administrative process. This section will discuss that dissatisfaction and the specific efforts in several areas to strengthen agency accountability. These areas include: 1) sunset laws; 2) legislative veto; 3) legislative oversight reform; 4) open government acts (FOIA, Privacy Act, Open Meetings ("Sunshine") Act); and 5) expanded public participation. The discussion will more heavily emphasize the first three developments. However, the purposes of the last two will also be discussed.

#### 1. Dissatisfaction with Administrative Agencies

Professor Schwartz has considered the motivation for current reform efforts. He states:

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58. The MOSS REPORT, *supra* note 49, at 538.

59. 414 U.S. 291 (1973).

60. 417 U.S. 156 (1974).

61. The MOSS REPORT, *supra* note 49, at 558.

62. *Id.* at 559.

63. *Id.* at 559-61.



The problem is complicated by current disillusionment with the administrative process. The goal of cheap and inexpensive justice by experts, one of the chief reasons for setting up agencies, has proved illusory. The administrative process has too often proved even more expensive and time consuming than the judicial process. Even more important has been the increasing failure of agencies to protect that very public interest they were created to serve. The administrative process, which had once been vigorous in fighting for the public interest, has become an established part of the economic status quo. It has come to terms with those it is ostensibly regulating; the "public interest" is equated more and more with the interest of those being regulated. For the age-old central question of political science, *Quis custodiet ipsos custodes* ("Who will regulate the regulators?"), our system has given a new answer: Those who are regulated themselves.<sup>64</sup>

Others have criticized the federal regulatory agencies in a variety of settings. Irving S. Shapiro, Chairman of the Board of E.I. duPont de Nemours & Co., questions whether all of the various expensive environmental and health regulations, existing and proposed, are still needed in their original dimensions.<sup>65</sup> Political leaders, lawyers, and professors are echoing the reform theme.<sup>66</sup> The movement for regulatory reform encompasses both "deregulation" and reform of administrative decision making. The focus at this point will be on the latter.<sup>67</sup>

## 2. "Sunset" Laws

The nature of "sunset" legislation is very simple and straightforward. Under such an approach, regulatory agencies, along with their regulations and authority to issue new regulations, are automatically terminated at a certain date unless reauthorized by legislative action. The schedule of termination is staggered so that only some agencies are lost or renewed at a particular time. Generally, the agency's performance must be legislatively reviewed

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64. SCHWARTZ, ADMINISTRATIVE LAW 23 (1976) [hereinafter cited as SCHWARTZ TEXT].

65. *Environmental Safety or Economic Waste*, The Philadelphia Enquirer, May 31, 1977, § A, at 2, col. 2. See also Weidenbaum, *Cost of Government Regulation Too High?*, Los Angeles Times, April 8, 1979, § 7 (Outlook), at 1, col. 1. Zero based budgeting is grounded on the principle that each agency starts each fiscal year from ground zero; in other words, no agency is entitled to the level of expenditures of the previous year.

66. Political Leaders: See Kennedy, *Regulatory Reform; A Confused National Issue*, 28 AD. L. REV. 447 (1976); Lawyers: Doub, *Regulation: Restoring Public Confidence*, 28 AD. L. REV. 1 (1976); Kennedy, *The Causes of Popular Dissatisfaction with the Administrative Agencies*, 29 AD. L. REV. v (1977); Professors: Redford, *Regulation Revisited*, 28 AD. L. REV. 543 (1976).

67. See Nerenberg, *Regulatory Reform in a Nutshell*, 62 A.B.A.J. 121 (1976). Some of the reasons for the dissatisfaction which has triggered the administrative reform movement are discussed in Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1941 (1975). See also, DAVIS, ADMINISTRATIVE LAW TREATISE § 1.12 at 52-56 (1978), discussing deregulation, the impact of regulation, and the impact of non-regulatory spending programs.

before termination occurs.<sup>68</sup>

The Moss report criticizes the "sunset" proposal because of the opportunities for "special interest influence"<sup>69</sup> and the inflexibility of sunset review schedules.<sup>70</sup> The second Ribicoff report advocates sunset laws as a device for "systematic and comprehensive review of those agencies' activities—something that has been missing from Congressional oversight."<sup>71</sup> This report perceives

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68. See MOSS REPORT, *supra* note 49, at 528. With regard to this agency review process, the MOSS REPORT states that:

Under Colorado's sunset law, a Legislative Audit Committee is required to submit a performance audit report to the Colorado legislature at least 3 months prior to the agency's termination date. Under the proposed Regulatory Reform Act of 1976 (S. 2812) introduced by Senators Percy and Byrd, agencies are reviewed in the first instance by the Executive branch. Reports of such reviews are to be submitted to the Congress in the form of comprehensive plans which shall include recommendations for:

- (1) The transfer, consolidation, modification, or elimination of functions;
- (2) Organizational, structural and procedural reforms;
- (3) Merger, modification, establishment or abolition of Federal regulations or agencies;
- (4) Eliminating or phasing out outdated, overlapping or conflicting regulatory jurisdictions or requirements of general applicability; and
- (5) Increasing economic competition.

*Id.*

69. *Id.* at 530. The MOSS REPORT states:

1. *Special interest influence*—The most serious charge directed at sunset devices is that they will aid special interests. This allegation can be divided into several parts. First, it is argued that powerful interests will try to eliminate regulatory agencies which counterpose the public interest against their private power. They will be aided in this effort by the sunset concept itself, which places the burden of affirmative action on the agency and the public. It is further argued that, even in a balanced struggle, an unorganized constituency of consumers interested in safe drugs, reasonable energy prices, or safe consumer products would be no match for an affluent and intensely interested and disciplined industry. This criticism has been partially accepted by several proponents of sunset mechanisms.

70. *Id.* at 531. The MOSS REPORT states:

2. *Inflexible schedules*—The inflexible termination date of sunset puts a straightjacket on the calendar of the Congress and a President. No one can foresee what will require the attention of the legislative and Executive branches of government at some future date. This Nation's recent experience with the oil embargo and related energy problems counsels flexibility. If a crisis is at hand, sunset mechanisms should and must provide for either or both (i) the possibility of delayed termination or (ii) limited disturbance of necessary programs in times when the political branches of government are addressing other pressing problems. The only bill which seems to reasonably meet these criteria is S. 2925, the Government Economy and Spending Reform Act of 1976.

71. STAFF OF SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, 95th Cong., 1st Sess., STUDY ON FEDERAL REGULATION. II CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES 135 (Comm. Print 1977) [hereinafter RIBICOFF OVERSIGHT STUDY].

the sunset proposal as a valuable periodic review device which can hopefully stop agency stagnation through systematic review and reform.<sup>72</sup> A time limit has been proposed which requires renewal of an agency's mandate every five to ten years.<sup>73</sup> This is designed to enhance agency accountability.<sup>74</sup>

Although several states (but not the United States government) have "sunset" laws,<sup>75</sup> the Colorado statute is typical.<sup>76</sup> It provides (Subsection (1)):

The general assembly finds that state government actions have produced a substantial increase in numbers of agencies' growth of programs, and proliferation of rules and regulations and that the whole process developed without sufficient legislative oversight, regulatory accountability, or a system of checks and balances. The general assembly further finds that by establishing a system for the termination, continuation, a re-establishment of such agencies, it will be in a better position to evaluate the need for the continued existence of existing and future regulatory bodies.<sup>77</sup>

The Colorado statute (enacted April 22, 1976) established staggered termination dates for listed agencies starting on July 1, 1977, then July 1, 1979, and July 1, 1981. Agencies that are terminated are given one year to close up operations. Agencies can be reauthorized by the legislature for periods of up to six years. New agencies are subject to the sunset law and have six year initial lives. Prior to the termination dates, performance audits and public hearings are required to assess the effectiveness of the agency utilizing nine statutorily required standards: 1) public service by qualified applicants; 2) compliance with affirmative action requirements; 3) service in the public interest; 4) advocacy of legislative changes to the public's benefit; 5) required industry reporting on effect of agency action on quality of service by industry; 6) agency required assessment by industry of problems affecting the public; 7) encouragement of public participation in agency decisionmaking; 8) efficiency of agency processing of public complaints; 9) extent of required statutory changes to achieve these goals. Agencies "have the burden of demonstrating a public need for . . . [their] continued existence."<sup>78</sup>

Although advocacy of sunset laws reflects disillusionment with

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72. *Id.* at 129-35.

73. Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 AD. L. REV. 415, 425 (1976).

74. See Adams, *Sunset: A Proposal for Accountable Government*, 28 AD. L. REV. 511 (1976).

75. Among the states with "sunset" laws see, e.g., 1) *Alabama*, ALA. CODE 1975, § 41-20-1; 2) *Arizona*, ARIZ. REV. STAT. § 41-2351 (1978); 3) *Colorado*, COLO. REV. STAT. § 24-34-104 (1976).

76. COLO. REV. STAT. § 24-34-104 (Supp. 1978). See discussion in SCHWARTZ, *supra* note 6, at 59-63.

77. COLO. REV. STAT. § 24-34-104(1) (Supp. 1978).

78. *Id.* § 24-34-104(8)(b).

administrative agencies as solvers of public problems,<sup>79</sup> there is some question as to the effectiveness of "sunset" laws as a reform device. Professor Schwartz notes "the Sunset concept is the type of gimmick which all too often appeals to Americans as a facile solution to complex problems. It may, however, be doubted that sunset statutes will really resolve the problem of the agency life cycle."<sup>80</sup> Professor Schwartz goes on to comment that sunset laws may be applied in a nominal and superficial manner by legislatures, pressed for time, and that the public will be deceived into thinking a "real" (but in actuality, a "false") "safeguard" is in operation.<sup>81</sup>

### 3. The Legislative Veto

The Moss Report describes the legislative veto as a device which "would provide the Congress, either House, or its jurisdictional committees with an option to veto specified agency actions, usually rules and regulations." Supporting adoption of the legislative veto is the "assumption . . . that regulatory reform is a process of allowing Congress or one of its constituent units to control or limit over-regulation by overzealous administrative agencies through legislative veto."<sup>82</sup> Typical of legislative veto devices is H.R. 12048.<sup>83</sup>

79. Recent legal periodical discussions on the subject of "sunset" legislation include: Adams, *Sunset: A Proposal For Accountable Government*, 28 AD. L. REV. 511 (1976); Christian, "Sunset" Laws—A New Approach To Congressional Oversight, 44 I.C.C. PRAC. J. 186 (1977); Muskie, *Sunset: New Sunlight on Government*, 13 TRIAL 47 (1977); Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401 (1978); Comment, *Zero-Base Sunset Review*, 14 HARV. J. LEGIS. 505 (1977); Note, *Model Federal Sunset Act*, 14 HARV. J. LEGIS. 542 (1977); and Note, *Sunset Legislation: Spotlighting Bureaucracy*, 11 U. MICH. J.L. REF. 269 (1978).

80. Schwartz, *Administrative Law: The Third Century*, 29 AD. L. REV. 291, 294 (1977).

81. *Id.* at 294-95, (quoted in SCHWARTZ, *supra* note 6, at 71). See also Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973).

82. MOSS REPORT, *supra* note 49, at 523. The report goes on to point out that 125 separate statutes include some variation of the legislative veto device.

83. H.R. 12048, 94th Cong., 2d Sess. (1976), would provide 60 days during which a defined class of new rules would be subject to resolution of disapproval. If within 60 days of promulgation a rule is disapproved by a concurrent resolution of both Houses, it is void. Also if one House adopts a disapproval resolution and the other House does not act, the rule is vetoed. Therefore, in the absence of a stalemate between the two Houses, H.R. 12048 would provide for one House veto of proposed rules.

With respect to previously promulgated rules, the bill would provide for "resolutions for reconsideration." Under this provision of the legislation, the passage by one House of a resolution of reconsideration would require

The Moss Report mentions four concerns with the legislative veto proposal described above. The report notes that the first of these is constitutionality and warns that "caution should be exercised with respect to conclusions as to the Constitutionality of such devices." Two constitutional questions are at issue; the separation of powers doctrine and the effect of the legislative veto on the President's power to veto.<sup>84</sup> The report discusses the positive answer contained in Justice White's concurring opinion in *Buckley v. Valeo*,<sup>85</sup> but is not persuaded by it. The second concern of the report is the observation that Congressional review of all regulations would be extremely burdensome and not particularly helpful to the agencies.<sup>86</sup> The third concern is that adoption of the legislative veto could give special interests another chance to invalidate regulations to which they are opposed.<sup>87</sup> The final concern is that the availability of the legislative veto could tempt opponents of adopted regulations to delay their implementation.<sup>88</sup> This observation of the Moss Report supports the author's thesis

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an agency to reconsider and promulgate a rule. Upon repromulgation, the rule could be vetoed pursuant to the procedures applicable to new rules.

*Id.*

84. *Id.* at 524. Recent legal periodicals discussing the legislative veto device include: W. GELLHORN, C. BYSE, AND P. STRAUSS, *supra* note 7, at 116-122; Bunn and Gallagher, *Legislative Committee Review of Administrative Rules in Wisconsin*, 1977 WIS. L. REV. 935; Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 NO. CAR. L. REV. 423 (1978); Miller and Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Schwartz, *The Legislative Veto and the Constitution—A Re-examination*, 46 GEO. WASH. L. REV. 351 (1978). See also W. GELLHORN, C. BYSE, AND P. STRAUSS, *supra* note 7 at 103-126 discussing generally the subject of legislative controls on the administrative process including legislative oversight, legislative veto and "sunset" laws.

85. 424 U.S. 1 (1975).

86. MOSS REPORT, *supra* note 49, at 526. The crushing nature of the burden imposed on Congress by review of all regulations is illustrated by Table 1 at 527.

While selective review would be an alternative to reduce the burden, determining which regulations to select for review out of the great mass would be difficult. See ACUS, *Legislative Veto of Administrative Regulations*, 1 C.F.R. § 305.77-1 (1979).

87. MOSS REPORT, *supra* note 49, at 526. If an industry lost a battle over adoption of a regulation by an agency it could refight the battle in Congress.

88. The statement here was:

The procedures envisioned by H.R. 12048 automatically impose delays and uncertainty on the rulemaking process.

By providing for "resolutions of reconsideration," H.R. 12048 makes possible substantial changes in existing rules. This can be done by one House acting alone, both to force reconsideration and ultimately veto. If an individual company has already complied with a rule, it might incur the expense of changing to meet competition in the unregulated environment. Although the unrestrained competition could prove mutually destructive, the chance for a short-term competitive advantage will encourage a firm to seek every possible delay in complying with agency health, safety, or economic rules.

*Id.*

that there is an interrelationship between the accountability and delay reduction trends.<sup>89</sup> The nature of this interrelationship will be discussed in the next section.

The second Ribicoff report notes that legislative veto of agency regulations has been proposed as a device to enhance agency accountability to Congress. According to that report, the concept of a legislative veto includes three options: 1) positive approval; 2) disapproval; and 3) appropriations check. One proposal states that a rule will go into effect unless, within sixty days of its issuance, both the House and the Senate pass a concurrent disapproval resolution. A variation of this allows a veto based on passage of a concurrent disapproval resolution by only one House of Congress. Vetoed rules could not be reissued by agencies in the absence of a statutory change. A new rule on the same subject would have to be promulgated anew by following APA requirements.<sup>90</sup> Existing regulations can be vetoed through passage of a reconsideration resolution by one house. The rule must then be re-enacted within 180 days or lapse.<sup>91</sup>

The Ribicoff report takes the position that while the legislative veto may be constitutional under some circumstances, the controlling question as to its use is a policy question. Arguments supporting the legislative veto concept include the insufficiency of existing oversight techniques, the alternative of legislation being too unwieldy and time consuming, and the prospect of more care being exercised by the agencies in rule making. Associated problems include increased delay, and uncertainty.<sup>92</sup>

#### 4. Legislative Oversight Reform

The Ribicoff Oversight Study notes one overall objective of legislative oversight<sup>93</sup> of administrative agencies and six specific

89. The RIBICOFF OVERSIGHT STUDY, *supra* note 71, at 117-120 supports the observation that one effect of the utilization of the legislative veto would be to greatly worsen the problem of administrative delay. See also Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 AD. L. REV. 415, 426 (1976).

90. RIBICOFF OVERSIGHT STUDY, *supra* note 71, at 115.

91. *Id.* at 115-16.

92. *Id.* at 116-17. On the legislative veto, see also, *Sibbach v. Wilson*, 312 U.S. 1 (1941); Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638 (1956-57); Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953); Stone, *The Twentieth Century Administrative Explosion and After*, 52 CALIF. L. REV. 513 (1964).

93. RIBICOFF OVERSIGHT STUDY, *supra* note 71, at 4-5. Oversight can be defined to include: 1) "study, review, and investigation;" 2) "congressional efforts to re-

objectives. The overall objective is "political accountability in the regulatory process."<sup>94</sup> The study notes that agencies are accountable to the public by being accountable to Congress through oversight. This indirect accountability to the public results from the fact that agency members, who are not elected, are not susceptible to direct public accountability in any other fashion. It is the duty of Congress and the President to oversee the agencies to ensure that they reflect the popular will. Effective oversight also diminishes the probabilities of regulatory "failure."<sup>95</sup>

Specific objectives of oversight include: 1) monitoring agency adherence to Congressional intent in the administration of laws passed by Congress; 2) evaluating agency implementation, impact and effectiveness of regulatory policies promulgated by Congress; 3) monitoring of efficiency and integrity of agency operations; 4) prevention of arbitrary decisions and abuse by agencies; 5) ensuring that the public interest is not forgotten by agencies; and 6) ensuring that agencies don't infringe on congressional decisionmaking authority.<sup>96</sup>

The Ribicoff Oversight Study made eleven major recommendations to improve Congressional oversight of administrative agencies. These recommendations include: 1) "systematic review" by Congress of regulatory agencies using "periodic authorization" of all regulatory agencies preceded by a comprehensive look at an agency's activities;<sup>97</sup> 2) strengthening of Congressional access to

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view and control policy implementation by the regulatory agencies;" 3) "an active concern with the administration of policies during implementation." *Id.* at 4. See *Administrative Delay*, *supra* note 1, at 129-136 for a discussion of the role of legislative oversight in controlling administrative delay. See also Cutler and Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975); Fitzgerald, *Congressional Oversight or Congressional Foresight: Guidelines from the Founding Fathers*, 28 AD. L. REV. 429 (1976) (discussing legislative veto proposals and the separation of powers doctrine); and *Proceedings of the Administrative Law Section's 1976 Bicentennial Institute Oversight and Review of Agency Decisionmaking*, 28 AD. L. REV. 569 (1976); Krasnow and Shooshan, *Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission*, 10 HARV. J. LEGIS. 297 (1973); Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 U. KAN. L. REV. 277 (1975); and Williams, *Securing Fairness and Regularity in Administrative Proceedings*, 29 AD. L. REV. 1, 26-32 (1977).

94. RIBICOFF OVERSIGHT STUDY, *supra* note 71, at 5.

95. *Id.* at 5-6. "Failure" here refers to agencies becoming "captured" by the industries they regulate or identifying the public interest with industry interests thereby losing their effectiveness.

96. *Id.* at 4-5.

97. *Id.* at vii, 44-48. The study also recommends "in order to enhance systematic Congressional review of regulatory agencies, Congress should require that all regulatory agencies be made subject to a periodic authorization process." *Id.* at 48. Periodic, as opposed to permanent authorization, is a powerful weapon in favor of agency cooperation with Legislative Committee review of the agency's activities. In addition, it is believed that periodic authorization would have a positive effect on agency effectiveness. However, only seven out of seventeen regulatory

agency information;<sup>98</sup> 3) coordination of all oversight activities;<sup>99</sup> 4) "evaluation of regulatory programs";<sup>100</sup> 5) increasing personnel for appropriation committees;<sup>101</sup> 6) enhancing the value of hearings;<sup>102</sup> 7) greater use of "congressional resource agencies" such as Congressional Research Service, The Office of Technology Assessment, General Accounting Office, Congressional Budget Office, and Comptroller General;<sup>103</sup> 8) major recodification of agency

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agencies are under periodic authorization statutes. The others have permanent authorizations. Periodic authorizations are preferred to "sunset" legislation. *Id.* at 44-48. Periodic authorization is similar to "sunset" laws in that both state a definite term for an agency's life.

98. *Id.* at vii, 105, 128. This recommendation has five specific statutory requirements: 1) that agencies transmit simultaneously to both Congress and OMB their legislative and budget proposals; 2) that agencies submit information requested by Congress within a set time period, or explain any non-compliance; 3) biennial joint compliance review process by Congress and agencies to monitor, a) agency information collection deficiencies; and b) agency tabulation and reporting of collected information to Congress and the public; 4) congressional enforcement in a Federal District Court of its subpoenas through civil or criminal penalties; and 5) protective legislation for agency personnel who report vital information to Congress. *Id.*

99. *Id.* at vii-viii. Specific recommendations to achieve coordination are: 1) central reporting by all oversight committees to one Committee in each House each session. Such information should be tabulated and turned into a report for Congress as a whole to determine areas of "conflict and cooperation;" 2) annual reports to appropriations committees of oversight committees' reports to standing committees. *Id.*

100. *Id.* at viii, 58. This recommendation requires both mandatory agency program evaluation and reporting of results to Congress. Evaluation plans must include goal articulation and assessment of goal achievement, hearings on plans, and periodic specific reports to Congressional authorizing committees on agency actions including: 1) principles on which regulatory programs are premised; 2) ability of an agency to test those principles; 3) development of mechanisms to evaluate the impact of agency rules; and 4) report on evaluation process and future plan of attack. *Id.*

101. *Id.* at viii. The purposes of these increases are to ensure a more thorough look at the agencies' expedition and priorities. *Id.*

102. *Id.* at viii. This would utilize three devices: 1) expand the number of questions served on agencies prior to hearings; 2) increase the use of post hearing follow-up questions asked of witnesses testifying at hearings; 3) prepare post hearing synopses of committee conclusions and develop a mechanism for ensuring that agencies implement committee suggestions. *Id.*

103. *Id.* at viii. The specific recommendations here are 1) greater use of the Office of Technology Assessment (OTA) as an oversight resource through OTA communication to Congressional staff and members of its abilities and qualifications; 2) reporting by CRS or GAO on content, adoption, and impact of proposed and adopted agency regulations; 3) Comptroller General monitoring of quality and relevance of GAO reports and minimizing time between request and Congressional receipt of a report; 4) greater utilization of GAO staff for oversight work and strengthening of Office of Program Analysis through increased funding and personnel. *Id.* at 8-9. The Congressional Research Service performs research and reference work for Congress and is very helpful with oversight work in performing



law;<sup>104</sup> 9) examination of the advisability and practicability of setting up a mechanism to gather and evaluate data on Congressional casework for oversight purposes; 10) use of the "legislative veto" device only sparingly, and never as a matter of course; and 11) narrow drafting of regulatory agency legislation.<sup>105</sup>

The Ribicoff Oversight Study also noted several problems with current Congressional oversight of administrative agencies. These problems include: 1) overlapping committees;<sup>106</sup> 2) lack of coordination;<sup>107</sup> 3) sweetheart relationships;<sup>108</sup> 4) low priority;<sup>109</sup> and 5) lack of information.<sup>110</sup>

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studies, developing charts, etc. *Id.* at 68-69. OTA was created in 1972. It can research and evaluate programs for Congress. It is extremely helpful when it can:

provide unbiased information and technical expertise in the various applications of technology; secure, analyze and assess data about the effects of technological developments; identifying existing or probable impacts caused by new technology; ascertain cause and effect relationships, explore alternative technological methods for implementing programs; estimate and compare the impacts which alternative technological methods and programs might have; and report findings of completed analyses and identify areas for further research.

*Id.* at 69.

*The Congressional Budget Office* can assist Congress and legislative oversight committees by reporting correct, unbiased "financial data or fiscal forecasts. . . ." This information is helpful to oversight. *Id.* at 70-71.

The oversight study recommends against creation of a separate institution within Congress specifically designated an "oversight office." It recommends adding a new section to GAO or CRS, or use of GAO's regulations unit in the Division of Program Analysis to "analyze the impact of proposed and promulgated agency regulations and to make recommendations based on its analysis." *Id.* at 136.

104. *Id.* at ix, 137-39. This recommendation calls for mandatory recodification by both the agencies and Congress of statutes, cases, and administrative rulings relating to a particular agency. *Id.*

105. *Id.*

106. *Id.* at 94. The study notes that the current Congressional committee organization is ineffective for thorough oversight because multiple committees have responsibility for one area, (*e.g.*, transportation), and because each committee has such wide oversight authority, (*e.g.*, several agencies), that each agency does not receive systematic, periodic review. *Id.*

107. *Id.* at 95. The RIBICOFF OVERSIGHT STUDY notes that a lack of cooperation and coordination among committees (between legislative and appropriations committees, with each House, between House and Senate) reduces efficiency in oversight, and wastes resources. *Id.*

108. *Id.* at 109. The study points out that lack of effective oversight may also be attributable to "sweetheart" relationships between oversight Committees and the agencies they oversee, and between Committee members and industries regulated by a particular agency. Both of these lead to less oversight activity.

109. *Id.* at 107-08. Another problem is that oversight work is frequently not the first matter on which a member of Congress will choose to spend his time. Given much work and limited time in which to do it, oversight is often neglected because the other activities are more interesting. This low interest is exacerbated by political reality.

110. *Id.* at 102. The problem here is lack of timely compliance by agencies with Congressional requests for information relevant to oversight. The solution advocated is the imposition of strict time limits set by Congress for agency compliance

The Moss Report<sup>111</sup> concurs as to the relationship between effective oversight and regulatory reform. That report offers a number of recommendations to enhance oversight.<sup>112</sup> In general,

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with such requests, coupled with a requirement of a written explanation of reasons for agency non-compliance. *Id.* An interesting statistic here is that there are roughly one hundred Congressional staff members who have oversight or legislative duties for regulatory agencies whose employees number 84,773. *Id.* at 106.

111. MOSS REPORT, *supra* note 49, at 2. The MOSS REPORT is based upon a study of nine agencies: six independent commissions—the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission; and three executive branch agencies—the Environmental Protection Agency, the Food and Drug Administration and the National Highway Traffic Safety Administration. The purpose of the study “was to look in depth at their performance to assess the validity of congressional mandates and the quality of execution and especially to question whether regulation seemed to be serving a useful purpose justly and efficiently.” The report ranked the nine agencies into three groups: 1) High—SEC, FTC, EPA; 2) Middle—NHTSA, CPSC, FDA; 3) Low—ICC, FPC, FCC. The rankings were based on overall effectiveness of the agency in carrying out its statutory mandate. The study notes the following:

The Subcommittee finds that the primary goal in the reform of Federal regulation should be to make regulatory programs function more effectively on behalf of the consuming public. We also have concluded that regulatory reform can be accomplished only if approached agency-by-agency and program-by-program and not with any sweeping, across-the-board solution. It is irrational to subject economic regulation and other types of regulations, including health, safety, and environmental, to the same criteria and to the same solutions. The process of reform is thus laborious, requiring full recognition of the complexity of the Federal regulatory processes.

Although we firmly believe that reform must proceed agency-by-agency, we have nonetheless identified certain common failings in the agencies studied.

All suffer from a critical defect, an insufficient response to the public they were created to serve. Our studies confirm earlier observations that the actions of regulatory agencies reflect more than anything else their primary attention to the special interests of regulated industry and lack of sufficient concern for under-represented interests. Given the frequent communication between regulated industry and regulatory agencies, and given the cohesive structure of regulated industry, this finding should not be surprising.

The Subcommittee has concluded that, if durable change is to be accomplished, there will have to be fundamental adjustments in the political environment of regulation and new structures for increasing the accountability of agency actions to broad public interests. Regulation relating to health and safety, in particular, must not be biased by extraneous interference on behalf of special interests.

*Id.* at 3.

112. *Id.* at 544-47. The report notes that enhancement of the quality of Congressional oversight should aid in regulatory reform particularly if there exists joint House and Senate oversight committee meetings, yearly oversight plans and coordination to prevent “duplication of effort and unnecessary burdens on the agencies.” *Id.* at 544-45. The report concurs in recommendations to strengthen the

it advocates "strengthening Congressional oversight to increase the accountability of the agencies to elected representatives of the public."<sup>113</sup>

##### 5. Open Government Acts and Expanded Public Participation: Interrelationship to Accountability

These two subjects have already been extensively discussed. The reason for noting them again at this point is to emphasize the relationship of open government and public participation to accountability. Several examples of this relationship can be cited. One clear cut example is the volume of open meeting act litigation in jurisdictions with "sunshine" laws<sup>114</sup>—litigation which includes ten cases having as a named party a member of the mass media.<sup>115</sup> One inference to be drawn here is that the media is attempting to maintain accountability through exposure of public body deliberations. Another example is the linking by the Moss Report of recommendations for strengthening oversight with open government recommendations and expanded public participation recommendations. Such recommendations are described as "di-

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congressional right to access to agency information and adds some new recommendations. These include the setting up of an office of Congressional Counsel to aid in oversight work, expansion of GAO investigative powers, annual agency reports to Congress with highly specific compliance data, and authority for staff and members of committees to take depositions when required "to obtain essential oversight information." *Id.* at 544-47. Finally, the report advocates devoting more money and staff resources to oversight, putting a higher priority on oversight work, and protecting "whistle blowing" agency employees who in good faith expose "inefficiency, waste, or wrongdoing" from "reprisals such as firing, demotion, loss of support staff, or transfer to undesirable locations." *Id.* at 546-47.

113. *Id.*

114. There are numerous sunshine or open meeting act cases. *See, e.g.,* 1) *Arizona*: *Karol v. Bd. of Ed. Trustees*, 112 Ariz. 95, 593 P.2d 649 (1979); *Rosenberg v. Arizona Bd. of Regents*, 118 Ariz. 489, 578 P.2d 168 (1978); *Arizona Press Club, Inc. v. Arizona Bd. of Tax Appeals*, 113 Ariz. 545, 558 P.2d 697 (1976); *Washington School Dist. v. Superior Court*, 112 Ariz. 335, 541 P.2d 1137 (1975); 2) *California*: *Morris v. County of Marin*, 18 Cal. 3d 901, 559 P.2d 606, 136 Cal. Rptr. 251 (1977); *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 354 P.2d 637, 7 Cal. Rptr. 109 (1960).

115. These cases are: *Arizona Press Club, Inc. v. Arizona Bd. of Tax Appeals*, 113 Ariz. 545, 558 P.2d 697 (1976); *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 354 P.2d 637, 7 Cal. Rptr. 109 (1960); *The Tribune Co. v. School Bd. of Hillsborough County*, 367 So. 2d 627 (Fla. 1979); *News-Press Pub. Co. v. Wisher*, 345 So. 2d 646 (Fla. 1977); *Fiscal Court of Jefferson County v. The Courier Journal and Louisville Times Co.*, 554 S.W.2d 72 (Ky. 1977); *Minneapolis Star and Tribune Co. v. Housing and Redevelopment Authority*, 251 N.W.2d 620 (Minn. 1976); *Channel 10, Inc. v. Independent Sch. Dist. No. 709*, 298 Minn. 306, 215 N.W.2d 814 (1974); *In re Orange County Publications, Inc. v. Council of the City of Newburgh*, 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157 (1978); *Gannett Co., Inc. v. DePasquale*, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544 (N.Y. Ct. App. 1977); *WTAR Radio-TV Corp. v. City Council*, 216 Va. 892, 223 S.E.2d 895 (1976). Presumably journalists were seeking the broadest possible access to deliberations of public bodies so that press reports could be made of those deliberations and their decisions.

rected at creating new structures and a political environment which supports rather than impedes regulation in the public interest."<sup>116</sup> The two specific recommendations are: "establishing new mechanisms of effective public participation, to offset the dominance of regulated industry in agency proceedings;" and "increasing the openness of agency proceedings to facilitate public participation."<sup>117</sup>

### III. RELATIONSHIP OF THE THREE TRENDS—DELAY REDUCTION, PUBLIC PARTICIPATION EXPANSION, INCREASED ACCOUNTABILITY

In this section, the three trends developed in the foregoing section will be examined in an effort to illuminate the various ways in which they interrelate. Initially, the interaction between delay reduction and public participation expansion will be discussed. Thereafter, the interrelation between delay reduction and accountability will be noted. Finally, the goals and standards which relate to the implementation of these trends will be studied.

The thesis to be examined is whether delay reduction can be achieved without compromising expanded participation and increased accountability. Also to be discussed is whether achievement of increased participation and accountability would be compromised by delay reduction efforts. This section will conclude with a discussion of solutions including: 1) tradeoffs among disparate goals and standards; 2) integrating principles; and 3) methods of structuring citizen and legislative intervention in the administrative process.

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116. The MOSS REPORT, *supra* note 54, at 3.

117. *Id.* The MOSS REPORT defines public participation in a manner suggestive of the public interest. It states "The term 'public participation' is generally defined as input by persons or groups which do not themselves have a large or direct economic interest in the decision." *Id.* at 469, note 1. The report goes on to note that the quality of agency work will be enhanced by greater public participation in agency decisionmaking, as will the agency's capacity to reflect the public interest in those decisions. The lack of input by those not directly affected by the agency's decision, the regulated companies, results in a greater likelihood that decisions reached will not consider the public interest. The report cites several examples of decisions reflecting inadequate public participation and neglect of the public interest. *Id.* at 469-72.

### A. *Interaction—Delay Reduction and Expansion of Public Participation*

There are at least three views regarding the relationship between delay reduction and participation expansion. These are: 1) delay reduction hinders participation expansion; 2) delay reduction enhances participation expansion; 3) delay reduction does not significantly affect participation expansion. Illustrations of each of these three positions will be given, followed by a somewhat deeper analysis of the interaction. This article proceeds on the theory that the more accurate position is the first of the three, namely that delay reduction hinders participation expansion. However, this does not reflect a bias in favor of regulated industries or towards agencies who, like the FCC in *Office of Communication v. FCC*,<sup>118</sup> fear change of the status quo. Rather, it is contended herein that if delay reduction does indeed hinder expansion of public participation, then solutions must be devised to accommodate both.

The first view that delay reduction hinders participation expansion, is one supported by Professor Shapiro.<sup>119</sup> This position is also supported by the ACUS.<sup>120</sup> The second view, that delay re-

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118. 359 F.2d 994 (D.C. Cir. 1966). See notes 126-27 *infra*.

119. He states: On the whole, the insistence of the courts that interested persons, in the broad sense of the term, have a right to be heard appears to have been beneficial. Some agency representatives concede that even with the best of intentions an overworked and undernourished staff cannot do a complete job of supplying information to the agency in every case. The continuing presence of a broad range of representatives may also reinforce the agency against pressures from narrow interests, especially from the regulated industry itself.

But the picture is not as idyllic as this hasty sketch might suggest. There are occasions when reviewing courts seem to have gone overboard in finding a right to intervene and a right to a hearing on a questionable showing. *Agencies confronted with increasingly crowded dockets and extensive delays have had difficulty persuading the courts* either that there was in fact little a particular applicant for intervention could add to what the parties already in the case would present or that the opportunities for participation were adequate to protect the interest of the applicant even though they did not amount to full status as a party. *Not enough attention has been paid, in other words, to the applicant's potential contribution or to the agency's need for expedition in handling of cases.*

Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 765-66 (1968) (emphasis added).

120. Public Participation in Administrative Hearings, 1 C.F.R. § 305.71-6 (1979). It states:

However, the scope and manner of public participation desirable in agency hearings has not been delineated. In order that agencies may effectively exercise their powers and duties in the public interest, public participation in agency proceedings should neither frustrate an agency's control of the allocation of its resources nor unduly complicate and delay its proceedings. Consequently, each agency has a prime responsibility to reexamine its rules and practices to make public participation meaningful and effective without impairing the agency's performance of its statutory

duction enhances participation expansion, is supported by an observation of the Ribicoff Studies that delayed administrative decisionmaking hurts public interest representatives more than regulated industries.<sup>121</sup> Senator Edward M. Kennedy agrees, observing that administrative delay increases the costs of participation and thus decreases access of citizen groups who are not as well financed as industry groups.<sup>122</sup>

The third view is illustrated by then Judge (now Chief Justice) Burger in *United Church of Christ v. FCC*.<sup>123</sup> He noted that fear of increased delay is the principal reason that the FCC opposes expanded public participation. He stated:

The Commission's attitude in this case is ambivalent in the precise sense of that term. While attracted by the potential contribution of widespread public interest and participation in improving the quality of broadcasting, the Commission rejects effective public participation by invoking the oft-expressed fear that a "host of parties" will descend upon it and render its dockets "clogged" and "unworkable."<sup>124</sup>

He goes on to indicate that minimizing delay while expanding public participation is quite possible. This is because the FCC has the authority to structure citizen participation through statutory rulemaking so as to minimize increased delay.<sup>125</sup>

The relationship of delay reduction and participation expansion can be analyzed more clearly by focusing on the goals served and standards utilized by each trend. This subject will be extensively discussed in the section dealing with goals and standards. However, one example will be noted here. If we assume that delay reduction serves the goal of efficiency and that participation expansion serves the goal of ensuring agency effectiveness in carrying out the public interest, then we can analyze conflicts between the two trends from the perspective of conflicting goals. That will allow us to design goal balancing devices, standards that accommodate both, and integrating principles when there is a clash of goals.

An example of the conflict between the goals of efficiency and procedural fairness is illustrated in the fourth Ribicoff report

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obligations. . . . Whatever the form of the proceeding, reasonable limits should be imposed on who may participate in order (a) to limit the presentation of redundant evidence, (b) to impose reasonable restrictions on interrogation and arguments, and (c) to prevent avoidable delay.

121. See III RIBICOFF REPORT, *supra* note 7, at 53-54.

122. Chicago Tribune, January 5, 1979.

123. 359 F.2d 994 (D.C. Cir. 1966).

124. *Id.* at 1004.

125. *Id.*

which contains a number of delay reduction recommendations.<sup>126</sup> One of those recommendations is to amend the APA to allow restriction of oral proceedings in adjudicatory hearings including direct and cross-examination.<sup>127</sup> While these restrictions may improve the speed of adjudication, that speed may be achieved at the expense of muzzling citizen participants who frequently seek to challenge efforts by the agency and by the regulated industries to equate the public interest with the industry's private interest. That challenging role can be only partially fulfilled through written communication. Confrontation and cross-examination of industry witnesses frequently proves useful. The report's recommendation conditions the restriction by excluding those circumstances where "oral testimony or cross-examination is *essential*."<sup>128</sup>

"Essential" is a key term. The Ribicoff report sheds some light on this:

Oral direct-examination and cross-examination should ordinarily be allowed only when the perceptions, memory, or honesty of the witness is at issue. Except in circumstances such as these, agencies should not be obligated to provide parties with the opportunity to develop the facts through formal oral trials. But an agency should, in its discretion, provide for an oral trial when it believes this will *expedite* the proceeding.<sup>129</sup>

The fundamental observation is that *expedition*, a synonym of efficiency, is the guiding standard for exercise of agency discretion to allow examination of witnesses when essential. This does not imply the applicability of discretion to some other goal such as effectiveness, or procedural fairness. It only states that examination would be allowed only when the "perception, memory, or honesty of the witness is at issue."

#### *B. Interaction—Delay Reduction and Increased Accountability*

There are three positions on the interaction between the delay reduction trend and the increased accountability trend: 1) that increased accountability absorbs agency time and resources and takes time away from all other tasks; 2) the related position that increased accountability hinders delay reduction; and 3) that increased accountability enhances the effectiveness and efficiency of an agency. These positions will be discussed.

The "time absorption" position is noted by Professor Strauss.<sup>130</sup>

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126. IV RIBICOFF REPORT, *supra* note 3, at 8-10.

127. *Id.* at xiii, 55-65, 73-76.

128. *Id.* at xiii (emphasis added).

129. *Id.* at xvii-xviii, 55-65, 73-78.

130. At the time he made this observation, Professor Strauss, on the faculty of Columbia University School of Law and co-author of the seventh edition of GELLHORN, BYSE & STRAUSS, ADMINISTRATIVE LAW, CASES AND MATERIALS (1979), was General Counsel of the Nuclear Regulatory Commission. He stated that:

According to the Ribicoff Oversight Study, the impact of absorbing Commission members time is heightened by use of oversight hearings at which agency personnel are required to testify.<sup>131</sup> The allocation of resources toward oversight and away from other tasks of the agency would result, given finite resources, in the relative neglect of other agency responsibilities. Thus, if the first position is correct, the effect of resource allocation decisions on delay reduction is unclear. Delay reduction may be neglected if the agency chooses to ignore achievement of efficiency goals. To the extent that delay reduction is primarily the responsibility of the agency, it may be neglected except to the extent that oversight focuses on efficiency.<sup>132</sup>

Thus far the discussion has focused on the impact of legislative oversight on delay reduction. Other accountability devices also impact on delay reduction. In particular, use of the legislative veto as an accountability device can hinder delay reduction.<sup>133</sup> This supports the second position. The Ribicoff Oversight Study notes that agency rulemaking could be delayed across the board because of legislative veto provisions which require 60 to 90 days for initial House or Senate consideration of rules and 180 days if

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[O]versight by Congress, by the judiciary, by anyone, tends uniquely to consume the time of the people at the top of the agency. So one of the prices that one pays for an oversight system is that you divert the attention of commissioners from doing the other things which they might be doing—for example, from deciding some complex questions which are before them, and which ought to be given their full attention.

IV RIBICOFF REPORT, *supra* note 3, at 182. See also GELLHORN, BYSE AND STRAUSS, *supra* note 7, at 125; *Administrative Delay*, *supra* note 1, at 71.

131. [P]resenting testimony at hearings requires a large commitment of time by the agency personnel involved. An agency such as EPA, which presented testimony in hundreds of hearings over the past few years, spends a great deal of its resources in responding to requests by several different committees for testimony. The impact on the agencies of the fragmented committee structure might be softened somewhat if there were coordination between committees. Instead, the lack of coordination between committees often adds to the strain on an agency's limited resources.

RIBICOFF OVERSIGHT STUDY, *supra* note 71, at 96.

132. See *Administrative Delay*, *supra* note 1, at 132-33 (discussion of compliance reports as an oversight device that could be utilized to reduce delay). The MOSS REPORT, *supra* note 49, at 546, 596-97, discusses the use of agency annual reports. It recommends changes in the content of those annual reports so that the extent to which "statutory deadlines for initiating programs, issuing regulations, and publishing reports have been met." *Id.* at 546. Furthermore, the MOSS REPORT advocates oversight coordination to prevent "duplication of effort and unnecessary burdens on the agencies." *Id.* at 544-45.

133. RIBICOFF OVERSIGHT STUDY, note 71 *supra*, at 117.



either House or Senate adopt reconsideration resolutions.<sup>134</sup> Furthermore, use of the legislative veto by Congress could subject agencies to conflicts with statutory and court required time periods within which agencies are bound to act. The greater number of rules that are subject to legislative veto, the greater the likelihood that the regulatory process can become subject to serious delays.<sup>135</sup> Others have opposed the legislative veto idea for just such reasons.<sup>136</sup>

Finally, the Ribicoff Oversight Study notes two related problems with the legislative veto. One of these is that greater use of the legislative veto could lead to agencies using adjudication more and rulemaking less, which in turn would lead to greater delay in the administrative process. The other problem noted would be the increased uncertainty which could result if proposed rules are delayed in effective date or, at the worst, are implemented and then rendered invalid by Congress.<sup>137</sup>

The second position, that increased accountability may hinder delay reduction, is also supported with regard to "sunshine" or open meeting statutes. Professors Gellhorn, Byse, and Strauss suggest such a possible impact.<sup>138</sup>

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134. *Id.* at 118. The burden of routine Congressional consideration of agency rules is illustrated by statistics. According to the RIBICOFF OVERSIGHT STUDY, there was a 1:18 ratio between public enactments of Congress and rules promulgated by agencies in 1974. There were 7,596 new or amended rules issued by 67 federal agencies. Congress, in contrast, enacted 404 public laws. *Id.* at 116.

135. *Id.* at 118-19. For example, the RIBICOFF OVERSIGHT STUDY notes that the Federal Election Campaign Act has a 30 day legislative veto provision. Regulations proposed in August, 1975 were vetoed by the House in October, 1975. They were reissued in August, 1976 but the House Committee adjourned in October, 1976 without the 30 day time having elapsed. The reissued regulations could not have become effective until, at the earliest, January or February, 1977. *Id.* at 118.

136. See Trister, *Legislative Proposals to Improve Access to Federal Courts and Administrative Agencies*, 10 CLEARINGHOUSE REV. 1023, 1037-38 (1977).

137. RIBICOFF OVERSIGHT STUDY, *supra* note 71, at 119. The ACUS "urges that Congress should not, in general legislation, or as a routine practice, provide for prior submission of agency rules for Congressional review and possible veto." *Legislative Veto of Administrative Regulations*, 1 C.F.R. § 305.77-1 (1977). In so recommending, the ACUS notes that "[l]egislative review of substantive rules would increase the workload of Congress substantially. Review of complex, technical rules would be difficult, time consuming, and often impracticable." *Id.*

138. GELLHORN, BYSE, AND STRAUSS, *supra* note 7, at 632-33.

Other factors of a practical nature may inhibit the effectiveness of the Sunshine technique in improving public oversight and political responsiveness in the larger federal agencies. . . . [T]he mechanisms of doing business publicly could make it clumsy, slow, and productive of painful publicity diversions and delays. The greater time required to deal with agency business publicly and the greater formality of that dealing, if indeed these are results, can diminish the available resources for dealing with the agency's work as a whole "at the top."

*Id.*

This latest edition of a classic casebook, contains an excellent and thorough treatment of the FOIA, Sunshine Acts, public participation in agency proceedings,

The third position is that increased accountability enhances the efficiency and the effectiveness of an agency particularly when oversight is concerned with agency delay. This position is likely to be correct insofar as it relates to oversight of agency delay. It is also correct when enhanced public participation results in greater accountability of an agency with regard to the goals of efficiency and effectiveness.<sup>139</sup> Similarly, delay reduction would lead to increased accountability insofar as delay reduction results in expanded citizen participation which in turn leads to enhanced accountability of the agency to the public.

As previously noted,<sup>140</sup> delay reduction is partially impeded by participation expansion as well as increased accountability. In turn, the latter two trends are impeded by delay reduction. Accordingly, an examination of the goals of the administrative process is warranted.<sup>141</sup>

### C. Goals and Standards

All institutional systems have goals (or ends) and standards (or means) for achieving the goals. It is acknowledged that there are five<sup>142</sup> general goals which relate to the decisionmaking activities of administrative agencies. These five goals are: 1) timeliness

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public support of citizen participation and the Federal Advisory Committee Act. *Id.* at 579-61. See also Perritt and Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act after Two Years*, 63 GEO. L.J. 725 (1975).

139. See text accompanying notes 121-22 *supra*, discussing the position that delay reduction enhances citizen participation by reducing the time and cost of such participation. See also *Administrative Delay*, *supra* note 1, at 132-34.

140. See text accompanying notes 9-10, 127-29, *supra*.

141. Other illustrations of the interaction of delay reduction with the other two trends include the observation in the RIBICOFF OVERSIGHT STUDY that periodic reauthorization work under a sunset statute can be very time consuming to both the agency under the review and to Congress. See RIBICOFF OVERSIGHT STUDY, *supra* note 100, at 133. Examples also include several advocates of the position that increased public participation can exacerbate problems of delay. See, e.g., MURPHY AND HOFFMAN, *supra* note 7, at 398 who notes the argument, but views it somewhat skeptically.

142. There may be more than five. The five presented seem to be the most important to the author.

See Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978). Professor Verkuil identifies three norms or values of administrative procedure: fairness, efficiency, and satisfaction. He states "administrative procedure should be concerned with the overall fairness and accuracy of decisions, with their efficient and low-cost resolution, and in a democratic society, with participant satisfaction with the process." *Id.* at 279-80. Verkuil's norm of "satisfaction" is an example of an additional goal not stressed here.

and efficiency in administrative decisionmaking; 2) procedural fairness;<sup>143</sup> 3) substantive consistency; 4) accuracy; and 5) effectiveness in enforcing and implementing the agency's statutory mandate.<sup>144</sup> In this section each of these goals will be examined, along with the standards by which they are effectuated. An analysis of the several issues which arise in connection with goal conflict will follow. Throughout this section, goal articulation will be shown as a useful technique for resolving questions of the impact of delay reduction on expansion of participation and increased accountability.

The first goal to be discussed is *timeliness and efficiency* in administrative decisionmaking. Professor Mashaw defines "timely" as "a decision . . . made within a reasonable or a statutorily prescribed period of time after presentation of a claim."<sup>145</sup> While "efficiency" generally connotes "effective" as well as "industrious," it will be used here in the latter sense only. This goal, important enough to be embodied in the APA,<sup>146</sup> is effectuated through several types of standards, including the APA "reasonable time" standards.<sup>147</sup> These standards and others are enforced by the courts.<sup>148</sup> Other standards are included in Recommendation 78-3

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143. This is not to say that fairness is solely within the realm of procedure. While substantive due process is no longer in vogue, the fourteenth amendment Equal Protection Clause embodies notions of fair treatment that are hardly procedural in nature. However, it is more logical to deal with substantive fairness under the heading of substantive consistency or one of the other goals.

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

"Accuracy" involves the correspondence of the substantive outcome of an adjudication with the true facts of the claimant's situation and with an appropriate application of the relevant legal rules to those facts. Accuracy is thus the substantive ideal; approachable but never fully attainable. "Fairness" is the degree to which the process of making claims determinations tends to produce accurate decisions. That a decision is "timely" simply means that it was made within a reasonable or a statutorily prescribed period of time after presentation of the claim.

*Id.* at 773-74. This author, by equating fairness with procedure, may be guilty of advocating what Mashaw says is excessive emphasis on traditional trial type procedures. *Id.* at 775-76.

145. *Id.* at 774.

146. 5 U.S.C. §§ 555(b), 558(c), 706(1) (1979). Both sections 555(b) and 558(c) require agencies to act "within a reasonable time." Section 706(1) allows courts to "compel agency action . . . unreasonably delayed."

147. See 5 U.S.C. §§ 555(b) and 558(c) (1977) and a discussion of timeliness standards in ADMINISTRATIVE DELAY, *supra* note 1, at 73-92.

148. See discussion of the judicial role in *Judicial Control*, *supra* note 1, at 345-87. In addition to the cases on delay discussed therein, see also *Blankenship v. Secretary of HEW*, 587 F.2d 329 (6th Cir. 1978); *Ligon Specialized Hauler, Inc. v. ICC*, 587 F.2d 304 (6th Cir. 1978); *EEOC v. Liberty Loan Corp.*, 584 F.2d 853 (8th Cir. 1978); *Silverman v. NLRB*, 543 F.2d 428 (2d Cir. 1976); *Cannon v. Univ. of Chicago*, 559 F.2d 1063 (7th Cir. 1976); *Radovich v. Agricultural Labor Rel. Bd.*, 72 Cal. App.

of the ACUS.<sup>149</sup>

The second goal is *procedural fairness*. The traditional definition of this term concentrates on "the extent to which accurate decisionmaking should be supported by providing a directly affected party with a trial-type hearing."<sup>150</sup> A unique definition is provided by Professor Mashaw, who states that fairness "is the degree to which the process of making determinations tends to produce accurate decisions."<sup>151</sup> The standards which are the means of effectuating this goal include the elements of procedural due process,<sup>152</sup> APA procedural rights,<sup>153</sup> and the basic distinction between legislative and adjudicative action.<sup>154</sup>

The third goal of *substantive consistency* is common to all administrative agencies but differs within each agency that has a separate statutory mandate. It is not the purpose of this discussion to delineate these varieties of specific mandates, but rather to focus on the general mandate imposed by legislatures who create administrative agencies. The mandates to which agencies are to remain faithfully consistent range from the "public interest, convenience, and necessity" language regulating the FCC as

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3d 36, 140 Cal. Rptr. 24 (1977); *Cornelius v. Minter*, 395 F. Supp. 616 (D. Mass. 1974); *Nelson v. Sugarman*, 361 F. Supp. 1132 (S.D.N.Y. 1972).

149. See text accompanying notes 15-17, *supra*.

150. See Mashaw, *supra* note 144, at 775. Notice and an opportunity to be heard are the fundamental requisites of due process. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

151. See Mashaw, *supra* note 144, at 774. While Mashaw's observations focus on claims determinations in social welfare benefit agencies, his observations concerning fairness are, in this author's opinion, generally applicable.

152. For analyses of the ten elements of due process required for a fair administrative hearing, at least in the public assistance context, see Burrus and Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience*, 16 AM. U.L. REV. 199, 218 (1967), and Comment, *California Welfare Fair Hearings: An Adequate Remedy?* 5 U.C.D.L. REV. 542 (1972). In addition, this author would add to the list of procedural due process elements discussed above and found in *Goldberg v. Kelley*, 397 U.S. 254 (1970), the right to a timely hearing. See discussion of due process as a substantive standard, in *Judicial Control*, *supra* note 1, at 364-75.

153. See *Vermont Yankee Nuclear Power Corp. v. Natural Res. D.C.*, 435 U.S. 519 (1978) (APA states maximum procedural protections courts can impose on agencies). See discussion of this case in *Administrative Delay*, *supra* note 1, at 93-101. See also Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978); Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978); Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1804 (1978).

154. *Bi Metallic Investment Co. v. Colorado*, 239 U.S. 441 (1915); *Londoner v. Denver*, 210 U.S. 373 (1908); SCHWARTZ, *supra* note 6, at 303-08.

found in the Communications Act of 1934,<sup>155</sup> to the more specific "unable to engage in any substantial gainful activity" language that governs disability entitlement determinations made by the Social Security Administration.<sup>156</sup> The standards utilized to implement the goal of substantive consistency vary with the content of each goal but range from specific statutory language, to regulations, to internal policy statements of the agency.

The fourth goal is *accuracy*. Professor Mashaw defines this as "correspondence of the substantive outcome of an adjudication with the true facts of the claimant's situation and with an appropriate application of the relevant legal rules to those facts. Accuracy is thus the substantive ideal; approachable but never fully obtainable."<sup>157</sup> Accuracy as used here deals both with fact finding (what happened) and with fact application (determining the ultimate or operative facts through the use of relevant legal rules).

The fifth goal is *effectiveness* in implementing and enforcing the agency's statutory mandate. Professor Blumrosen discusses effectiveness as a goal, stating: "modern reform legislation continues to rely on administrative agencies to promote interests which are newly recognized or supported. Much of this legislation is floundering in its execution for reasons which include the ineffectiveness of the administrative process."<sup>158</sup> Other terms used by Blumrosen include "impact" and "implementation." He seeks to develop a general theory of "administrative implementation" as well as requiring "administrators to adhere to the principle that reform legislation is to be broadly construed."<sup>159</sup> "Effectiveness" differs from "substantive consistency" in that the former refers to whether one implements a program and the latter to the principles used in an agency's operations.<sup>160</sup> A major point made by Professor Blumrosen is that there is a need for and a lack of standards for achieving effectiveness. He stated:

[R]egulation is a difficult and complex task requiring a wide range of skills and capacities. The problem of the regulator is how to be effective *within* basic principles of fairness. But where can the administrator turn

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155. 47 U.S.C. §§ 151-609 (1979). Section 303 states: "except as otherwise provided in this chapter, the Commission from time to time, *as public convenience, interest, or necessity requires*. . . ." (emphasis added). 47 U.S.C. § 303 (1979).

156. Social Security Act, 42 U.S.C. §§ 401-429 (1979).

157. Mashaw, *supra* note 144, at 773-74.

158. Blumrosen, *Toward Effective Administration of New Regulatory Statutes* (pts. 1-2), 29 AD. L. REV. 87, 209 (1977). Effectiveness can be defined as "achieving or accomplishing; producing as a result." FUNK AND WAGNELLS STANDARD DICTIONARY 421 (1977).

159. See Blumrosen, *Toward Effective Administration of New Regulatory Statutes*, 29 AD. L. REV. 87, 89 (1977).

160. *Id.* at 90-91. It is important to differentiate between effectiveness as program implementation and substantive consistency as fidelity to the public interest not the interests of industry.

for guidance and advice on this problem? Where are the principles, traditions and sound counsel as to how to be an effective regulator? There is no text on effective legal regulation.<sup>161</sup>

#### *D. Conflicts among Trends and Goals: Goal Analysis*

Once again, the thesis of this article is that, at least some of the time, implementation of delay reduction impedes implementation of expanded citizen participation and increased accountability. Conflicts among these trends, as previously noted,<sup>162</sup> can be analyzed from the deeper perspective of conflicts in basic goals of the administrative process. It is suggested at this point that *goal analysis* can be used as a method of predicting the interaction of the three trends; of explaining harmony among the trends as a result of congruent goals; of explaining conflict among the trends as a result of conflicting goals; and to suggest goal tradeoffs, integrating principles, and methods for structuring citizen and legislative involvement. This discussion will begin with an analysis of the goals served by each trend and will be followed by examples of trend conflict and goal conflict.

The delay reduction trend serves the goals of procedural fairness, efficiency (timeliness), and effectiveness. It serves procedural fairness because "justice delayed is justice denied." Delay reduction also directly enhances efficiency. Effectiveness is served when an agency is prompt in implementing agency policy in an effectual manner. Substantive consistency and accuracy are not directly served by delay reduction, which focuses on *when* decisions are made rather than *how* they are made with regard to fact finding (accuracy) or legal fidelity (substantive consistency).

The expanding citizen participation trend serves the goals of substantive consistency, effectiveness and accuracy. It serves substantive consistency if we assume that regulatory legislation is designed broadly to reflect the public interest, that agencies be-

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161. *Id.* at 90-91. The goal of regulatory effectiveness is discussed extensively in the MOSS REPORT, *supra* note 49, at 539, 550-56. The report states that three things should be done to enhance regulatory effectiveness. These are: 1) "creating mechanisms to foster a regulatory environment that is supportive of effective programs;" 2) "reforming current agency practices to ensure evenhanded enforcement of law and selection of qualified regulatory officials;" and 3) "reducing and eliminating duplicative, anticompetitive, and ineffective programs." *Id.* at 539. The report emphasizes stronger enforcement of current laws as well as periodic review of programs and regulations to eliminate those that are ineffective. *Id.* at 550-57.

162. See text accompanying notes 125-26, *supra*.

come "captured" and tend to reflect the interests of private regulated industries, that this reflection is inconsistent with the statutory mandate of a particular agency, and that citizen participation is necessary to restore the agency's balance and focus on the public interest. These assumptions are frequently made by advocates of expanding citizen participation.<sup>163</sup> Expanded citizen participation also serves the effectiveness goal because citizen pressures counter-balance industry pressure on regulatory agencies. Thus, regulatory policy is less likely to be neutralized by industry pressures which produce paralysis or an ineffective agency.<sup>164</sup> Expanding public participation serves the goal of accuracy insofar as the citizen representatives can provide useful information and arguments that are not otherwise presented by the regulated industries or the agency staff. Accuracy here would be served because the agency would have *all* the information that it needs to make an accurate decision.

Expanded public participation does not *per se* serve the goals of procedural fairness or efficiency (timeliness). Procedural fairness is not served if we assume a dividing line between the public and the normal parties to an administrative proceeding. Under this conception, procedural fairness is satisfied if those who are directly affected by agency action are given party status. The dividing line between parties and the public is described by Professors Gellhorn, Byse, and Strauss.<sup>165</sup> They state:

Other chapters have concerned themselves with the right to a hearing of persons directly affected by agency action. Obviously the applicant for a license, the subject of an enforcement action, or the recipient of a notice of proposed rulemaking inviting the general public to submit comments will have little difficulty in securing participation, whatever dispute there may be about the particular procedures to be employed. This section asks somewhat different questions: to what extent individuals outside the agency structure can intervene in ongoing proceedings to present positions unlikely otherwise to be put forward or forcefully contended for, or stimulate enforcement or regulatory action which the agency itself appears unready to take, or initiate the rulemaking process.<sup>166</sup>

This dividing line may reflect limitations in our thinking about the proper role of procedure and procedural fairness, but it is sufficient for these purposes if we assume that one who ought to be a

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163. See text accompanying notes 28-31, *supra*.

164. See text accompanying notes 51-57, *supra*. In particular, see the RIBICOFF REPORT recommendation that "full public participation in the regulatory process is essential if regulatory agencies are to effectively discharge their mandate to regulate in the public interest." *Id.* at v. Note the emphasis on both effectiveness, "effectively discharge their mandate," and on substantive consistency, "to regulate in the public interest." This supports the conclusion that expanding citizen participation serves these two goals.

165. GELLHORN, BYSE AND STRAUSS, *supra* note 7, at 634-59.

166. *Id.* at 634-35.

party is given notice and an opportunity to be heard.<sup>167</sup>

Similarly, efficiency (timeliness) as a goal is not served by expanding citizen participation. The aforementioned ACUS recommendation states that "[w]hatever the form of the proceeding, reasonable limits should be imposed on who may participate in order (a) to limit the presentation of redundant evidence, (b) to impose reasonable restrictions on interrogation and argument, and (c) to prevent avoidable delay."<sup>168</sup> Similarly, the Federal Rules of Civil Procedure state that "[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."<sup>169</sup>

The increased accountability trend serves the goals of substantive consistency, and effectiveness. Substantive consistency is served because one of the purposes of agency accountability to Congress is to ensure that agencies follow Congress' will as expressed in enabling legislation.<sup>170</sup> Similarly, effectiveness is served through legislative oversight, a powerful accountability device. This is illustrated by the Moss Report, which states: "[t]he Subcommittee finds that the primary goal in the reform of federal regulation should be to make regulatory programs *function more effectively* on behalf of the consuming public."<sup>171</sup>

The goal of efficiency (timeliness) is *not* served by the increased accountability trend, except insofar as legislatures focus on timeliness and efficiency in legislative oversight. As previously noted,<sup>172</sup> the effect of utilization of "sunshine" legislation and legislative vetoes may be to seriously hinder the efficiency (timeliness) of agencies, and to slow down their processes of decisionmaking. This is substantially true notwithstanding the truth of the third position on the interaction of delay reduction and increased accountability.<sup>173</sup>

The increased accountability trend does not necessarily serve<sup>174</sup>

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167. See *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

168. Public Participation in Administration Hearings, 1 C.F.R. § 305.71-6 (1979).

169. FED. R. CIV. P. 24(b).

170. See text accompanying notes 95-112, *supra*. In particular see quote at note 111, *supra*.

171. See note 111 *supra*.

172. See text accompanying notes 133-38, *supra*.

173. See text accompanying note 139, *supra*.

174. In this discussion "serving" means "directly promote" or "further." When a trend does serve a goal it has a positive effect toward achieving that goal. When



the goals of accuracy and procedural fairness. Given severe time constraints on Congress, oversight of agencies is limited to larger policy questions, not the details. It strikes this author that, except for systematic questions, accuracy issues are details that the agencies concern themselves with, not Congress. Similarly, procedural fairness is more the province of the agencies initially subject to judicial review. Congress can always intervene and pass legislation,<sup>175</sup> but the more frequent type of Congressional action includes oversight hearings and reports, as well as legislation directed toward effectiveness.<sup>176</sup>

In any case, regardless of whether or not the author's perceptions in this area are valid, the purpose of this argument has been to raise for discussion the concept of goal analysis. The preceding analysis can be charted on a grid so that one can graphically see the role that it can play.

Goal Analysis Chart			
	Delay Reduction	Expansion of Public Participation	Increased Accountability
Efficiency (Timeliness)	X		(P)
Procedural Fairness	X		
Substantive Consistency		X	X
Accuracy		X	
Effectiveness	X	X	X

X = Served    P = Partly Served

As can be seen from the chart, there is some overlap in the goals served by each trend. Note that effectiveness is the only goal served by all three trends.

In order to see the usefulness of goal analysis, it is helpful to look at actual goal conflict situations. An excellent example is found in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>177</sup> In that case, "public interest" in-

a trend does *not* serve a goal, it does *not* have such a positive impact. However, the trend may be neutral toward the particular goal. It does not necessarily have a negative impact.

175. Congress can and does legislate procedurally. Such was the case when the APA was enacted by Congressional action in 1946.

176. The MOSS REPORT ranked nine agencies by effectiveness ratings. See note 114 *supra*, and accompanying text.

177. 435 U.S. 519 (1978).

tervention in the administrative process and judicial review was aimed at insuring thorough agency consideration of all statutorily required factors, thus fulfilling the goals of substantive consistency, accuracy in the sense of thoroughness of information, and effectiveness in the sense of safety. However, the price of achievement of those goals was the sacrifice of the goal of efficiency in the sense of timeliness and effectiveness in the sense of licensing approvals.

The conflict here can be illustrated by a factual discussion of the case. In *Vermont Yankee*, two power companies sought construction and operating permits from the Nuclear Regulatory Commission (NRC) (then the Atomic Energy Commission (AEC)). Vermont Yankee Nuclear Power Plant Company (VY) obtained its construction permit in December, 1967. It subsequently applied for an operating license. The hearing on that application began in August, 1971. The issue of the environmental effects of fuel reprocessing and radioactive wastes was handled in a separate rulemaking proceeding which was completed in April, 1974. The adopted rule and the approved VY operating license were challenged by intervenors on judicial review. The decision of the United States Supreme Court was handed down in April, 1978, ten years after the AEC granted the VY construction permit.

Similarly, there was a nine year delay between the date of application by Consumers Power Company for a permit to construct two nuclear reactors in Michigan, and the Supreme Court decision in April, 1978. The AEC had granted the permits in 1972. The granting of the permits was challenged by public interest intervenors and judicial review consumed most of the remaining time.<sup>178</sup>

While data which outlines the increased costs incurred by these power companies is not available, data is available for the similarly delayed construction of the Consolidated Edison Company's planned Storm King pumped storage hydroelectric facility near the Hudson River at Cornwall, New York. A ten year delay in construction (1963 to 1973) caused a tripling of construction costs from 162 million dollars to 465 million dollars.<sup>179</sup>

The goal of efficiency also conflicts with other goals such as pro-

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178. 435 U.S. at 525-35.

179. See ROBINSON AND GELLHORN, *supra* note 7, at 809-10. This facility was at issue in *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965). See Note, *Of Birds, Bees, and the FPC*, 77 YALE L.J. 117 (1967).

cedural fairness. Procedural fairness would require full ventilation of issues utilizing adjudicatory hearing procedure as the norm for administrative procedure.<sup>180</sup> This requirement is premised on the familiarity of courts with the element of fair procedure in civil and criminal litigation. However, adjudicatory procedure is frequently the slowest form of decisionmaking.

One solution to this conflict is that used in *Goss v. Lopez*,<sup>181</sup> namely requiring less than the full panoply of trial type procedures.<sup>182</sup> A better approach, however, would be for the agency to explicitly recognize the conflict in goals. The agency in question should then be required to prioritize the achievement of the various goals it has identified. Generic standards should be developed through rulemaking which would resolve recurring general questions and recurring goal conflicts.<sup>183</sup>

The potential conflict between the goal of efficiency and other goals is recognized in the two ACUS recommendations dealing with delay reduction. The first notes that "[w]hen asked to enforce statutory time limits, courts have recognized that an agency's observance of the prescribed limits may conflict with other requirements of law (*e.g.*, the right of interested persons or parties to a full or fair hearing) or with the requirements of sound decisionmaking."<sup>184</sup> The goal conflicts recognized in this quotation are between efficiency and fair procedure, and efficiency and accuracy ("sound decisionmaking"). It states that "[i]f Congress does enact time limits, for cases of any type, it should recognize that special circumstances (such as a sudden substantial increase in caseload, or complexity of the issues raised in a particular proceeding, or the presence of compelling public interest considerations) may justify an agency's failure to act within a predetermined time."<sup>185</sup> The goal conflicts identified here are efficiency versus accuracy, fair procedure, and substantive consistency.

The second ACUS recommendation states in subsection (a) of the discussion section:

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180. See, *e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970).

181. 419 U.S. 565 (1975).

182. Professor Schwartz calls this "flexible due process" and devotes a section of his administrative law casebook to the subject. SCHWARTZ, *supra* note 6, at 341-50, 370-89 (1977). See also Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

183. This recommendation for using rulemaking procedures to resolve generally recurring policy issues is analogous to the rulemaking recommendation discussed in note 39, *supra*. "Generic" is defined as "pertaining to a genus or class of related things" or "[h]aving a wide, general application." FUNK AND WAGNELL'S STANDARD DICTIONARY 556 (1977).

184. *Time Limits on Agency Action*, 1 C.F.R. § 305.78-3 (1979).

185. *Id.*

[B]ecause rate cases differ in kind and complexity, as well as in their immediate and future consequences, subjecting the decision process to unvarying time limits would be unwise. Nevertheless, steps that will reduce delays without jeopardizing the agencies' ability to bring relevant consideration to bear on the decision of each case are urgently needed.<sup>186</sup>

The conflict in goals presented is between efficiency and accuracy, as well as substantive consistency in the sense of thoughtful and thorough consideration of all relevant issues. Another example of conflicting goals is contained in subsection (d) of the ratemaking recommendation discussion. It states:

The present recommendation also reaffirms the Conference's earlier judgment (recommendation 72-4) that "[s]ettlement of rate proceedings by agreement among the parties is appropriate and desirable if the agency . . . is in a position to determine that the disposition is in the public interest." Implicit in the 1972 recommendation was the recognition, here explicitly stressed, that the interests of unrepresented groups must be considered before a settlement is approved. Increased emphasis upon settlement of cases should reduce the need for formal decisions and opinions.<sup>187</sup>

The conflicting goals in this example are efficiency (which is facilitated by settlement) and substantive consistency to the public interest or other legal standards binding on the agencies.

The ability to identify goal conflicts,<sup>188</sup> to harmonize the conflicts, and to therefore hopefully fulfill all goals will aid significantly in fostering the sense of legitimacy that agencies need to function. Illustrative of this is Dean Freedman's identification of "effective performance" and "fair procedure" as two sources of legitimacy.<sup>189</sup>

In conclusion, the importance of identifying problems that involve conflicting goals is illustrated by Justice Rehnquist's opinion in the *Vermont Yankee*<sup>190</sup> case. The goal of efficiency was

186. Reduction of Delay in Rulemaking Cases, 1 C.F.R. § 305.78-1 (1979).

187. *Id.*

188. Other examples of conflicting goals can be stated. For example, the ACUS states: "Legislative review of substantive rules would increase the workload of Congress substantially. Review of complex, technical rules would be difficult, time consuming and often impracticable." To the extent that the legislative veto serves substantive consistency, its value is outweighed by the negative impact it would have on the goal of efficiency. Similarly, use of the legislative veto could hinder the effectiveness of the agency, particularly if regulations are vetoed after becoming effective. This is a result of increased uncertainty on the part of the agency and the regulated industries. Legislative Veto of Administrative Regulations, 1 C.F.R. § 305.77-1 (1977). See also RIBICOFF OVERSIGHT STUDY, *supra* note 71, at 119-20.

189. See FREEDMAN, *supra* note 34, at 11.

190. 435 U.S. at 519 (1978).

All this leads us to make one further observation of some relevance to this case. To say that the Court of Appeals' final reason for remanding is in-

totally subsumed in this instance by the ability of parties to obtain judicial review "to secure the advantages of delay."<sup>191</sup> The following section on integrating principles will discuss the resolution of goal conflicts and/or trend conflicts.

### *E. Integrating Principles*

This section will discuss integrating principles which can be utilized to resolve conflicts among goals, and therefore among trends serving those goals. There are four principles to be discussed. These are: 1) identifying the problem as one involving conflicts in goals; 2) identifying the type of decisionmaking process involved, as well as the level, agency or court; 3) requiring the agency to prioritize goals; and 4) if prioritizing does not resolve the conflict, requiring the agency to make explicit tradeoffs among goals.

The first principle is to identify the problem as one involving conflicts in goals. The two previous sections of the article,<sup>192</sup> were directed toward this proposition, (*i.e.*, viewing some problems in administrative decisionmaking to be a result ultimately of con-

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substantial at best is a gross understatement. Consumers Power first applied in 1969 for a construction permit—not even an operating license, just a construction permit. The proposed plant underwent an incredibly extensive review. The reports filed and reviewed literally fill books. The proceedings took years. The actual hearings themselves over two weeks. To then nullify that effort seven years later because one report refers to other problems, which problems admittedly have been discussed at length in other reports available to the public, borders on the Kafkaesque. Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function. NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached. And a single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below, must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding.

*Id.* at 557-58. Professors Gellhorn, Byse, and Strauss quote this portion of Justice Rehnquist's opinion with the observation that "judicial review also can be used to excess or for essentially political purposes or to secure the advantages of delay." GELLHORN, BYSE, AND STRAUSS, *supra* note 7, at 916-17.

191. *Id.*

192. See text accompanying notes 142-91, *supra*.

flicting goals which are unarticulated and therefore go unnoticed and unexamined). Until conflicts in goals are noticed, examined, and resolved, many of the problems bedeviling the administrative process will continue.<sup>193</sup>

The second principle is to identify the type of decisionmaking process involved and the level, agency or court. This principle is basic to administrative law as the distinction between rulemaking and adjudication,<sup>194</sup> and between agency decisionmaking and judicial review.<sup>195</sup> The elementary nature of the principle suggests its importance to understanding administrative process problems.<sup>196</sup> It needs to be emphasized for two reasons: 1) there are varying conceptions regarding the nature of a particular decisionmaking process, and 2) solutions devised for one process may not work for another.

The first reason for emphasizing the type and level of the process involved (that there are varying conceptions regarding the nature of a particular decisionmaking process), is well illustrated by contrasting the views promulgated in two recent law review articles. Professor Fuller states "that the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."<sup>197</sup> Hahn, on the other hand, emphasizes the similarities of

193. See Ayer, *Do Lawyers Do More Harm Than Good?*, 65 A.B.A.J. 1053 (1979). This article won the 1979 Ross Essay Contest. Professor Ayer made an observation instrumental to the author's textual point. He stated: "Our criticism of lawyers, however comprehensive, conceals some deepseated self-contradictions, which often go *unnoticed* and thus *unexamined*. I don't think we can begin to make sense out of our attitude toward lawyers and the law until we *articulate* these underlying self-contradictions and recognize them for what they are." *Id.* at 1054 (emphasis added).

194. See, e.g.; SCHWARTZ TEXT, *supra* note 64, at 183-85, 198-203. See also Verkuil, *supra* note 27, at 294-303. He identifies six types of decisionmaking activities.

195. See, e.g., Professor Schwartz who differentiates between "intervention" at the agency decisionmaking level and "standing to sue" at the level of judicial review. SCHWARTZ, *supra* note 6, at 391-402, 565-87.

196. Administrative law casebooks promote this distinction as one of the pillars of the basic course in administrative law. See GELLHORN, BYSE, AND STRAUSS, *supra* note 7, at 147-248.

197. Fuller, *The Focus and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978). Fuller contrasts adjudication with "contract" serving "reciprocity," and having "negotiations" as the mode of participation by the affected party, and "elections" serving "organization by common aims" and having "voting" as the mode of participation. *Id.* at 363. See also Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410 (1978).

all administrative decisionmaking whether adjudication, rulemaking or otherwise. He states: "[v]iewed functionally, procedure is a mechanism of information acquisition, exchange, and management that contributes to the decisionmaker's determination." Hahn goes on to note that "[t]his view of procedure also assumes that the underlying activity—decisionmaking—is the same in each instance, regardless of whether the label applied to it is 'adjudicative' or 'legislative.'"<sup>198</sup> Professor Fuller also provides support for the proposition that solutions devised for one process may not work for another, when he states:

[i]t is in the field of administrative law that the issues dealt with in this paper become most acute. An official charged with allocating television channels wants to know of one applicant "what kind of fellow he really is" and accepts an invitation to a leisurely chat over the luncheon table. The fact of this meeting is disclosed by a crusading legislator. The official is accused of an abuse of judicial office. Charges and counter-charges fill the air and before the debate is over it appears that nearly everyone concerned with the agency's functioning has in some measure violated the proprieties that attach to a discharge of judicial functions. In the midst of this murky argument few are curious enough to ask whether the tasks assigned to such agencies as the Federal Communications Commission (FCC) and the Civil Aeronautics Board (CAB) are really suited for adjudicative determination, whether in other words, they fall within the proper limits of adjudication. No one seems inclined to take up the line of thought suggested by a remark of James M. Landis to the effect that the CAB is charged with what is essentially a managerial job, unsuited to adjudication or to judicial review.<sup>199</sup>

Fuller's comments emphasize the importance of matching the task to the type of decisionmaking process, a concern central to the second principle and expressed in the second reason.<sup>200</sup> It is felt by this author that the better view is that the differences in decisionmaking activity outweigh the similarities, and thus the agency should adhere strictly to the second principle.<sup>201</sup>

The third integrating principle is that agencies should be required to prioritize their goals. This is important because some

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198. Hahn, *Procedural Adequacy in Administrative Decisionmaking*, (pt. 1), 30 AD. L. REV. 467 (1978); (pt. 2), 31 AD. L. REV. 31 (1979). See also Verkuil, *supra* note 27, at 294-303.

199. Fuller, *supra* note 197 at 355 (1978).

200. Professor Davis developed the distinction between legislative facts and adjudicative facts in Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-16 (1942); See DAVIS, ADMINISTRATIVE LAW TEXT 160-62 (3rd ed. 1972). The distinction is utilized to determine when an individual is entitled to an adjudicatory hearing. The relevant observation here is that when legislative facts are at issue, an adjudicatory hearing concerned with the rights of a particular individual would not be helpful since legislative facts deal with general policies.

In addition, there are other decisionmaking processes, such as *ratemaking*, see text accompanying notes 34-39, *supra*. See also DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); and DAVIS, ADMINISTRATIVE LAW TEXT 88-122 (1972).

201. While this author may disagree with Mr. Hahn, his two part article is a brilliant discussion of administrative procedure.

policy resolutions will enhance one goal at the expense of another. To resolve the policy question while maintaining respect for that latter goal requires a determination of the relative importance or competing priority of the two goals.<sup>202</sup> Management techniques can be utilized here.<sup>203</sup> Once priorities among goals have been established, then standards used to achieve various goals can be reconciled and integrated, consistent with those goals.<sup>204</sup>

It is important to note that disparate goals will not always conflict. When that is the case, prioritizing is not necessary. It is only when there is a conflict in goals, and hard choices have to be made, that prioritizing becomes necessary.

Use of management techniques to resolve administrative process problems is on the rise. The ACUS recommends that "[a]s part of their positive caseload management program, agencies should begin immediately to explore, develop and implement statistical quality assurance reporting systems that will indicate the accuracy, timeliness and fairness of claims processing."<sup>205</sup>

The fourth and final principle involves the making of explicit tradeoffs among goals, when prioritizing cannot resolve a conflict. A tradeoff among conflicting goals, both of which can be fulfilled to some extent, is an alternative to prioritizing when both goals in conflict have to be accommodated. For example, the Moss Report, in recommending expanded public participation in regulatory agency decisionmaking, recognized that to fulfill the goal of substantive consistency, the goal of efficiency would have to be de-emphasized or traded off. The report states:

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202. For example, if first priority were given to efficiency, and fourth priority to procedural fairness, there would be an emphasis on streamlined procedure and a deemphasis on the full panoply of trial type procedures exemplified in *Goldberg v. Kelly*, 397 U.S. 254 (1970) (prioritizing results in the achievement of the more important goal at the expense of the less important goal).

203. See Mashaw, *supra* note 144, at 775-76, for a discussion of management techniques for a quality assurance system. See also note 11 *supra*, and accompanying text and notes 7 and 8 *supra*, for a discussion of public administration managerial literature on deadlines.

204. *Standards* as used in this context refer to the means utilized to effectuate the goals of an agency. See, e.g., 5 U.S.C. § 555(b) (efficiency achieved within a reasonable time), § 558(c) and § 706(1) (unreasonable delay) (1966). See generally, ACUS, *Time Limits on Agency Actions*, 1 C.F.R. § 305.78-3 (1979).

Similarly, citizen participation in agency decisionmaking is a means of ensuring the goals of substantive consistency and effectiveness. ACUS, *Public Participation in Administrative Hearings*, 1 C.F.R. § 305.71-6 (1979).

205. *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 1 C.F.R. § 305.73-3 (1979).



[o]ur study has convinced us that all too often important interests have not been considered sufficiently . . . because there has been no effective way to present those views forcefully. *Further while increased public participation could consume decisionmaking time in certain instances, the time will not be significant and will in any case be well worth the cost because the result will be decisions which truly reflect the public interest.*<sup>206</sup>

The ability to make tradeoffs is enhanced by the separate development of information regarding implementation of each goal.<sup>207</sup> The concept of "hybrid" or hybridization (defined as "anything of mixed origin")<sup>208</sup> is useful in understanding goal tradeoffs. The trend of "hybrid" rulemaking<sup>209</sup> is an illustration of this principle of goal tradeoffs. "Hybrid" rulemaking is described by Professors

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206. MOSS REPORT, *supra* note 49, at 470. The RIBICOFF REPORT reiterates the need for tradeoffs among the goals of procedural fairness and efficiency. It states:

With its resources and official standing, a consumer advocacy agency might actually be a force against delay as it attacks both agency practices or the use of any dilatory tactics detrimental to consumer interests. To the extent that more time is necessary to hear previously unvoiced consumer interests, some further deliberation should be acceptable. After all, lawsuits would proceed more rapidly if only one side were able to present its case, yet our system of justice does not accept the *loss of equity in the interest of speed*. Similar considerations of equity are also present in regulatory proceedings and should not be readily sacrificed to other procedural considerations.

III RIBICOFF REPORT, *supra* note 7, at 71. Tradeoffs result in the mutual accommodation, or achievement to a lesser extent, of conflicting goals.

207. The ACUS recommends such separate development. It states:

As part of their positive caseload management program, agencies should begin immediately to explore, develop and implement statistical quality assurance reporting systems that will indicate the accuracy, timeliness, and fairness of claims processing. In designing such systems, agencies should consider the need for information of a type that:

- (a) Reflects differences in the types of cases and types of issues adjudicated and the stages of the administrative process involved;
- (b) Identifies the management unit, or where appropriate, the individual adjudicator involved in order that effective action may be taken to reinforce success and to improve performance;
- (c) Permits separate evaluation of (1) substantive decision-making, (2) case development effort, and (3) procedural regularity;
- (d) Enables separate evaluation of particular functions of the decision process (*e.g.*, issue statement or evaluation of evidence in substantive decision-making.)

1 C.F.R. § 305.73-3(2) (1979).

208. FUNK & WAGNALL'S STANDARD DICTIONARY 656 (1977).

209. See Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1277 (1972); Williams, "Hybrid" Rulemaking Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975). Professor Schwartz, describing "hybrid" rulemaking developments notes that "[o]ther recent statutes adopt an approach in between the notice-and-comment requirements of § 553 and the requirement of a trial type hearing. For examples, see the Consumer Product Safety Act of 1972 § 7, 15 U.S.C. § 2056 (1972); Coal Mine Health and Safety Act of 1969 § 6, 30 U.S.C. § 811 (1969); Occupational Safety and Health Act of 1970 § 101, 29 U.S.C. § 655 (1970). SCHWARTZ, *supra* note 6, at 277. See also ACUS, *Procedures for the Adoption of Rules of General Applicability*, 1 C.F.R. § 305.72-5 (1979).

Gellhorn, Byse, and Strauss<sup>210</sup> as follows:

In April, 1978, the Commission initiated a rulemaking proceeding governed by special hybrid procedures under the Magnuson-Moss Federal Trade Commission Improvement Act, 15 U.S.C. § 57a: A record is to be compiled, although the procedures are generally informal, parties are to have the opportunities to show that particular disputes of fact exist, material to the outcome, which require on-the-record oral proceedings replete with cross-examination and the like; review is in accordance with the substantial evidence test.<sup>211</sup>

As the description illustrates, hybrid rulemaking accommodates procedural fairness by affording a trial-type procedure, accommodates accuracy with regard to fact finding, and promotes efficiency to the extent that the speed of informal rulemaking procedure is preserved. The only caution here is that explicit goal tradeoffs should be articulated by agencies when they "hybridize."<sup>212</sup>

210. GELLHORN, BYSE AND STRAUSS, *supra* note 7, at 886.

211. *Id.*

212. Hybridizing is not always required. In an interesting decision by Judge (now Chief Justice) Burger, the Court of Appeals for the D.C. Circuit rejected a challenge to the accuracy and thoroughness of a decision by the Federal Power Commission because the decision was decided too quickly. This served the goal of efficiency as well as accuracy. *Florida Economic Advisory Council v. Federal Power Commission*, 251 F.2d 643 (D.C. Cir. 1957). Judge Burger noted:

Petitioner claims that two defects resulted from the speed in which the hearings were concluded and a decision reached. First, it claims it had an unduly short amount of time in which to brief and argue its case. After the hearings had been in progress for over four months, with petitioner present and actively participating, petitioner on December 6 was asked to submit briefs by December 15 (actually December 17, as the 15th was a Saturday), and on December 13 was asked to submit to oral argument on December 21. We do not find this so short a time, considering the need for dispatch as to amount to a denial of substantial rights. There is no showing that due to the speed, petitioner overlooked any important points or was otherwise adversely affected.

Second, petitioner complains that the Commission decided the case too fast; that in the time available the Commissioners could not have read all the evidence and pondered all the issues. It is not for the courts, short of flagrant extremes, to tell the administrative agencies how long they must ponder before coming to a decision. The time spent in considering the evidence cannot be held by us to be too little if it appears that the Commission has spent the time required to satisfy itself as to its findings and conclusions.

We cannot say that either the statute or the Constitution was violated by the Commission in not consuming a longer time in considering and deciding the case. The vigorous dissent by the Commissioners Cannole and Kline serve to emphasize the close scrutiny given by the Commission. Errors, whether induced by haste or other factors, are always reviewable on appeal.

*Id.* at 648.

*F. Methods of Structuring Citizen and Legislative Involvement in the Administrative Process*

This final section will discuss the incorporation and integration of a variety of concepts into meaningful statutory standards with the express purpose of harmonizing conflicts among the three trends so that all may be fulfilled, and so that the institutional goals of the administrative process will be furthered. Amendments to the APA will be suggested to harmonize expansion of public participation and delay reduction so that citizen involvement in the administrative process is effectuated.<sup>213</sup> In addition, legislative standards will be developed to harmonize increased accountability and delay reduction. The integrating principles will be reflected in both types of standards.

1. § 555a "Goal Analysis"—A Model Amendment<sup>214</sup>

(a) This section applies, according to the provisions thereof, to each "agency" as defined in § 551(1) conducting formal decision-making procedures including "adjudication," as defined in § 551(7) and as governed by §§ 554, 556, 557; "rulemaking," as defined in § 551(5) whether informal notice and comment rulemaking as governed by § 553 or formal "on the record" rulemaking as governed by §§ 553(c), 556, 557; "licensing" as defined in § 551(a) and as governed by §§ 556, 557, 558; "ratemaking" and other formalized administrative decisionmaking procedures.<sup>215</sup>

(b) This section applies to agencies deciding whether to allow intervention<sup>216</sup> by an interested person or group in an agency

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213. The need for such harmonizing is emphasized in Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1770-76 (1975). In a portion of this article Professor Stewart notes with regard to expanded public participation in agency decisionmaking that:

[T]o the extent trial-type procedures are required, with the right of participants to introduce evidence, and to cross-examine, a considerable measure of delay and increased expenditure of resources will be involved. *These characteristics will be aggravated with the expansion of the number of parties entitled to participate. Liberal grants of standing to seek judicial review will promote further delay and require additional commitments of resources* (emphasis added).

*Id.* at 1770-71.

214. This model amendment is intended to appear in the proper statutory form. "Section" refers to the statutory section as a whole, *e.g.*, Section 555a. "Subsection" refers to subdivisions of a particular statute. *See* SCHWARTZ, *supra* note 6, at 49-52 for President Ford's proposed "agenda for Governmental Reform Act." Section 4(b)(1) contains a requirement that purposes of legislation be identified.

215. The sections mentioned in proposed 5 U.S.C. § 555a are part of the current Administrative Procedure Act § 4, 5 U.S.C. §§ 551-559, 701-706 (1979).

216. An excellent set of intervention standards is contained in ACUS, Public Participation in Administrative Hearings, 1 C.F.R. § 305.71-6 (1979).

On intervention, *see also* Shapiro, *supra* note 119, at 765-66; GELLHORN, BYSE,

decisionmaking procedure as defined in subsection (a), whether such procedure is ongoing at the time intervention<sup>217</sup> is sought, or whether such person or group is seeking to commence an agency decisionmaking procedure.

(c) This section requires agencies to determine whether granting an intervention request as described in subsection (b) is consistent with agency decisions required under subsections (d), (e), (f), and (g).

(d) Each agency shall survey and determine the extent to which its current decisionmaking processes fulfill<sup>218</sup> the following goals:

- (1) timeliness and efficiency;
- (2) procedural fairness;
- (3) substantive consistency;
- (4) accuracy;
- (5) effectiveness in enforcement and implementation;
- (6) other goals that each agency decides it fulfills or should fulfill.

(e) The purpose of the determination required in subsection (d) is to ascertain if agency activities are aligned with the goals listed therein;<sup>219</sup> to discover if any activities are burdened with conflicting goals; and to integrate intervention decisions of each

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AND STRAUSS, *supra* note 7, at 634-37. For a discussion of a definition of "an interested person" see also GELLHORN, BYSE AND STRAUSS, *supra* note 7, at 637-59.

217. The provisions of FED. R. CIV. P. 24 are very helpful here by way of analogy. The observation has been made that

[t]he typical setting for intervention in agency proceedings is like that in which intervention occurs in judicial proceedings. That there will be a hearing involving certain parties is already established. The would-be participants, learning of the proceeding somehow, come forward with a claim that they also should be accorded party status. The agency's statute or, more likely, its procedural rules, will state some governing criteria, often in terms reminiscent of Fed. R. Civ. P. 24, governing entry to the proceeding.

GELLHORN, BYSE AND STRAUSS, *supra* note 7, at 635-36.

218. The ability of agencies to make such determinations would be aided by information collection systems such as those described. See note 242 *infra*.

219. See Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 550 (1978). Professor Breyer advocates an approach, a framework of analysis, similar to goal analysis which utilizes determination of objectives. He states:

This Article concerns proposals of the fourth sort. It seeks to help formulate and advance substantive proposals for change by providing a framework for analyzing economic regulation. The framework is designed to isolate existing regulatory areas that are particularly likely to need reform. It also seeks to aid legislators and administrators deciding whether

agency into the overall goal implementation planning of the agency.

(f) Each agency shall determine, after conducting the goal analysis required in subsection (d), whether any of its decision-making processes cause conflicts in goals which hamper the fulfillment of one or more of the goals enumerated in subsection (d).

(g) After making the determination required by subsection (f) and, finding a goal conflict as defined in subsection (f), each agency shall, through generic rulemaking proceedings, governed by section 553 of this title:

- (1) Rank each of the goals enumerated in subsection (d) by relative priority, either generally, or by category of decisionmaking process, so as to resolve goal conflict through prioritizing, by making achievement of one goal in conflict more important than achievement of another goal in conflict with the first goal; and
- (2) if the determination required by subsection (g)(1) does not resolve the goal conflict, as defined in subsection (f), then each agency shall make explicit tradeoffs among conflicting goals either generally, or by category of decisionmaking process, so that both goals can be accommodated and achieved to some extent, although less than if each goal were solely being fulfilled by the particular decisionmaking process.

(h) "Decisionmaking process" should be defined broadly to include:

- (1) the formal decisionmaking procedures of adjudica-

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they should design new regulatory programs or rely instead upon alternatives to traditional systems of regulation.

*The framework is built upon a simple axiom for creating and implementing any program: determine one's objectives, examine the alternative methods of obtaining these objectives, and choose the best method for doing so.* In regulatory matters, several factors cause this axiom to be honored only in the breach. First, although the defects of the free market are widely recognized, there is no well-known systematic account of typical problems that accompany classical forms of regulation. Nor are the potential alternatives to classical regulation, such as taxation, typically explored in any detail. Too many arguments made in favor of government regulation assume that regulation, at least in principle, is a perfect solution to any perceived problem with the unregulated marketplace. But regulation embodies its own typical defects. One of this Article's objectives is to present these defects systematically, so that legislators, administrators, and others will find it easier *to match regulatory goals with regulatory systems* (emphasis added) (footnotes deleted).

*Id.* at 550-51.

tion, rulemaking, licensing, and ratemaking as defined in subsection (a);

- (2) agency determinations under § 552, § 552a, and § 552b of this title;
- (3) informal agency action involving exercises of agency discretion to the extent feasible.

(i) In making the determinations required under subsections (b), (c), (d), (e), (f), and (g), agencies shall determine, to the extent feasible, the impact of judicial review, as defined in agency statutes, including but not limited to §§ 701-706 of this title, upon the fulfillment of agency goals as defined in subsection (d). In making the determinations required under this subsection, agencies shall proceed through generic rulemaking proceedings, governed by section 553 of this title, either generally or by category of decisionmaking activity, and shall consider:

- (1) the impact of agency intervention decisions on the ability of intervenors to obtain standing for judicial review of agency action;<sup>220</sup> and
- (2) the effect of judicial review on the agency including time elapsed during such review as well as the quality of the result achieved;
- (3) the resource costs of such review to the agency, and to affected parties.

(j) Each agency shall consider, when feasible, the effect on the determinations required under subsections (d), (e), (f), and (g) of multi-party, multi-agency proceedings. The determination required by this subsection should be made, when feasible, on an individual case basis in cooperation with other agencies also having responsibility for parts of an individual case.<sup>221</sup>

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220. Professor Stewart suggests that intervenors, particularly public interest intervenors, will be tempted to seek judicial review to cause additional delays in the effective date of an agency's decision in particular cases. Stewart, *supra* note 214, at 1770-76.

221. The ability of a particular agency to achieve discrete goals can be complicated immensely if multiple parties are involved. The complexity is increased when multiple agencies are present and when several courts become involved in a particularly large case. A good example of this phenomenon is the *Sohio* case. Standard Oil Company of Ohio wanted to build a pipeline from Southern California to carry Alaskan crude oil to Texas. Agencies involved in the pipeline approval process, which had to issue permits before the project could proceed, included *pollution agencies* such as the Air Quality Management District for Southern California (SCAQMD), an arm of the State Air Resources Board; *land development control agencies*; South Coast Regional Commission of the California Coastal

In addition to adding a goal analysis section to the APA, the provisions of the APA that are timeliness standards should be re-written, because these sections<sup>222</sup> “have contributed little to the reduction of delay.”<sup>223</sup>

## 2. § 555b “Timeliness Standards”<sup>224</sup>—A Model Amendment

(a) This section is intended to integrate the current “within a reasonable time” language of § 555(b) and § 558(c) with the requirements of section 555a. These two sections, 555a and 555b should be construed consistently with each other. Section 555b should be used as a guide by courts asked to “compel agency action . . . unreasonably delayed” under § 706(1) of this title.

(b) This section applies, according to the provisions thereof, to each “agency” as defined in § 551(1) conducting formal decision-making procedures including “adjudication,” as defined in § 551(7) and as governed by §§ 554, 556, 557; “rulemaking” as defined in § 551(5) whether informal notice and comment rulemaking as governed by § 553 or formal “on the record” rulemaking as governed by §§ 553(c), 556, 557; “licensing” as defined in § 551(9) and as governed by §§ 556, 557, 558; “ratemaking” and other formalized administrative procedures.<sup>225</sup>

(c) Each agency shall, by rulemaking proceeding pursuant to § 553 of this title, develop specific time period timeliness standards<sup>226</sup> within two calendar years of the date of this enactment.

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Commission; and *energy development agencies* such as the Federal Department of Energy. This type of multi-party, multi-agency decision making will increase as the development of alternative energy sources (“synfuel”) proceeds in the 1980’s.

222. 5 U.S.C. §§ 555(b), 558(c), 706(1) (1966).

223. Tomlinson notes that:

[C]ourts have not developed worthwhile rules for determining what constitutes an unlawful or unreasonable delay and have granted relief from the effects of delay only on a haphazard basis and in egregious cases. The vagueness of the statutory terms is only partially responsible for this situation. Courts have also held that these statutory provisions do not affect the broad discretion enjoyed by most agencies to allocate their limited resources among the competing demands for their attention. (footnotes omitted).

Tomlinson, *supra* note 8, at 1. Tomlinson discusses judicial efforts to construe specific time period standards, *e.g.*, *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976); *NRDC v. Train*, 510 F.2d 692 (D.C. Cir. 1973); *Forth Worth Nat. Corp. v. Federal Savings and Loan Insurance Corp.*, 469 F.2d 471 (5th Cir. 1972); *Maryland Casualty Company v. Cardillo*, 99 F.2d 432 (D.C. Cir. 1938); *Diamond Match Co. v. United States*, 181 F. Supp. 952 (Customs Ct. 1960).

224. See *Administrative Delay*, *supra* note 1, at 73-92. Proposed § 555b draws heavily on ACUS Recommendation 78-3, *Time Limits on Agency Action*, 1 C.F.R. § 305.78-3 (1979).

225. The language of proposed 5 U.S.C. § 555b(b) is identical to that of proposed 5 U.S.C. § 555a(a).

226. See *Administrative Delay*, *supra* note 1, at 74-76.

Such standards shall be articulated separately for each of the following decisionmaking processes:

- (1) adjudication;
- (2) notice and comment rulemaking as defined in subsection (b);
- (3) "hybrid" rulemaking;<sup>227</sup>
- (4) formal "on the record" rulemaking as defined in subsection (b);
- (5) ratemaking;<sup>228</sup>
- (6) permit granting;
- (7) "clearance activities;"<sup>229</sup>
- (8) other quantifiable agency decisionmaking activities.<sup>230</sup>

(d) Each agency shall, when developing the standards required by subsection (c), provide "escape clauses,"<sup>231</sup> the effect of which would be to justify noncompliance with a specific time period standard developed in subsection (c).

(e) The "escape clauses," established pursuant to subsection (d) by agencies shall be one of the following three types:

- (1) "reasons justifying noncompliance;"<sup>232</sup> or
- (2) "deadline extension;"<sup>233</sup> or
- (3) "time exclusion;"<sup>234</sup>

(f) "Escape clauses" pursuant to section (f) shall be established by agencies for any of the following justifications:

- (1) "a sudden substantial increase in the agency's

227. See text accompanying notes 209-13, *supra*.

228. See Morgan, *supra* note 23, at 23.

229. See Tomlinson, *supra* note 8, at 15-17. See also Verkuil, *supra* note 27, at 263.

230. Subsection (c) draws on two specific parts of ACUS Recommendation No. 78-3: 1) the subsection (1) statement that "generally it is preferable that such limits be established by the agencies themselves, rather than by statute,"; 2) the subsection (3) requirement that agencies set their deadlines "either by announcing schedules for particular agency proceedings or by adopting regulations that contain general timetables for dealing with categories of the agency's proceedings." This author believes the latter route is better, and feels it is permissible for Congress to require, agencies to set their own deadlines. See also *Administrative Delay*, *supra* note 1, at 84-87.

231. *Administrative Delay*, *supra* note 1, at 76, 89-90.

232. *Id.*

233. *Id.* This is the type of clause preferred by this author.

234. *Id.*



caseload;”<sup>235</sup>

- (2) “complexity of the issues raised in a particular proceeding;”<sup>236</sup>
- (3) “presence of compelling public interest considerations;”<sup>237</sup>
- (4) “delay caused by or requested by one of the parties;”<sup>238</sup>
- (5) other unusual circumstances which, in good faith, prevent the agency from meeting the articulated standard.<sup>239</sup>

(g) Each agency developing the standards required by subsections (c), (d), (e), and (f), shall report, by annual compliance report,<sup>240</sup> to Congress on that agency’s progress (1) in adopting the standards required by subsections (c), (d), and (e); and (2) in meeting the standards so required. The reports required by this subsection shall be subdivided by decisionmaking process as stated in subsection (c). In addition, each agency shall report to affected parties in individual cases the agency’s compliance or lack thereof with the standards required herein.<sup>241</sup>

(h) If any agency fails, without good cause, to adopt the standards required in subsections (c), (d), (e), and (f) within the time period specified in subsection (c), Congress shall, at the earliest feasible time, adopt such standards for such agency. Congress shall follow the requirements of subsections (c), (d), (e), (f), in so adopting such standards, and shall enact such standards as amendments to the agency’s authorizing statutes.<sup>242</sup>

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235. Subsection 4) of ACUS, Recommendation No. 78-3 is the source of justifications (f) (1), (2), (3). It states in part:

[i]f Congress does enact time limits, for cases of any type, it should recognize that special circumstances (such as a sudden substantial increase in caseload, or complexity of the issues raised in a particular proceeding, or the presence of compelling public interest considerations) may justify an agency’s failure to act within a predetermined time.

1 C.F.R. § 305.78-3 (1979).

236. *Id.*

237. *Id.*

238. See *Administrative Delay*, *supra* note 1, at 89.

239. The requirement of good faith is imposed to ensure that agencies do not utilize justification (5) to swallow up a deadline.

240. See *Administrative Delay*, *supra* note 1, at 132-33.

241. Subsections 2) and 4) of ACUS Recommendation No. 78-3 both require such reports. Subsection 2) states in part: “It may also require that significant departures from agency-adopted timetables may be explained in current status reports.” Subsection 4) states in part: “Statutes fixing limits within which agency adjudication must be completed should ordinarily require that an agency’s departure from the legislative timetable be explained in current status reports to affected persons or in a report to Congress.” 1 C.F.R. § 305.78-3(2) and (4) (1979).

242. Subsection 2) of ACUS Recommendation No. 78-3 states “[b]efore determining to impose statutory time limits on agencies for the conduct of agency pro-

(i) Standards enacted by agencies or Congress pursuant to this section should be reviewed for accuracy by the agency bound by the standard at least every two years to determine if the standard is still accurate and realistic. The Administrative Conference of the United States may aid agencies in this review process.<sup>243</sup>

(j) Timeliness standards adopted pursuant to this section are enforceable by a private right of action<sup>244</sup> that may be brought by "aggrieved or affected persons"<sup>245</sup> in the federal court that has jurisdiction over the particular agency. Subject matter jurisdiction over actions brought under this subsection shall be provided by § 1331 of title 28, if the reviewing court is a district court of the United States, or shall be provided by a judicial review provision in the enabling statute of the particular agency.<sup>246</sup>

(k) The language of § 555b and § 555c, "within a reasonable time," shall be construed consistently with the requirements of this section.<sup>247</sup>

Finally, legislative intervention standards should be drafted to ensure that increased accountability is harmonized with delay re-

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ceedings, Congress should give due consideration to the alternative of requiring the agency itself to establish timetables or guidelines for the prompt disposition of various types of proceedings conducted by it." 1 C.F.R. § 305.78-3(2) (1979).

243. The ACUS, in Recommendation 78-3 at subsection 6) states:

If Congress does impose a statutory time limit on agency decisionmaking, whether in adjudicatory or rulemaking matters, it should be attentive to the need for revision. A time limit considered desirable at the outset may prove to have been unrealistic because it was based on incomplete information. If realistic at the time of enactment, the limit may cease to be so with the passage of time. Statutes imposing time limits therefore should provide for periodic reconsideration by the Congress or grant the agency authority to revise the limits under standards established by the Congress.

1 C.F.R. § 305.78-3(6) (1979).

244. Subsection 7) states:

If a statutory time limit is imposed, Congress should expressly state whether affected persons may enforce the time limit through judicial action and, if so, the nature of the relief available for this purpose. In cases where the time limit is intended only as a norm by which the agency's performance is to be measured, a requirement that the agency report deviations from the time limit to Congress may be a desirable means of assuring oversight of its performance.

1 C.F.R. § 305.78-3(7) (1979).

245. See 702 of the APA, (codified at 5 U.S.C. § 702 (1979)).

246. See note 234 *supra*.

247. The author prefers integrating the proposed new § 555b with current APA timeliness language, rather than deleting that language and rewriting §§ 555(b) and 555(c).

duction, and to ensure that agencies are able to fulfill their goals. These standards should be enacted by Congress but should be separately codified in the United States Code, rather than included in the APA.

### 3. § 600 Legislative Intervention Standards—A Model Amendment<sup>248</sup>

(a) In ensuring the accountability of administrative agencies to Congress and the American people, Congress should conduct legislative oversight of those agencies consistent with the principles stated in this section.

(b) Congress should conduct oversight primarily through the traditional methods of oversight committees. In so doing, to minimize the drain on agency resources, there should be coordination<sup>249</sup> of oversight activities and consolidation of oversight hearings, between legislative and appropriations committees, among each house, and between House and Senate.<sup>250</sup>

(c) The legislative veto should not normally be used as an accountability device because of its impact on agency goals, in particular, the goals of effectiveness and efficiency, as well as the crushing burden on Congress imposed by review of regulations.<sup>251</sup>

(d) Periodic reauthorization of administrative agencies with mandatory review should not be substituted for oversight by committee required by subsection (b). Such reauthorization has the potential for endangering agency fulfillment of the goals of effectiveness and efficiency. In addition, the time required for such reauthorization poses heavy pressures on Congress.<sup>252</sup>

(e) In conducting oversight, Congress should emphasize the use of agency compliance reports, and interrogatories, and deemphasize oral hearings which are time consuming for both the agency and the committee hearing testimony.<sup>253</sup>

These standards are only a first step toward structuring legislative intervention in the administrative process. They are intended to stimulate further discussion of others on this subject.

## IV. CONCLUSION

This article has examined three current trends in American ad-

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248. These standards draw heavily from the MOSS REPORT, note 49 *supra*, and the RIBICOFF OVERSIGHT STUDY, note 71 *supra*. See text at notes 68-81 (sunset laws), 84-94 (legislative veto) and 93-114 (legislative oversight reform) *supra*.

249. See notes 99, 106-08 *supra*, and accompanying text.

250. *Id.*

251. See notes 82-92 *supra*, and accompanying text.

252. See notes 68-81 *supra*, and accompanying text.

253. See text accompanying note 98, *supra*.

ministrative law. These trends are reduction in administrative delay, expansion of citizen access to and public participation in administrative agency proceedings, and increased accountability of administrative agencies to the legislature and the public. It has described these trends, and then explored their interaction. It has proposed goal analysis as a method to integrate the three trends. In so doing, it has discussed goals and standards, conflicts among trends and goals, integrating principles, and methods of structuring citizen and legislative involvement in the administrative process. It is to be hoped that the ideas expressed herein will stimulate thinking and writing by other scholars in the field on these subjects.

