THE TEMPORARY EMERGENCY COURT OF APPEALS: A STUDY IN THE ABDICATION OF JUDICIAL RESPONSIBILITY

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INTRODUCTION

The increasing importance of the administrative process in the creation and implementation of public policy suggests the need for further study of the relationship between the administrative process and the other power centers in our legal system. An area of early concern which is a continuing subject of study is the allocation of power between the courts and the administrative agencies.[1] Congressional action largely controls the distribution of power between courts and agencies. It is Congress which establishes the mandate and the broad guidelines for administrative action and judicial review of the administrative process. Congress usually grants the newly-created agency extremely broad authority which is subject to only minimal restrictions. Moreover, Congress has increasingly delegated to the agencies the task of resolving complex socio-economic problems.

Social, economic and political conditions in the 1970's have created pressures which have increased congressional reliance upon the administrative process. The most prominent example is the congressional response to the economic problems of the late 1960's and early 70's. With surprisingly

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THE FOLLOWING CITATION WILL BE USED IN THIS ARTICLE:

Economic Stabilization Act of 1970, 84 Stat. 799, as amended by 84 Stat. 1468, 85 Stat. 13, 85 Stat. 38, 85 Stat. 743, 87 Stat. 27-29 (as included at 12 U.S.C. § 1904 (Supp. V 1975)) [hereinafter cited as Economic Stabilization Act].

1. For an excellent description of the historical evolution of the allocation of power between administrative agencies and courts, see White, *Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis*, 1974 DUKE L.J. 195. A recent study of judicial review of Federal Power Commission policy-making also examines the interaction between court and agency. Fiorino, *Judicial-Administrative Interaction in Regulatory Policy Making: The Case of the Federal Power Commission*, 28 AD. L. REV. 41 (1976).

little deliberation, Congress in August 1970, enacted this country's first peacetime program of wage and price controls.[2] Congress sought to meet the problem of inflation by delegating sweeping power to the President to "issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries."[3] Only after a court challenge to the constitutionality of the Economic Stabilization Act of 1970[4] and further congressional consideration in 1971 was the Economic Stabilization Act amended to provide some guidelines for the exercise of the President's authority and to delineate the congressional policies on economic controls.[5] The guidelines and policies that were contained in the amended Act, however, were extremely broad, requiring only that the President's program be "generally fair and equitable," that it provide generally "comparable sacrifices" by all segments of the economy, and that it contain "general exceptions and variations as are necessary to foster orderly economic growth and to prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profit."[6]

In 1973, Congress, responding to "spiraling" inflation and severe shortages of crude oil caused in part by the Arab oil embargo, accorded the President additional emergency power by amending the Economic Stabilization Act so as to permit the President to issue orders and regulations to establish "priorities of use and . . . systematic allocation of supplies of petroleum products including crude oil in order to meet the essential needs of various sections of the Nation."[7] The amended Economic Stabilization Act expired in 1974[8] and was succeeded by the Emergency Petroleum

2. Economic Stabilization Act. For a comparison of the 1970's economic stabilization program with its historical predecessor established under the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (1942), see Nathanson, *Price-Control Standards and Judicial Review—An Historical Perspective*, 18 PRAC. LAW. 59 (1972); Comment, *Administration and Judicial Review of Economic Controls*, 39 U. CHI. L. REV. 566 (1972). *See also* Leventhal, *Principled Fairness and Regulatory Urgency*, 25 CASE W. RES. L. REV. 66 (1974).

3. Economic Stabilization Act § 202.

No attempt will be made here to evaluate the wisdom of the congressional enactments or the effectiveness of the administrative agencies created to implement these national programs. On the need and effectiveness of the economic stabilization program, see Fortune, Book Review, 12 HARV. J. LEGIS. 281, 285-88 (1975). *See also* Dougherty, *Sector by Sector Anti-Inflation Legislation: Proposed Amendments to the Council on Wage and Price Stability Acts*, 13 HARV. J. LEGIS. 363 (1976).

4. *See* Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971).

5. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743 (1971).

6. Economic Stabilization Act § 203(b).

7. Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, § 2(a), 87 Stat. 27 (1973) (Economic Stabilization Act § 203(a)(3)).

8. Economic Stabilization Act § 218. For analysis of the Act, its operation and effectiveness, see Fortune, *supra* note 3; Note, *Phase V: The Cost of Living Council Reconsidered*, 62

Allocation Act of 1973 (EPAA).[9] Both acts delegated unprecedented peacetime authority to the President. This authority was in turn subdelegated to administrative agencies to carry out the congressional mandate.

The original legislation which empowered the President to impose peacetime economic controls contained no provision for judicial review. This oversight was corrected by Congress in 1971 when it amended the Economic Stabilization Act to create a special national court of appeals, designated the Temporary Emergency Court of Appeals (TECA).[10] The court was given jurisdiction to hear all appeals taken from federal district court cases arising under the Economic Stabilization Act,[11] and to decide all

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GEO. L.J. 1663 (1974); Comment, *supra* note 2. For a succinct history of the economic stabilization program, see United States v. Pro Football, Inc., 514 F.2d 1396, 1398-99 (Temp. Emer. Ct. App. 1975). *See also* HISTORICAL WORKING PAPERS ON ECONOMIC STABILIZATION PROGRAM (1974).

9. Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760h (Supp. V 1975). The EPAA has been amended by the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975). Subsequent to the passage of the EPAA, the President established the Federal Energy Office (FEO) to promulgate regulations covering crude oil allocation. Exec. Order No. 11,748, 38 Fed. Reg. 33,575 (1973). The FEO was superseded by the Federal Energy Administration (FEA) on June 27, 1974, pursuant to the Federal Energy Administration Act of 1974, 15 U.S.C. §§ 761-786 (Supp. V 1975) and section 5(a) of Exec. Order No. 11,790, 39 Fed. Reg. 23,185 (1974).

For a discussion of the origins of the petroleum supply shortage, a history of FEA regulatory programs and an analysis of FEA's mandatory crude oil allocation program, see Note, *National Energy Goals and FEA's Mandatory Crude Oil Allocation Program*, 61 VA. L. REV. 903 (1975). For a brief history of the federal energy program, see Condor Operating Co. v. Sawhill, 514 F.2d 351, 356-57 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975).

10. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 2, 85 Stat. 743 (1971) (Economic Stabilization Act § 211). The TECA, which began operations in February 1972, is made up of nine judges—six circuit and three district court judges—who were originally appointed on January 13, 1972 by the Chief Justice of the United States pursuant to the statutory mandate of the 1971 amendments. The principal location of the TECA is the District of Columbia, but the court sits as necessary at such other places and times as the Chief Judge may designate. The court operates under its own rules, 6 C.F.R. app. A (1972), and cases are assigned by the Chief Judge based on the case load of the individual judges and the location of the case.

11. It is now unquestioned that Congress has plenary power over jurisdiction of inferior federal courts. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts conferred on Congress by article III, § 1 of the Constitution. Lockerty v. Phillips, 319 U.S. 182, 187 (1942), and authorities cited therein. In *Lockerty*, the Court upheld provisions of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (1942), which created a statutory scheme for enforcement and judicial review similar to that provided for by the amended Economic Stabilization Act. In the Emergency Price Control Act Congress conferred equity jurisdiction on the Emergency Court to restrain the enforcement of price orders and at the same time withdrew that jurisdiction from other federal courts. In construing the statute in *Lockerty*, the Supreme Court found:

> In the light of the explicit language of the Constitution and decisions, it is plain that Congress has power to provide that the equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, be restricted to the Emergency Court, and, upon review of its decisions, to this Court.

319 U.S. at 188.

substantial constitutional issues certified to it by the district courts.[12] The jurisdictional scheme for judicial review of economic stabilization cases was

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In Yakus v. United States, 321 U.S. 414 (1943), the defendant was convicted of violating an allegedly unlawful price order established pursuant to the Emergency Price Control Act of 1942 and was not afforded an opportunity after indictment to question the validity of the order. The issue before the Court was whether to use the reasoning of *Lockerty* and uphold exclusive jurisdiction where the defendant attempted to raise the constitutional question in the course of a criminal trial. In affirming the conviction, the Supreme Court held that the provisions of the Emergency Price Control Act of 1942,

> conferring upon the Emergency Court of Appeals and this Court "exclusive jurisdiction to determine the validity of any regulation or order," coupled with the provision that "no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation," are broad enough in terms to deprive the district court of power to consider the validity of the Administrator's regulation or order as a defense to a criminal prosecution for its violation.

Id. at 429-30.

The Supreme Court further held that the adoption of exclusive jurisdiction is within the constitutional power of Congress. "Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process." *Id.* at 433. *Accord,* Bowles v. Willingham, 321 U.S. 503 (1943). *See also* South Carolina v. Katzenbach, 383 U.S. 301, 331 (1965).

Moreover, the "jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part." Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922); *see* Dieffenbaugh v. Cook, 47 F. Supp. 645 (N.D. Ind. 1942). However, in Payne v. Griffen, 51 F. Supp. 588 (M.D. Ga. 1942), this power was called into question. In that case, suit was brought by a tenant against a landlord to recover damages for an alleged violation of a regulation enacted under the Emergency Price Control Act. The landlord moved to dismiss on the ground that the Act and the regulation creating the right of action were unconstitutional. In passing upon the validity of the exclusive jurisdiction clause of that Act, the court recognized the principle that a district court can entertain only such cases as Congress gives it jurisdiction to try, and that jurisdiction to try any case or class of cases might be withheld altogether. But once Congress confers jurisdiction to try a particular class of cases, the court held, it cannot withhold the power to try the case according to the supreme law of the land. The rationale in *Payne* was that if a court has jurisdiction to try a case, it has inherent power to determine whether an act or regulation, on which the existence of the right of action depends, conforms to the Constitution.

A similar rationale was adopted in Brown v. W.T. Grant, 53 F. Supp. 182 (S.D.N.Y. 1943), where the court held that once it is given jurisdiction to enforce a statute and corresponding regulations, it cannot be deprived of the power to consider the validity of any regulation which is sought to be enforced. *Id.* at 188-89.

The views expressed in *Payne* and *Brown* have not been adopted by the Supreme Court. In *Lockerty, Yakus* and *Bowles*, the Supreme Court steadfastly held that the removal from other courts of jurisdiction over cases challenging the validity of Office of Price Administration regulations was a valid exercise of congressional power under article III, § 1 of the Constitution. The Court has thus consistently refused to open the floodgates to those contingencies sought to be avoided by the legislative drafters by the use of the exclusive clause.

12. Economic Stabilization Act § 211(c). One of the most novel aspects of judicial review in the TECA is the jurisdiction of the court to hear certified constitutional issues from the lower courts. Pursuant to section 211(c) of the Economic Stabilization Act, as amended, federal district courts hearing economic stabilization cases were directed to certify "substantial constitutional issues" to the TECA. The certification procedure in section 211(c) of the Economic Stabilization Act was incorporated into the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1) (Supp. V 1975).

The court has consistently exercised the statutory option of deciding cases in their entirety rather than rendering an opinion solely on the constitutional issues presented. *See* Griffin v. United States, 537 F.2d 1130 (Temp. Emer. Ct. App. 1975); United States v. Pro Football, Inc.,

later incorporated into the Emergency Petroleum Allocation Act,[13] thereby making the TECA the appellate court for all federal energy matters as well.[14] The TECA currently has jurisdiction over all cases arising from the

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514 F.2d 1396 (Temp. Emer. Ct. App. 1975); DeRieux v. Five Smith, Inc., 499 F.2d 1321, 1323 (Temp. Emer. Ct. App. 1974); Schirtzinger v. Dunlop, 489 F.2d 1307, 1390 (Temp. Emer. Ct. App. 1974); United States v. Ohio, 487 F.2d 936, 938 (Temp. Emer. Ct. App. 1973), *aff'd sub nom.* Fry v. United States, 421 U.S. 542 (1975); National Petroleum Refiners Ass'n v. Dunlop, 486 F.2d 1388, 1391-92 (Temp. Emer. Ct. App. 1973).

The TECA has, however, cautiously delimited the jurisdictional boundaries of the court. *See, e.g.*, United States v. California, 504 F.2d 750, 754 (Temp. Emer. Ct. App. 1974), *cert. denied*, 421 U.S. 1015 (1975); United States v. Cooper, 482 F.2d 1393, 1398 (Temp. Emer. Ct. App. 1973). *See also* Spinetti v. Atlantic Richfield Co., 522 F.2d 140 (Temp. Emer. Ct. App. 1975); Gulf Oil Corp. v. FEA, 521 F.2d 810 (Temp. Emer. Ct. App. 1975). For a comprehensive discussion of the legislative history and scope of the court's jurisdiction, see Exxon Corp. v. FEA, 516 F.2d 1397 (Temp. Emer. Ct. App. 1975).

The court has adopted a "separability of issues" concept which allows review of economic stabilization issues by the TECA while collateral issues are reviewed by other appellate courts having jurisdiction over the collateral issue. *See* Spinetti v. Atlantic Richfield Co., 522 F.2d 1401, 1403 (Temp. Emer. Ct. App. 1975); United States v. Cooper, 482 F.2d 1393 (Temp. Emer. Ct. App. 1973); City of Groton v. FPC, 487 F.2d 927, 935-36 (Temp. Emer. Ct. App. 1973); Associated Gen. Contractors v. Laborers Int'l Local 612, 489 F.2d 749 (Temp. Emer. Ct. App. 1973).

In at least two instances the TECA proceeded to decide the merits of a case in which both parties objected to the certification to the TECA. Griffin v. United States, 537 F.2d 1130, 1136-37 (Temp. Emer. Ct. App. 1976); National Petroleum Refiners Ass'n v. Dunlop, 486 F.2d 1388 (Temp. Emer. Ct. App. 1973).

An unresolved issue is whether a district court must refrain from enjoining implementation of energy agency regulations where the injunction proceeding raises "substantial constitutional questions" whose resolution lie solely within the jurisdiction of the TECA. The TECA avoided this issue in Condor Operating Co. v. Sawhill, 514 F.2d 351, 354 (Temp. Emer. Ct. App. 1975), by simply deciding the case, including constitutional and non-constitutional issues.

In no case has the TECA overturned a determination of a district court not to certify issues. For example, in League of Voluntary Hosp. & Homes v. Local 1199, Drug & Hosp. Union, 490 F.2d 1398 (Temp. Emer. Ct. App. 1973), the TECA approved the district court's refusal to certify allegedly substantial constitutional issues since the district court "based upon a review of the case law, legislative history, and relevant background material, [was] unable to conclude that the regulation is clearly unconstitutional or presents a substantial constitutional issue." 490 F.2d at 1403. *See also* Murphy v. O'Brien, 485 F.2d 671, 674 n.7 (Temp. Emer. Ct. App. 1973) (TECA noted that "Appellant's Constitutional claims are before us unopposed rather than pursuant to the mandatory certification procedure set forth in § 211(c) of the Act, because the trial court determined that the constitutional issues were not substantial").

The TECA, however, has indicated that district courts have been overly prone to certify interim constitutional problems to the court. In a number of instances the court has refused jurisdiction based upon improper certification. In Shapp v. Simon, 523 F.2d 1405 (Temp. Emer. Ct. App. 1975), the court refused to rule on the merits of a suit alleging improper gasoline allocation to the state of Pennsylvania by the FEO where the only issue certified by the district court was whether the plaintiffs had standing to maintain the action. Since the standing issue was not a "substantial constitutional question" within the meaning of section 211(c), the court remanded without hearing the case on its merits on the grounds that the certification was inappropriate.

13. 15 U.S.C. § 754(a)(1) (Supp. V 1975).

14. The TECA has ruled that its appellate jurisdiction does not extend to an appeal of a conviction under 18 U.S.C. § 1001 (1970) for false statements made during an investigation to determine compliance with economic stabilization regulations. United States v. Cooper, 482

Federal Energy Administration (FEA)[15] and from presidential control of natural gas in national emergencies.[16]

The TECA was envisioned as an integral part of the economic stabilization program.[17] Administration spokesmen argued that the TECA was vital to the stabilization program,[18] which depended in large part upon a

F.2d 1393, 1397 (Temp. Emer. Ct. App. 1973). The Supreme Court has upheld this limitation on the TECA's jurisdiction. *See* Bray v. United States, 423 U.S. 73 (1975) (per curiam).

15. The jurisdiction of the TECA over the FEA does not extend to all so-called "energy" cases. In August 1977, Congress created a new Department of Energy, 42 U.S.C.A. § 7131 (West pamph. supp. 3, 1977), and transferred the function of the FEA to the new department. *Id.* § 7151(a). The Act preserved TECA jurisdiction over the FEA, *id.* § 7192(a), but otherwise provided for exclusive original jurisdiction of matters arising under the Department of Energy in the federal district courts. *Id.* § 7192(b). In essence, the Department of Energy Organization Act maintained the present statutory provisions of judicial review and did not transfer additional jurisdiction to the TECA.

16. The Emergency Natural Gas Act of 1977, 15 U.S.C.A. § 717 (West pamph. supp. 1, 1977), empowered the President to declare, under specified conditions, a natural gas emergency. The President was authorized by the Act to direct any natural gas company transporting natural gas by interstate pipeline to make emergency deliveries to local distribution companies and to direct the construction and operation of any facility necessary to accomplish the delivery. *Id.* note 4(a)(1). The President activated the statute by declaring the existence of a natural gas emergency, Pres. Proclamation No. 4485, 42 Fed. Reg. 6789 (1977), and delegated authority to the Chairman of the Federal Power Commission to carry out the Act. Exec. Order No. 11969, 42 Fed. Reg. 6791 (1977). The TECA has decided no cases under the Act.

17. The concept of a specialized appeals court to hear economic price control cases was not original to the Economic Stabilization Program. The TECA was, in fact, closely modeled after the Emergency Court of Appeals created by Congress in 1942. Emergency Price Control Act of 1942, ch. 26, § 204(c), 56 Stat. 32 (1942). That court was given exclusive jurisdiction to decide cases arising from wartime price control measures imposed by the Emergency Price Control Act of 1942. Jurisdiction was later extended to include the Housing and Rent Act of 1948, ch. 161, § 202(d), 62 Stat. 97 (1948), and the Defense Production Act of 1950, ch. 932, § 408, 64 Stat. 808 (1950).

The idea for the World War II emergency court, described as "probably the most brilliant single innovation" in the World War II price control effort, has been credited to Judge Harold Leventhal, one of the architects of the World War II price control legislation. Wilson, *The Price Control Act of 1942*, in HISTORICAL REPORTS ON WAR ADMINISTRATION 58 (U.S. Office of Temporary Controls, Office of Price Administration, General Publication No. 1 (1947)). A special court with limited and exclusive jurisdiction was devised in order to avoid hostile courts imposing delays and jeopardizing the overall implementation of the emergency price control program. Leventhal and the other planners of the World War II economic controls program recognized that

> [t]he stay of enforcement had in many instances caused excruciating difficulties to the regulatory agencies of the Federal government. To all intents and purposes their basic statutes were nullified for a period of months or years by a series of test cases and injunctions. Not only might the statute itself be contested, but also the validity of each regulation issued under it. Moreover, though a regulation might be designed to control Nationwide functions or processes, it might be declared valid in one court and invalid in another all the way across the country, so that the result was a reasonable facsimile of chaos.

Id. 99-100.

18. *Hearings on H.R. 11309 to Extend and Amend the Economic Stabilization Act of 1970, Before the House Comm. on Banking and Currency*, 92d Cong., 1st Sess. 314 (1971) (statement of John Connally, Secretary of the Treasury); *Economic Stabilization Legislation: Hearings on S. 2712 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 1st Sess. 20 (1971) (statement of Charles E. Walker, Under Secretary, Department of the Treasury).

coordinated and integrated effort.[19] It was further argued that without special judicial review provisions, stabilization regulations would be interpreted inconsistently by federal courts throughout the nation, thereby jeopardizing the national system of emergency controls.[20] The TECA was therefore envisioned as the means to ensure timely implementation of the stabilization program by minimizing judicial interference.[21]

This Article will examine the relationship between the TECA and the administrative agencies created to implement emergency economic legislation and will demonstrate that TECA judicial review of the peacetime economic stabilization and energy agencies has inadequately controlled administrative decisionmaking. The resolution of "the tension between expediency and principle"[22] has not resulted in "principled fairness,"[23] but rather has resulted in almost total judicial deference to administrative expediency. In its review of the Cost of Living Council (COLC), the Price Commission, the Pay Board, the Construction Industry Stabilization Committee, the Federal Energy Office (FEO) and, currently, the FEA, the TECA has failed to control agency decisionmaking to such an extent that "principled fairness" has become the sacrificial lamb for the feast of regulatory urgency.[24]

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19. SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, ECONOMIC STABILIZATION ACT OF 1971, S. REP. NO. 507, 92d Cong., 1st Sess. 10 (1971).

20. *See* Municipal Intervenors Group v. FPC, 473 F.2d 84, 90 (D.C. Cir. 1972).

21. In the absence of the TECA and the specific jurisdictional scheme outlined above, the established process of judicial review could have undermined administrative efforts to enforce compliance with the program. For example, it is not uncommon for a federal regulatory provision or an entire program to be enjoined by a district court in favor of a private citizen. In such cases, the program is effectively halted while a series of appeals work their way to the Supreme Court.

22. Bickel, *The Supreme Court, 1960 Term—Foreward: The Passive Virtues*, 75 HARV. L. REV. 40, 68 (1961).

23. *See* Leventhal, *supra* note 2. The term "principled fairness," as used here, follows the views of Circuit Judge Skelly Wright of the District of Columbia Court of Appeals, who distinguishes the meanings of "fairness" when used in the context of informal rulemaking and in adjudication. "Fairness" in the context of an adjudication is achieved when a pre-existing legal standard is applied by the agency to a set of facts accurately established through adversary procedures. "Fairness" in the context of administrative rulemaking, on the other hand, implies that "the *public* is treated unfairly when a rulemaker hides his crucial decisions, or his reasons for them, or when he fails to give good faith attention to all the information and contending views relevant to the issues before him." Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 379 (1974). Therefore, fairness in administrative rulemaking "must be openly informed, reasoned, and candid." *Id.*

24. One approach to the study of the TECA which could offer additional insight is to compare the court's decisions to those of its predecessor, the Emergency Court of Appeals, which was established to hear cases arising out of the World War II price control program. See note 17 *supra*. The work of the earlier court has been explored in Freund, *The Emergency Price Control Act of 1942: Constitutional Issues*, 9 LAW & CONTEMP. PROB. 77 (1942); Ginsberg, *Legal Aspects of Price Control in the Defense Program*, 27 A.B.A.J. 527 (1941); Glasser, *Constitutional Power of the President to Control Inflation Without Statutory Authority*, 1 RUTGERS U.L. REV. 179 (1947); Grainey, *Price Control and the Emergency Price Control Act*,

I. THE TECA AND THE SCOPE OF JUDICIAL REVIEW

Both structural and dynamic features in the relationship between courts and administrative agencies shape the allocation of power between them. The structural component of the relationship consists of the congressional mandate to the agency and, in many instances, express provisions as to how and when agency decisionmaking is to be reviewed. However, while the structural features of judicial review determine the outer limits of the courts' power vis-à-vis the agency, the court-agency relationship is ultimately defined by the dynamic nature of ongoing judicial review.

This study of the TECA will begin with the area where structural and dynamic features overlap—the standard for judicial review and its effect on the scope of review. It is the *scope* of judicial review and the courts' articulation or interpretation of the standard for delineating the scope that ultimately determines the allocation of power between the courts and the agency.[25]

19 NOTRE DAME LAW. 31 (1943); Nathanson, *The Emergency Court of Appeals*, in PROBLEMS IN PRICE CONTROL: LEGAL PHASES (Historical Reports on War Administration No. 11 (1947)); Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review*, 9 LAW & CONTEMP. PROB. 60 (1942); Nathanson, *supra* note 2; Sprecher, *Price Control in the Courts*, 44 COLUM. L. REV. 34, 37-42 (1944); Note, *Some Aspects of OPA in the Courts*, 12 GEO. WASH. L. REV. 414 (1944).

25. Another device that affects this allocation of power is the requirement that administrative remedies be exhausted prior to judicial review. The TECA, much like other appellate courts, has developed no consistent precedents for guidance as to when exhaustion will be required. The first case of the TECA to apply the exhaustion doctrine was City of New York v. New York Tel. Co., 468 F.2d 1401 (Temp. Emer. Ct. App. 1972), in which the City of New York, among others, challenged intrastate telephone rate increases as violating the Economic Stabilization Act and Price Commission regulations. The TECA found that the city had not presented its arguments on the issue of the propriety of the rate increases to the agency and, therefore, had not exhausted an existing and adequate administrative remedy. The court noted that "[j]udicial review is surely hindered by the failure of the litigant to give the agency an opportunity to make a factual record, exercise its discretion or apply its expertise." *Id.* at 1403. Another factor in the court's decision to require exhaustion was a concern for "administrative autonomy" which

> require[s] that the Commission be given an opportunity to discover and correct its own errors. In this respect we have noted in our cases to date a healthy trend towards amendment of regulations when error or oversight has been pointed out to the Commission. Such autonomy lends itself to prompt, consistent price control policies which are essential to the administration of a nationwide program of price control.

Id.

The TECA next used the exhaustion doctrine in Anderson v. Dunlop, 485 F.2d 666 (Temp. Emer. Ct. App. 1973), *cert. denied*, 414 U.S. 1131 (1974), which involved a class action by retail gasoline service station dealers challenging a regulation disallowing pass-throughs of certain increases in production and non-production costs such as rent, labor, insurance and maintenance. The regulation allowed refiners-suppliers to pass on their increased costs to the service station dealers. The district court granted relief on grounds that the regulations were arbitrary and capricious and invidiously discriminatory. The TECA, without reaching the plaintiff's constitutional claims, reversed, holding that the plaintiff's failure to exhaust available administrative remedies precluded judicial review.

The legislation delegating authority to the President to implement peacetime economic controls provided an "arbitrary and capricious" test for judicial review of agency rules[26] and a "substantial evidence" test[27] for

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The decision in *Anderson* may have been influenced by the fact that three days before the hearing on the appeal before the TECA, the COLC announced that it was gathering information for revision of the gasoline price ceiling, 485 F.2d at 670 n.2, and two weeks later, prior to the issuance of the court's decision, the COLC announced a one to two and one-half cents increase in the ceiling, 39 Fed. Reg. 27,290 (1973). The court cited this fact in "further support to the view that applications for relief because of inequities or hardship would receive fair consideration." 485 F.2d at 670 n.2.

However, in Consumers Union of the United States v. COLC, 491 F.2d 1396 (Temp. Emer. Ct. App.), *cert. denied*, 416 U.S. 984 (1974), the court, on its own motion, raised the exhaustion issue and found the exhaustion requirement inapplicable since no factual issues were in dispute and the agency's administrative expertise was not in question. Although the court "decide[d] that under the exceptional circumstances of this case the doctrine of exhaustion of administrative remedies does not prevent our consideration of this appeal," it emphasized "that in the usual case arising under the Economic Stabilization Act, policies favoring exhaustion will no doubt apply, and plaintiffs should be extremely wary of commencing actions in court when an adequate administrative remedy lies open to them but has not been pursued." 491 F.2d at 1400. The court in *Consumers Union* went on to find the COLC regulations defining proprietary information to be illegal since they were in contravention of section 205(b)(3) of the Act and ordered the COLC to prepare and issue new regulations in accordance with the Act.

The TECA has also noted that exhaustion is not required when the administrative remedies are inadequate. *See* Associated Gen. Contractors of America, Inc. v. Laborers Int'l Union, 476 F.2d 1388, 1403-04 (Temp. Emer. Ct. App. 1973). *See also* Atlantic Richfield Co. v. FEA, 556 F.2d 542 (Temp. Emer. Ct. App. 1977); Gulf Oil Corp. v. Simon, 502 F.2d 1154, 1155-57 (Temp. Emer. Ct. App. 1974); American Nursing Home Ass'n. v. COLC, 497 F.2d 909, 912-13 (Temp. Emer. Ct. App. 1974); Pacific Coast Meat Jobbers Ass'n v. COLC, 481 F.2d 1388, 1389-90 (Temp. Emer. Ct. App. 1973).

In a related federal district court decision, Standard Oil Co. v. FEA, 440 F. Supp. 328 (N.D. Ohio 1977), the district court rejected the FEA's contentions that oil companies must exhaust exceptions proceedings prior to judicial review. The court found that the administrative exceptions proceedings would be unnecessary if the legal interpretation of regulations by the oil companies were correct; that the companies were adversely affected by the uncertainty over profits, the agency-induced publicity over the companies' interpretation and the possibility of private civil suits, *id.* at 370; and that the exceptions proceedings offered no opportunity to challenge the agency interpretation of the regulations, *id.* at 368 n.104.

The district court rejected the FEA's argument that the Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) ripeness doctrine applied only to agencies governed directly by the APA. 440 F. Supp. at 358. Moreover, the district court found that the statutory language of the review provisions governing FEA, Economic Stabilization Act § 201(a), was identical to the language of the APA, 5 U.S.C. § 702. Finding no specific statutory exemption of FEA or legislative history to support the FEA position, the district court rejected the FEA argument that pre-enforcement judicial review of FEA administrative action was precluded. 440 F. Supp. at 360.

26. Economic Stabilization Act § 211(d)(1). The "arbitrary or capricious" test also defined the scope of judicial review under the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (1942). The "arbitrary or capricious" standard "applies to the factfinding, fact-predicting, and factual reasoning processes which led the agency to adopt the rule." Wright, *supra* note 23, at 390.

27. Economic Stabilization Act § 211(d)(2). The Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

The TECA has in at least two instances upheld agency action against claims that the agency

review of agency orders.[28] These tests are not self-defining; the exact nature of the relationship between them is unclear and the differences, if any, are often debated.[29] The malleability of these tests is apparent from a review of the TECA opinions delineating the scope of review.

In the first case decided by the TECA, a landlord challenged an Office of Emergency Preparedness (OEP)[30] directive that prohibited a particular

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decision was not supported by "substantial evidence." *See* Atlantic Richfield Co. v. FEA, 556 F.2d 542, 548 (Temp. Emer. Ct. App. 1977); Local 1466, IBEW v. Boldt, 513 F.2d 1405, 1407 (Temp. Emer. Ct. App. 1975).

28. Section 211(d)(1) of the Economic Stabilization Act provides that

> no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

This provision was incorporated into the EPAA, 15 U.S.C. § 754(a)(1) (Supp. V 1975), and is therefore now applicable to the FEA.

29. In the past, it was assumed that the scope of judicial review defined by the "substantial evidence" standard required closer scrutiny of agency action than did the "arbitrary or capricious" standard. *See* Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899, 934 (1973); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 214 (1974).

Any difference in the scope of review applied under the "substantial evidence" and "arbitrary and capricious" tests is difficult to perceive. A move to merge the two tests has been supported by legislative action as well as judicial decisions. For example, Congress has created several administrative agencies for which the standard for judicial review of both regulations and adjudications was the "substantial evidence" test. In so doing, Congress ignored the general practice of applying the "substantial evidence" standard only to those proceedings which generate full-scale administrative records and include most of the procedures of a trial. According to Judge Leventhal, the "substantial evidence" test reflects "a congressional intent to limit agency determinations to record evidence," regardless of the procedures used to compile such record. Public Serv. Comm'n v. FPC, 487 F.2d 1043, 1069 (D.C. Cir.), *vacated*, 417 U.S. 964 (1973). *See also* Mobil Oil Co. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973).

The merger of the standards for judicial review is also indicated in judicial decisions. For example, in Bunny Bear, Inc. v. Peterson, 473 F.2d 1002, 1006 (1st Cir. 1973), the court found that the standard of review for rulemaking "may differ little, if at all, from the standard normally used in substantial evidence review." *See also* Chrysler v. Department of Transp., 472 F.2d 659 (6th Cir. 1972).

There is some question as to the scope of the "substantial evidence" test in economic stabilization cases where no record has been generated. Since the Economic Stabilization Act required that the scope of review of agency "orders" be based on the "substantial evidence" test, it could be argued that the congressional intent was to provide for a more searching review than the "arbitrary and capricious" test affords. Even in the absence of the kind of record which would normally be generated for this type of review, the fact that Congress required a "substantial evidence" standard for review of agency orders and an "arbitrary and capricious" standard for review of agency rulemaking lends support to the traditional view that the former standard requires closer scrutiny.

30. President Nixon, by executive order, established Phase I of the Economic Stabilization Program, commonly referred to as the "90-day freeze," and delegated his power to administer the Economic Stabilization Act to the COLC. Exec. Order No. 11,615, 36 Fed. Reg. 15,127 (1971). Because it lacked an administrative bureaucracy during the early days of the Economic Stabilization Program, the COLC delegated duties to the then existing Office of Emergency

rental increase.[31] The rental increase appeared to be permissible under the language of the executive order which created the original "90 day freeze" and Phase I of the Economic Stabilization Program.[32] The TECA in *United States v. Lieb*[33] considered the narrow question of whether the landlord could increase rents based upon a "substantial volume" of transactions in the base period, as provided in the executive order,[34] or whether he was precluded from increasing rents by a different OEP rule which used the previous rental history of the particular rental unit as a guide. Because of Congress' broad delegation of power and the belief of the OEP and of the court that the agency had only "refined" the executive order for implementation without abandoning its general policy, the TECA upheld the district court's injunction prohibiting the landlord's rent increase. The *Lieb* court mentioned in passing that "a reasonable basis exists for the orders and actions of the executive branch here attacked."[35] Thus, the standard for judicial review under the "arbitrary and capricious" standard set forth in the Economic Stabilization Act[36] and used by the court was in fact a "rational basis" test.[37]

Almost a year after the imposition of economic controls, the TECA decided two cases which challenged a COLC regulation that continued a temporary freeze on beef prices while allowing price increases for other meat products. The meat packers challenged the COLC beef price ceiling, alleging that it created severe financial losses, hardships, market disruptions and beef shortages. In *Pacific Coast Meat Jobbers Association v. COLC*,[38] the TECA upheld the beef price ceiling, reasoning that the COLC had not acted arbitrarily or capriciously, since the regulations "were enacted in furtherance of the statutory goals of fighting inflation and stabilizing the economy."[39]

Underlying the plaintiffs' position in *Pacific Coast* and *Western States*

Preparedness. 36 Fed. Reg. 16,215 (1971). *See generally* H. Yoshpe, *et al.*, *Stemming Inflation: The Office of Emergency Preparedness and the 90-Day Freeze* (Executive Office of the President, Office of Emergency Preparedness, 1972); R. Kagan, The Wage-Price Freeze: A Study in Administrative Justice (1974) (unpublished doctoral thesis, Yale University).

31. For an analysis of the rent control provisions in the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (1942), and the enforcement of those provisions, see Annot., 158 A.L.R. 1464 (1945); Borders, *Emergency Rent Controls*, 9 LAW & CONTEMP. PROB. 107 (1944); Mermin, *An Analysis of Federal Rent-Control Enforcement Litigation*, 2 OKLA. L. REV. 413 (1949).

32. Exec. Order No. 11,615, *supra* note 30.

33. 462 F.2d 1161 (Temp. Emer. Ct. App. 1972).

34. Exec. Order No. 11,615, *supra* note 30.

35. 462 F.2d at 1168.

36. See note 26 *supra* and accompanying text.

37. 462 F.2d at 1167.

38. 481 F.2d 1388 (Temp. Emer. Ct. App. 1973).

39. *Id.* at 1391.

Meat Packers Association v. Dunlop,[40] a suit presenting a similar challenge, was a rather compelling argument that it was arbitrary and capricious for the COLC to continue a freeze on beef prices while there were uncontrolled increases in the cost of supplies to the meat packers. The COLC was precluded from regulating the cost incurred by meat packers since, by executive order, cattle and raw agricultural products were exempted from stabilization controls.[41] With uncontrolled cost increases at the supply level and rising prices at the retail level, the COLC found it politically expedient to continue the freeze on beef prices.

The TECA in *Western States* recognized the failure of the COLC to forecast economic developments in the complex agricultural arena but refused to allow a "mere error in judgment" in "predicting economic trends" to undermine the agency's otherwise "reasonable basis" for the imposition and continuation of a freeze on beef prices for two months after prices on other meat products had been lifted.[42] The court thereby reaffirmed its *Pacific Coast* holding that if there were a rational basis for the implementation and continuation of the freeze on beef prices, the regulations would be held to be neither arbitrary nor capricious.[43]

In *American Nursing Home Association v. COLC*,[44] the rational basis test was turned on its head and applied not to the agency action in question but to the allegations of the challenging parties. At issue in the case was the COLC's position that nursing homes should be treated the same as hospitals for purposes of price controls. The TECA, disregarding the absence of evidence supporting the COLC's theory that charges for nursing home services were inflationary, held that the plaintiffs had failed to prove that nursing homes should be treated differently.[45]

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40. 482 F.2d 1401 (Temp. Emer. Ct. App. 1973).

41. Exec. Order No. 11,723, 38 Fed. Reg. 15,765 (1973).

42. 482 F.2d at 1406. Similarly, the court has found that the "rational basis" for agency action is not undermined even where it is shown that the agency relied upon inaccurate data in the decisionmaking which led to agency error. *See* Mandel v. Simon, 493 F.2d 1239, 1240 (Temp. Emer. Ct. App. 1974) (citing Western States Meat Packers Ass'n v. Dunlop, 482 F.2d 1401 (Temp. Emer. Ct. App. 1973)).

43. The TECA's willingness to uphold administrative regulations imposing a beef price freeze which resulted in financial losses to meat packers, beef shortages for consumers and market disruptions may be attributed to the temporary nature of the freeze. In both *Pacific Coast* and *Western States*, the TECA referred to the fact that the freeze would be in effect for less than one month after the court's opinion. *See* Western States Meat Packers Ass'n v. Dunlop, 482 F.2d 1401, 1406 (Temp. Emer. Ct. App. 1973); Pacific Coast Meat Jobbers Ass'n v. COLC, 481 F.2d 1388, 1391 (Temp. Emer. Ct. App. 1973). *See also* United States v. Lieb, 462 F.2d 1161, 1167 (Temp. Emer. Ct. App. 1972). While the temporary nature of the beef price freeze may have been one factor in the court's decision, subsequent opinions would support the view that it was not determinative—the TECA deference to administrative decisions continued after the time factor was no longer present.

44. 497 F.2d 909 (Temp. Emer. Ct. App. 1974).

45. The court concluded:

In February 1974, the TECA reviewed for the first time a decision of the FEO.[46] The district court had upheld a challenge to the FEO's allocation of gasoline to Maryland, based upon the state's showing that the data the FEO had used in achieving its allocation was unreliable, and had ordered the allocation of an additional sixteen million gallons of gasoline to the state. The TECA reversed the district court decision without contesting the finding that the FEO data was inaccurate. Recognizing the possibility of agency error, the TECA upheld the FEO allocation on the basis of the agency's "good faith" efforts in the administration of an embryonic regulatory program.[47] The court concluded that the administrators had been neither arbitrary nor capricious and that judicial interference with FEO's petroleum allocation program might have delayed rather than advanced effective regulation of a new and complex area in which the administrators were in good faith attempting to correct inequities as they were discovered.[48]

Gulf Oil Corporation provided the next opportunity for TECA review of the mandatory oil allocation program.[49] Program regulations required Gulf to offer to sell a specified portion of its supply of crude oil to other refiners, including major competitors. The district court found a rational basis for the allocation scheme and denied Gulf's request for injunctive relief. On appeal, the TECA upheld the program. The court found that FEO had a rational basis for creating "a scheme of allocation designed, among other objectives, to enable all refiners to continue in competitive operation, though the scheme required the better supplied producers and importers to

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> The C[O]LC said that there was "no evidence to indicate that the rate of inflation in . . . [nursing homes] was substantially different from that experienced in the health care industry as a whole." If this is incorrect and there are factors which show that nursing homes should be exempt or separately regulated, it is up to the plaintiff to prove that this is so. As the record stands there is no substantial evidence to show that the alleged differences exist.

Id. at 915. As for the heavy burden placed on plaintiffs seeking to show the invalidity of regulations and orders, see Texaco, Inc. v. FEA, 531 F.2d 1071, 1077 (Temp. Emer. Ct. App.), *cert. denied*, 426 U.S. 941 (1976); Condor Operating Co. v. Sawhill, 514 F.2d 351, 359 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975); Pasco, Inc. v. FEA, 525 F.2d 1391, 1404 (Temp. Emer. Ct. App. 1975).

46. Mandel v. Simon, 493 F.2d 1239 (Temp. Emer. Ct. App. 1974) (per curiam).

47. 493 F.2d at 1240. *See also* Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974).

48. 493 F.2d at 1240. The limitation of TECA judicial review solely to a determination of the "rational basis" for agency action has been reaffirmed in numerous cases. *See* Atlantic Richfield Co. v. FEA, 556 F.2d 542 (Temp. Emer. Ct. App. 1977); Amtel, Inc. v. FEA, 536 F.2d 1378 (Temp. Emer. Ct. App. 1976); Powerine Oil Co. v. FEA, 536 F.2d 378, 385 (Temp. Emer. Ct. App. 1976); Texaco, Inc. v. FEA, 531 F.2d 1071, 1077 (Temp. Emer. Ct. App.), *cert. denied*, 426 U.S. 941 (1976); Cities Service Co. v. FEA, 529 F.2d 1016, 1025 (Temp. Emer. Ct. App. 1975); Pasco, Inc. v. FEA, 525 F.2d 1391, 1400-01 (Temp. Emer. Ct. App. 1975); Condor Operating Co. v. Sawhill, 514 F.2d 351, 359 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975); Reeves v. Simon, 507 F.2d 455, 460 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

49. Gulf Oil Corp. v. Simon, 502 F.2d 1154 (Temp. Emer. Ct. App. 1974) (per curiam).

offer to sell some of their crude oil to their less adequately supplied competitors."[50]

It is evident from a review of the TECA's cases that, beginning with its first decision in *United States v. Lieb*,[51] the court has consistently used a "rational basis" test to determine whether regulations are "arbitrary and capricious."[52] The TECA's scope of review under the "arbitrary and capricious" test has been described as a "narrow one."[53] Since the same standard of review—"rational basis"—has been applied to orders under that test as has been applied to regulations under the "substantial evidence" test,[54] the scope of the court's review has been generally quite limited.

II. TECA DEFERENCE TO AGENCY DECISIONMAKING

The scope of the TECA review process has been narrowed even further by the great deference that the court has accorded agency decisions. The TECA indicated in *Lieb*, its first opinion, that it would "place great weight

50. *Id.* at 1155. *See also* Condor Operating Co. v. Sawhill, 514 F.2d 351 (Temp. Emer. Ct. App. 1975).

51. 462 F.2d 1161 (Temp. Emer. Ct. App. 1972).

52. The "rational basis" test was used by the court in *Lieb* in response to an argument that Lieb was denied due process of law because of the failure of the agency to provide an administrative hearing on the claim that an agency regulation violated the governing executive order which established the freeze. *Id.* at 1167-68. The TECA held that fifth amendment due process is satisfied if the statute or administrative action has a rational basis. *See generally* Bowles v. Willingham, 321 U.S. 503, 519-21 (1944).

For use of the "rational basis" test in a somewhat different context, see United States v. Ohio, 487 F.2d 936, 943 (Temp. Emer. Ct. App. 1973), *aff'd sub nom.* Fry v. United States, 421 U.S. 542 (1975), and League of Voluntary Hosp. & Homes v. Local 1199, Drug & Hosp. Union, 490 F.2d 1398, 1402-03 (Temp. Emer. Ct. App. 1973) (rational basis test applied by the court to determine whether regulations selectively continuing wage controls in the health industry were discriminatory).

53. In Nader v. Sawhill, 514 F.2d 1064, 1067 (Temp. Emer. Ct. App. 1975), the TECA, citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1970), found the "arbitrary and capricious" standard to be a "narrow" one. *See also* Basin, Inc. v. FEA, 552 F.2d 931, 934 (Temp. Emer. Ct. App. 1977); Amtel, Inc. v. FEA, 536 F.2d 1378 (Temp. Emer. Ct. App. 1976). It should be noted, however, that the *Nader* court selected only the "narrowing" dicta of *Overton Park* to the exclusion of language which would have permitted a more extensive scope of review. The *Overton Park* Court found that the reviewing court under the arbitrary and capricious standard must be "searching and careful" in its review and must conduct a "substantial inquiry" by way of a "thorough, probing, in-depth review." 401 U.S. at 415-16. *But see* Texaco, Inc. v. FEA, 531 F.2d 1071 (Temp. Emer. Ct. App.), *cert. denied*, 426 U.S. 941 (1976), where the TECA seems to have adopted a slightly more expansive view of the "arbitrary and capricious" test. There, the court noted that "[t]he arbitrary or capricious standard requires a determination whether the decision was based on a consideration of relevant factors, whether there has been a clear error of judgment and whether there is a rational basis for the conclusions approved by the administrative body." 531 F.2d at 1076-77.

54. The TECA did, however, in Chrysler Corp. v. Dunlop, 490 F.2d 985 (Temp. Emer. Ct. App. 1973), reverse a district court decision in favor of the COLC where the district court had failed to determine whether the order under attack was supported by substantial evidence. The district court had upheld the order on the grounds that the plaintiff had failed to show that the order was without a rational basis and was arbitrary and capricious. *Id.* at 988.

upon an agency's interpretation of its own regulation.''[55] On its next occasion to consider a stabilization agency interpretation, the TECA labeled this principle as the ''great deference test.''[56]

> It is a well settled principle that the courts place great weight on the interpretations given to statutes and regulations by those agencies charged with the responsibility of administering them. . . . This "great deference test," [was] . . . specifically recognized by this court in *Lieb* . . . .
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> . . . This court cannot and will not close its eyes to the realities of the situation facing the agencies. If the haste necessitated gave rise to unreasonable inconsistencies in the administrative interpretations, or to actions plainly without the purposes and scope of the Order, then we will readily rectify them. We will not, however, absent actions akin to the above, substitute our views for those of the agencies. According deference to an agency's interpretations is not allowing government by "bureaucratic fiat," it is avoiding government by "judicial fiat."[57]

Such deference was seen to be ''particularly appropriate'' since the interpretation at issue ''involve[d] a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.''[58] This principle was reiterated in *Plumbers Local 514 v. Construction Industry Stabilization Committee*,[59] where the TECA concluded that ''the administrative judgment [relating to negotiated wage increases] is of a technical nature and no flaw in the exercise of its expertise has been pointed out.''[60]

The TECA has rejected a suggestion that because an agency's decision does not appear to be an exercise of ''accumulated administrative expertise,'' no deference should be accorded the decision upon review.[61] In a case involving the COLC, the court responded by noting that the agency was composed of the Secretaries of Treasury, Agriculture, Commerce and

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55. 462 F.2d at 1166 (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945)).

56. University of S. Cal. v. COLC, 472 F.2d 1065, 1068 (Temp. Emer. Ct. App. 1972), *cert. denied*, 410 U.S. 928 (1973). For a citation by the TECA of the cases in which the "great deference" principle has been applied, see DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1325 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974).

57. 472 F.2d at 1068-69.

58. *Id.* at 1068. For limitations on TECA deference to statutory construction by a stabilization agency, see Associated Gen. Contractors of America, Inc. v. Laborers Int'l Union, 476 F.2d 1388, 1400 & n.20 (Temp. Emer. Ct. App. 1973).

59. 479 F.2d 1052 (Temp. Emer. Ct. App. 1973).

60. *Id.* at 1056.

61. University of S. Cal. v. COLC, 472 F.2d 1065, 1069 (Temp. Emer. Ct. App. 1972), *cert. denied*, 410 U.S. 928 (1973).

Labor, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisors and the Special Assistant to the President for Consumer Affairs.[62] The court offered that "[t]hese are men of no little 'administrative expertise,' and men who in fact occupy such positions as to known [sic] better than most the causes of inflation, the reasons for the freeze, and the purpose and intent of the Executive Order."[63] Interestingly, there was no indication in the record that this august body of officials had taken any part in the interpretation in question. The list itself is suggestive that they did not.

The lengths to which the TECA has gone to avoid overturning agency action are illustrated by *Baldwin County Electric Membership Corp. v. Price Commission*.[64] There, although the TECA found that the Price Commission's action was not covered by the literal terms of its regulations, it nonetheless upheld the agency's action, stating, "[i]n such a case, an administrative agency's interpretation of its own regulation is entitled to great deference by the courts."[65] The agency's action was upheld despite the fact that the so-called "interpretation" of the regulation by the agency was simply the publication of the name of the utility on an approved decision list, thereby exempting it from price control regulations. The TECA went so far as to state: "As a further consideration, there is a strong presumption against construing regulations so that they have the effect of altering regulatory actions already taken."[66]

The "great deference" test has evolved to the extent that the court now accords a "presumption" of validity to agency action.[67] Throughout the history of the economic stabilization program,[68] and now with respect to the

62. 472 F.2d at 1069.

63. *Id.*

64. 481 F.2d 920 (Temp. Emer. Ct. App. 1973).

65. *Id.* at 923.

66. *Id.* at 923-24.

67. This approach is reflected in Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975), in which the court "recognized a strong presumption in favor of administrative decisions by those agencies charged with immediate administration of a new statute." 507 F.2d at 460.

The TECA has only infrequently found sufficient grounds to reject the agencies' deference arguments, and then only as a result of agency actions which blatantly violated the statutory language of the Economic Stabilization Act or the delegated authority of the agencies. *See, e.g.*, Consumers Union, Inc. v. COLC, 491 F.2d 1396 (Temp. Emer. Ct. App. 1974). *See also* Associated Gen. Contractors of America, Inc. v. Laborers Int'l Union, 476 F.2d 1388 (Temp. Emer. Ct. App. 1973), reversing a district court decision and refusing to defer to a Construction Industry Stabilization Committee (CISC) ruling relying upon criteria outside the authority of CISC. The TECA finally hinted in Chrysler Corp. v. Dunlop, 490 F.2d 985, 988 (Temp. Emer. Ct. App. 1973), that the deference to the expertise of the COLC was not absolute.

68. *See* United States v. Ohio, 487 F.2d 936, 941 (Temp. Emer. Ct. App. 1973), *aff'd sub nom.* Fry v. United States, 421 U.S. 542 (1975); City of Groton v. FPC, 487 F.2d 927, 934 (Temp. Emer. Ct. App. 1973); Murphy v. O'Brien, 485 F.2d 671, 674 (Temp. Emer. Ct. App.

energy agencies,[69] the TECA has taken every opportunity to announce and reaffirm its deference to both substantive and procedural aspects of agency decisionmaking.[70]

Judicial deference to administrative agency expertise can be premised on various grounds. However, according judicial deference to agency decisionmaking is unsound where the doctrine results in an abdication of judicial responsibility. As the Supreme Court has noted:

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." . . . But the courts are the final authorities on issues of statutory construction . . . and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. . . ." "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . ."[71]

The TECA has justified the extreme deference to stabilization and energy agencies on the grounds that the expertise to solve problems of inflation and scarce energy resources lies with the agency and that deference is especially appropriate for agency decisionmaking during the embryonic stages of a regulatory program.[72] The TECA has further relied upon the temporary "emergency" nature of the regulatory programs[73] as a basis for deference. It can be argued, however, that the TECA's deference to the agencies' expertise is misplaced. First, the TECA has placed its confidence

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1973); Pacific Coast Meat Jobbers Ass'n v. COLC, 481 F.2d 1388, 1392 (Temp. Emer. Ct. App. 1973); Baldwin County Elec. Membership Corp. v. Price Commission, 481 F.2d 920, 923 (Temp. Emer. Ct. App.), *cert. denied*, 414 U.S. 909 (1973); Plumbers Local 519 v. Construction Indus. Stabilization Comm., 479 F.2d 1052, 1056 (Temp. Emer. Ct. App. 1973); United States v. IBEW Local 11, 475 F.2d 1204, 1209 (Temp. Emer. Ct. App. 1973); United States v. Lieb, 462 F.2d 1161, 1166 (Temp. Emer. Ct. App. 1972); Note, *supra* note 8, at 1673 n.45.

69. *See, e.g.*, Basin, Inc. v. FEA, 552 F.2d 931 (Temp. Emer. Ct. App. 1977); Condor Operating Co. v. Sawhill, 514 F.2d 351 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 926 (1975).

70. It has been noted that judicial deference to administrative expertise has, along with the doctrine of primary jurisdiction, been a principle of administrative law "used by the Courts to avoid responsibility for resolving basic issues of national economic policy." Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 438 (1954). Professor Schwartz's observation is certainly confirmed by this study of the TECA.

71. Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968) (citations omitted).

72. *See, e.g.*, Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975); Mandel v. Simon, 493 F.2d 1239, 1240 (Temp. Emer. Ct. App. 1974).

73. The TECA has characterized the task of the stabilization and energy agencies as "exceedingly complicated" and made more difficult because of the "emergency conditions" under which the agencies act. Condor Operating Co. v. Sawhill, 514 F.2d 351, 359 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975). *See also* Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974); Mandel v. Simon, 493 F.2d 1239 (Temp. Emer. Ct. App. 1974).

in new and untried agencies. At least at the start, the "expertise" to which the court deferred was extremely limited. This country had never employed price and wage controls during peacetime and our most recent economic control effort was during the Korean War, more than twenty years ago. The stabilization agencies were not heavily staffed by economists who had expertise in the causes and cures for inflation, but rather by government bureaucrats drawn from the ranks of other federal agencies. Second, whether the agencies necessarily have greater expertise than the TECA is open to some question. The TECA would appear to have much greater expertise than other reviewing courts since it had exclusive jurisdiction over all appeals arising under the Economic Stabilization Act. In addition, the TECA's close relationship with the agencies should give the court sufficient insight into agency policies and practices to accept or reject the myth of "expertise" on a more objective basis than that afforded most appellate courts.[74]

III. General Fairness Standards and TECA Review

The primary function of judicial review is to ensure that regulations and orders of administrative agencies do not exceed the agencies' delegated authority. This simple mandate is profoundly complicated when the court is determining compliance with the broad, vague and, in some instances, conflicting standards which Congress provided for implementation of the stabilization and energy programs.

In *Pacific Coast Meat Jobbers Association v. COLC*,[75] plaintiffs challenged COLC regulations that continued a temporary freeze on beef prices while allowing price increases for other meat products.[76] The plaintiff

74. Various commentators have noted the growing disillusionment with the role of regulatory agencies. *See, e.g.*, Wright, Book Review, 81 YALE L.J. 575, 579 (1972). One aspect of this disillusionment is the movement "away from blind trust in administrative competence." *Id.* 580. The judicial trust in administrative expertise may indeed be blind if it is true that "our regulatory and executive agencies are seldom really expert." Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1306 (1972).

On the role of economic and energy agency expertise in private civil suits for overcharges, see Longview Refining Co. v. Shore, 554 F.2d 1006, 1024 (Temp. Emer. Ct. App. 1977) (ordering district court to join FEA as a party to the civil litigation seeking refunds for overcharges).

75. 481 F.2d 1388 (Temp. Emer. Ct. App. 1973). See note 43 and text accompanying notes 38-43 *supra*. See also Western States Meat Packers Ass'n v. Dunlop, 482 F.2d 1401 (Temp. Emer. Ct. App. 1973).

76. Another case involving discriminatory controls which allowed all but selected segments of the economy to pass along cost increases was Anderson v. Dunlop, 485 F.2d 666 (Temp. Emer. Ct. App. 1973), *cert. denied*, 414 U.S. 1131 (1974). For other cases involving TECA review of administrative decisionmaking embodied in informal rulemaking, see American Nursing Home Ass'n v. COLC, 497 F.2d 909, 913-15 (Temp. Emer. Ct. App. 1974); League of Voluntary Hosp. & Homes v. Local 1199, Drug & Hosp. Union, 490 F.2d 1398, 1402 (Temp. Emer. Ct. App. 1973); Schirtzinger v. Dunlop, 489 F.2d 1307, 1309-10 (Temp. Emer. Ct. App. 1973).

meatpackers alleged that the COLC beef price ceiling created financial losses, severe hardships, market disruptions and beef shortages. Plaintiffs contended that the beef price freeze violated the Economic Stabilization Act, which required generally that all regulations be "fair and equitable" and provide for exceptions "as are necessary . . . to prevent gross inequities, hardships, [and] serious market disruptions."[77]

The TECA responded to the "fair standards" challenge in *Pacific Coast* with the elliptical statement "that complete success, or complete fairness, is neither possible nor required in this kind of administrative action."[78] The TECA made no effort to delineate the meaning of the "fair standards" mandate or to apply it to the specific regulations in question; rather, the court simply found that a rational basis existed for the regulation.[79] The *Pacific Coast* decision is anomalous in that the court used a rational basis test to justify denying relief required by the Act "to prevent gross inequities, hardships, [and] serious market disruptions."[80] The court in effect determined that the "fairness" standard in section 203(b) of the Economic Stabilization Act had been met if the agency had a rational basis for its regulation.

IV. TECA AND PROCEDURAL SAFEGUARDS

One of the matters that was frequently before the TECA during the economic stabilization program was the stabilization agencies' compliance with their procedural rules, as mandated by the Administrative Procedure Act (APA). Where administrative agencies such as the stabilization and energy agencies are permitted to implement policy, guided only by broad, open-ended delegations of authority, procedural safeguards take on added

77. Economic Stabilization Act § 203(b)(1)-(2). The standards contained in the Act required only that the stabilization program:

(1) be generally fair and equitable;
(2) provide for the making of such general exceptions as are necessary to foster orderly economic growth and to prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits;
(3) take into account changes in productivity and the cost of living, as well as such other factors consistent with the purposes of this title as are appropriate;
(4) provide for the requiring of appropriate reductions in prices and rents whenever warranted after consideration of lower costs, labor shortages, and other factors; and
(5) call for generally comparable sacrifices by business and labor as well as other segments of the economy.

Id.

This extremely broad and open-ended delegation of authority was thought to be limited by statutory provisions requiring general fairness for all those affected by the program. Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737, 754-58 (D.D.C. 1971).

78. 481 F.2d at 1391.

79. *Id.*

80. Economic Stabilization Act § 203(b)(1)-(2).

significance.[81] One commentator has noted that in the absence of statutory guidelines, "[s]tandards of due process offer a second means of protecting against arbitrary executive action."[82] The only effective means of controlling agency action under delegations of authority which do not contain standards may in fact be procedural safeguards.

Of the procedural standards set forth in the APA, only those contained in sections 553 and 555(e) apply to the economic stabilization and energy agencies.[83] Section 553 requires that general notice of proposed rulemaking, including a statement of legal authority, and either the terms or a substantial summary of the proposed rules be published in the Federal Register. It also provides for comment by interested parties on the proposed rules before their final publication.[84] Section 555(e), which covers agency orders other than rulemaking, requires prompt notice accompanied by a brief statement of the reasons for denial of any written request in connection with any agency proceeding.[85]

The economic stabilization agencies were not required to hold hearings and, thus, were subject only to the requirements of "notice and comment" rulemaking and the obligation to provide a rationale for the denial of administrative relief.[86] These requirements were specifically imposed to ensure procedural fairness while giving the agencies sufficient latitude to deal with the national economic emergency.[87] It would seem that Congress intended that administrative agency action be tempered by adherence to the limited procedural requirements of these APA provisions. However, the economic stabilization (and later the energy) agencies have

81. *See* Fisher, *Delegating Power to the President*, 19 J. PUB. L. 251, 274-75 (1970).

82. *Id.* at 274.

83. Economic Stabilization Act § 207(a). Section 207 was adopted by section 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1)(A) (Supp. V 1975).

84. 5 U.S.C. § 553(c) (1970).

85. 5 U.S.C. § 555(e) (1970).

86. The FEA is required to publish notice of proposed rules and regulations in the Federal Register and provide a 10-day period within which written comments regarding proposed agency action may be submitted. 15 U.S.C. § 766(i)(1)(A) (1970). The statute permits waiver of these requirements "where strict compliance is found to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order." 15 U.S.C. §766(i)(1)(B) (1970).

The FEA is directed by statute to provide an opportunity for oral presentation of views, data and arguments to the agency where a rule, regulation or order "is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses." 15 U.S.C. § 766(i)(1)(C) (1970). The hearing is to be held prior to the agency action "[t]o the maximum extent practicable" and where a hearing is required under the statute but is not held prior to the agency action, the agency is directed to hold the hearing within 45 days of the issuance of the rule, regulation or order. *Id.*

87. At least one court has recognized that "the informal or expeditious nature of the administrative procedure leading to an action or decision should not induce courts to relent in their demand for an adequate statement of reasons." Dry Color Mfrs. Ass'n v. Department of Labor, 486 F.2d 98, 106 (3d Cir. 1973).

consistently refused to comply with the minimal procedural requirements imposed by Congress, and the TECA has only rarely required adherence.[88]

In *Mass Retailing Institute v. COLC*,[89] the TECA upheld a district court judgment for the COLC, finding that postal rate increases did not violate price control regulations. The TECA held that the COLC could exempt postal rates from the regulation, notwithstanding its "failure to give specific reasons for its grant of an exemption from price controls."[90] The court noted that although the absence of specific reasons "makes the task of judicial review more difficult, there is enough before us to demonstrate that the exemption was consistent with the standards designed to prevent 'gross inequities' and 'hardships' set forth in § 203(b)(2) of the Economic Stabilization Act of 1970."[91]

Although the TECA did warn that "[i]n the future . . . the Cost of Living Council should make explicit the bases of its judgment,"[92] the warning was insufficient to prompt the Price Commission, an administrative agency under the parent COLC, to take the hint. In *Baldwin County Electric Membership Corp. v. Price Commission*,[93] over a strong dissent by the late Judge Hastie, the court upheld a Price Commission decision to allow rate increases in the sale of electric power, even though no reason was given for the Commission's decision. The TECA expressly rejected the plaintiff's contention that the Price Commission's interpretation of one of its regulations should not be given effect in the absence of an articulated reason for the interpretation. The court concluded that by placing the utility on an approved rate increase list, the Price Commission had implicitly ruled that the increase did not come within the terms of a regulation that would have

88. *See, e.g.*, Nader v. Sawhill, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975); California v. Simon, 504 F.2d 430, 439 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 1021 (1974); DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974).

The TECA has in a few instances refused to adopt conclusory agency claims as to "good cause" for procedural deviations. *See, e.g.*, Shell Oil Co. v. FEA, 527 F.2d 1243, 1248 (Temp. Emer. Ct. App. 1975) (finding no "good cause" for noncompliance with "notice and comment" rulemaking in promulgating regulations under the EPAA). *See also* Tasty Baking Co. v. COLC, 529 F.2d 1005, 1015-16 (Temp. Emer. Ct. App. 1975).

The TECA rulings in *Shell Oil* and *Tasty Baking* finding agency noncompliance with applicable APA procedures, had little effect on agency practices. The court in *Shell Oil*, before reaching the issue as to FEA procedural violations, found that FEA regulation of service station property rentals was beyond its statutory authority. 527 F.2d at 1247. Consequently, agency action was not overturned on the basis of procedural violations.

The finding of noncompliance by the TECA in *Tasty Baking* was made after the expiration of the Economic Stabilization program and therefore could have no effect on the persistent noncompliance by stabilization agencies.

89. 468 F.2d 948 (Temp. Emer. Ct. App. 1972) (per curiam).

90. *Id.* at 949.

91. *Id.*

92. *Id.*

93. 481 F.2d 920 (Temp. Emer. Ct. App.), *cert. denied*, 414 U.S. 909 (1973).

required suspension of the increase. The court supplied its own post hoc rationale for the Price Commission's decision, noting that the Federal Power Commission had stated its grounds for approval of the increase, that these grounds were known to the Price Commission and, therefore, that the Price Commission "assented to the rationale expressed by the FPC."[94] In one of the rare TECA dissents, Judge Hastie found it "amazing and perhaps unprecedented" that an administrative agency should refuse to supply a party affected by agency action "with a copy of any formal document embodying that decision or to disclose the identity of the individual or individuals who rendered the decision."[95] Not only did the Price Commission fail to state the rationale for its action, Judge Hastie noted, but there was no formal record of the actual decision, nor in fact were the individuals within the Price Commission responsible for the decision ever identified.[96] Given these circumstances, Judge Hastie stated: "I see no way in which such action of a remote subordinate without Commission authorization can lawfully be recognized as effective Commission action validating an otherwise unlawful price increase."[97]

In *Plumbers Local 519 v. Construction Industry Stabilization Committee*,[98] a Construction Industry Stabilization Committee (CISC) ruling, which substantially reduced two negotiated wage increases, was challenged on the grounds that the only rationale for the ruling set forth by CISC was that "the [proposed] wage levels [are] unreasonably inconsistent with the stabilization policies of the Committee."[99] The union argued that this was not an adequate statement of the CISC's grounds for denying the increases. The TECA, in its review, found that the conclusory statement of the CISC supporting its notice of denial was sufficient to comply with section 555(e) of the APA. The court, again merely warning the agency without overturning its procedurally defective ruling, found that

> [i]t would have been preferable for CISC to have included in its notice of denial some reference to the § 203(b) standards upon which it had relied and we trust that in the future it will do so, but nonetheless, in the case at bar, the evidence relevant to the § 203(b) standards so clearly supports CISC's conclusion as to make its terse disposition self-explanatory.[100]

The TECA decisions in *Mass Retailing Institute, Baldwin County Electric* and *Plumbers Local 519* violate the spirit if not the letter of the

94. 481 F.2d at 923 n.4.
95. *Id.* at 925.
96. *Id.*
97. *Id.* at 927.
98. 479 F.2d 1052 (Temp. Emer. Ct. App. 1973).
99. *Id.* at 1055.
100. *Id.* at 1056.

Supreme Court's rule in the *Chenery* cases.[101] The Supreme Court held in *SEC v. Chenery Corp. (Chenery I)*[102] that agency decisions must be reviewed upon the basis of the validity of the grounds stated by the agency as disclosed in the record before the Court, and not upon other unarticulated grounds which theoretically might provide a "reasoned decision."[103] The Court strengthened this holding in *Chenery II*[104] when it emphasized that the agency must clearly articulate its rationale: "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with sufficient clarity as to be understandable."[105] The Court refused to guess at the theory underlying the agency's action or to distill a rationale from vague and indecisive agency language, stating " '[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong.' "[106]

An adequate statement of a rationale for the agency's decision is an essential element in guaranteeing "principled fairness" for interested parties and the public[107] and is equally applicable to agency rulemaking and to agency adjudication.[108] The requirement that the agency state the reasons for its actions serves several purposes. First, it provides an internal check on arbitrary agency action by ensuring that before it acts the agency is able to articulate the reason for its decision. Second, it spells out for an affected party the basis of the decision. Third, it opens the administrative decisionmaking process to public scrutiny. Finally, it facilitates judicial review by providing a record of decision.

The procedural requirement that the agencies state grounds for denying requested relief was one of the few APA provisions that Congress imposed

101. 332 U.S. 194 (1947) (*Chenery II*); 318 U.S. 80 (1943) (*Chenery I*).

102. 318 U.S. 80 (1943).

103. *Id.* at 87; *accord*, Burlington Truck Lines v. United States, 371 U.S. 156, 169 (1962). *See also* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972) (FTC may not advance other possible considerations to justify its action when such considerations are not mentioned in the opinion authorizing the action); Environmental Defense Fund v. EPA, 465 F.2d 528 (D.C. Cir. 1972) (EPA must be held to a "high standard of articulation" in its elucidation of a decision); Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972) (administrator of EPA required to supply an "implementing statement" to inform the court on what basis an agency decision was reached from the material in the record).

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

105. *Id.* at 196.

106. *Id.* at 197 (quoting United States v. Chicago, Milwaukee, St. Paul & Pac. R.R., 294 U.S. 499, 511 (1935)); *see Fourth Circuit Review, De Novo Review of Informal Procedures of the Comptroller of the Currency*, 30 WASH. & LEE L. REV. 261, 273 (1973).

107. The requirement that an agency explain the rationale underlying its decisionmaking and the development of a body of standards from these reasoned decisions "tends to encourage greater deliberation, self-consciousness, and consistency in the exercise of administrative discretion and thereby reduces the likelihood that an agency will act arbitrarily." Freedman, *Summary Actions by Administrative Agencies*, 40 U. CHI. L. REV. 1, 44 (1972).

108. Leventhal, *supra* note 2, at 72-77.

upon the economic stabilization agencies. Both the agencies and the TECA, however, have adopted a very cavalier attitude toward this fundamental requirement.[109] The decisions of the TECA demonstrate the extent to which the court has abdicated its responsibility to require "reasoned" administrative action and a coherent record for judicial review. The TECA has allowed the claim of regulatory urgency to undermine the desired goal of "principled fairness."[110]

V. THE NATURE OF THE AGENCY RECORD AND ITS EFFECT ON JUDICIAL REVIEW

Another glaring deficiency in the TECA judicial review of economic stabilization and energy agency decisionmaking has been its failure to require a fully developed administrative record for appellate review.[111] An administrative record is of fundamental importance to a reviewing court because the court has access to no other information except for counsels' representations in briefs and oral argument. Thus, the quality of judicial review depends upon the adequacy of the record.

The economic stabilization and energy agencies were not required by statute to conduct formal hearings prior to the issuance of adjudicative orders or the promulgation of general rules. Therefore, stabilization and energy agency decisionmaking did not produce well-documented agency files or a "record" as that term is generally understood.

Given the nature of the stabilization and energy agency records, it was not uncommon for the district courts to review agency regulations and decisions on the basis of affidavits of agency experts or decisionmakers.[112] Thus, the administrative record upon which review by the district court would be based did not consist of a full record compiled by the agency at the

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109. For a similar complaint involving the FEA, see Atlantic Richfield Co. v. FEA, 556 F.2d 542, 547-48 (Temp. Emer. Ct. App. 1977).

110. The TECA has, in a limited number of cases, refused to sanction blatant procedural violations. *See, e.g.*, Consumers Union of the United States, Inc. v. Zarb, 523 F.2d 1404 (Temp. Emer. Ct. App. 1975) (upholding a district court declaratory judgment that an FEA interim price regulation for unleaded gasoline in effect from June 1, 1974 to July 9, 1974 was invalid for failure to comply with APA notice and comment requirements); California v. Simon, 504 F.2d 430, 439-40 (Temp. Emer. Ct. App. 1974).

111. The TECA has, in at least one instance, articulated the need for a properly developed record in order to carry out judicial review. *See* National Petroleum Refiners Ass'n v. Dunlop, 486 F.2d 1388, 1391-92 (Temp. Emer. Ct. App. 1973). The TECA remanded to the district court because of improper certification of the constitutional issues, but it noted in so doing that the court had the discretion to remand a case to a trial court for development of a factual record even where "substantial" constitutional issues were present. *See generally* Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975) (a seminal article on the administrative record and the role it plays in judicial review).

112. *See, e.g.*, Nader v. Sawhill, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975); Plumbers Local 519 v. Construction Indus. Stabilization Comm., 479 F.2d 1052 (Temp. Emer. Ct. App. 1973).

time of its decisionmaking, setting forth the evidence upon which it relied in promulgating its rule or order. Rather, it consisted of post hoc self-serving affidavits of the agency head or an agency expert produced expressly for the district court's review.

Similar problems with judicial review of regulations and orders were avoided by the World War II Office of Price Administration through the use of a protest procedure.[113] That procedure allowed a party affected by price controls to "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections."[114] The OPA administrator was then required to either grant or deny the protest and to notice it for hearing or to provide an opportunity to present further evidence in connection with the protest. When the OPA denied requested relief, the administrator was required to "inform the protestant of the grounds upon which such decision is based and of any economic data and other facts of which the administrator has taken official notice."[115] The protestant was thereby apprised of and given an opportunity to challenge the evidence upon which the administrator had relied in implementing the regulation or order in question. Moreover, the protest record served as the "primary record for judicial determination of the validity of the regulation or order."[116]

The OPA procedures can be contrasted with those of the economic stabilization and energy agencies. The Economic Stabilization Act contained no provision for a protest procedure whereby an administrator was required to compile an agency record in support of agency regulations or orders. Notwithstanding the agency procedures that provided for interpretations of rulings, exemptions and reclassifications,[117] substantially all of the

113. *See* Auerback, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 NEV. U.L. REV. 15, 62-66 (1977). *See generally* Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review*, *supra* note 24; Sprecher, *supra* note 24, at 48-53.

114. Emergency Price Control Act of 1942, ch. 26, § 203(a), 56 Stat. 31 (1943).

115. *Id.*

116. Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review*, *supra* note 24, at 64. The protest record was to consist of: (1) the protest and supporting affidavits; (2) the statement of considerations accompanying the regulation; (3) agency evidence, including economic data and other facts of which the administrator took official notice, in support of the provisions against which the protest was filed, in the form of affidavits or otherwise as the Administrator deemed appropriate; (4) supporting statements, accompanied by affidavits and other data in written form, of persons affected by the provisions against which the protest was filed; (5) the protestant's evidence rebutting (3) and (4); (6) any oral testimony taken in the course of the proceedings; and (7) all orders and opinions issued in the course of the proceedings. These materials also comprised the record filed for review purposes with the Emergency Court of Appeals. Auerback, *supra* note 113, at 63-64.

117. The Economic Stabilization Act of 1970, as amended, and the Emergency Price Control Act of 1942 provided for individual adjustment and industry exemptions from each Act. In section 203(a) of the Economic Stabilization Act, the President was directed to ensure that

litigation challenging economic stablization agency decisionmaking entailed direct challenges to the regulations or orders themselves rather than judicial review of a record compiled as a result of an agency proceeding.

The Record in Informal Agency Rulemaking.

Currently, one of the most perplexing problems in administrative law concerns the judicial review of administrative regulations promulgated

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orders and regulations implementing the stabilization program "provide for the making of such adjustments as may be necessary to prevent gross inequities." Economic Stabilization Act § 203(a). In section 203(b), it was stipulated that all standards must "provide for the making of such general exceptions and variations as are necessary to foster orderly economic growth, and to prevent gross inequities, hardship, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits." *Id.* at § 203(b)(2). A similar provision was applicable to the FEA. 15 U.S.C. § 766(i)(1)(D) (Supp. V 1975) (repealed 1977).

The economic stabilization agencies attempted to regulate a complex economy using very imprecise tools. Exceptions and exemption procedures were therefore of crucial importance. Judge Leventhal has aptly described the need for individual adjustments and exceptions in the price stabilization program during World War II:

> The initial price regulations were often "first cuts" at a problem, resolving an uncertainty and staking out how the agency would exercise its powers. Businesses were grouped according to a few similarities, and a single policy was made applicable. Exceptions and adjustments were the safety valve by which salient differences between parties initially treated alike could be exposed and evaluated.

Leventhal, *supra* note 2, at 75.

Merely providing for exceptions and exemptions in an administrative regulatory scheme does not guarantee that "principled fairness" will result. For example, the "90-day freeze" that initiated the economic stabilization program provides "heart-breaking examples of sellers or renters caught in the freeze with their prices down—that is to say with cost increases that had not yet been reflected in their prices during the base period." Nathanson, *supra* note 2, at 60. *See generally* R. Kagan, *supra* note 30; A. WEBER, IN PURSUIT OF PRICE STABILITY 33, 80-83 (1973). Weber notes that only five of approximately 2,435 requests for exception from the freeze were granted. *Id.* 80-81. The restrictive standards applied to the hardship cases during the price freeze of August 15, 1971 to November 14, 1971 can perhaps be justified on the basis of the temporary nature of the wage-price freeze and the prospect that its successor would accommodate the inequities of the short term program.

The right of affected parties to seek administrative relief from inequitable and unreasonably burdensome orders and regulations was based upon statutory language which required generally that the agency only "prevent gross inequities" and "hardships." Economic Stabilization Act § 203(b)(2). "[T]his concept lacked both precision or any amplifying legislative history." A. WEBER, *supra* at 81. Under similarly elusive general language in the Emergency Price Control Act of 1942, Judge Leventhal has pointed out that the World War II stabilization agencies achieved "principled fairness" by requiring that

> the basis for relief in exceptions and adjustment orders had to be embodied in a general standard. No applicant received relief from a price regulation unless a general provision in the regulation authorized it; alternatively, one who met the general conditions specified was entitled to relief as a matter of right, not of administrative privilege.

Leventhal, *supra* note 2, at 79. The economic stabilization agencies did not attempt to define the terms "hardship" or "gross inequity," or otherwise attempt to explicate the criteria by which they would allow access to this extraordinary relief. Thus, there was no published administrative principle "to prevent the agenc[ies] from drifting into the handling of general price problems on a piecemeal basis." Leventhal, *The Role of the Price Lawyers*, in PROBLEMS IN PRICE CONTROL: LEGAL PHASES, PART II HISTORICAL REPORTS ON WAR ADMINISTRATION 102 (Off. Price Admin. Pub. No. 11, 1947).

through "notice and comment" rulemaking.[118] This simplified type of agency proceeding is functionally different than adjudicative proceedings and rulemaking "on the record," which require an agency decision based solely upon a formal record. The salient procedural requirements of informal rulemaking are public notice in the Federal Register of proposed regulations and allowance of sufficient time for interested parties to comment on the agency's proposals. Since the informal rulemaking procedures result in regulations of a quasi-legislative nature, judicial review takes on a different character. The court is called upon to review not an evidentiary record of agency action but a quasi-legislative, policy-type decision. Thus, the judicial review of informal rulemaking of any administrative agency is complicated "in that the agency is not limited to a decision based on a carefully delimited 'record.' "[119]

In reviewing rulemaking of economic stabilization agencies, the TECA

The exceptions to energy agency regulatory action and adjudication have produced similar problems. In Powerine Oil Co. v. FEA, 536 F.2d 378 (Temp. Emer. Ct. App. 1976), the TECA observed that the statutory authority to make individual adjustments and grant exceptions from EPA regulations had not been subjected by Congress to any test or standards. Since Congress left the exceptions process to the President, the responsibility for and power to determine criteria was further delegated to the agency. The agency was deemed to have great flexibility in designing and carrying out exceptions procedures.

In Delta Refining Co. v. FEA, 559 F.2d 1190 (Temp. Emer. Ct. App. 1977), there was a challenge to an FEA refund order by which Delta was required to purchase additional entitlements after a year-end audit showed that its financial condition was better than it had projected when it secured FEA approval of a reduction in entitlement purchase obligations. Delta argued that the refund order involved a unique recapture program which was not provided for in FEA regulations and that FEA could invoke such a program only by promulgation of administrative regulations and not by use of administrative order. The TECA affirmed the district court decision holding that FEA had the power to grant relief from entitlement purchase obligation on a conditional basis. The retrospective revocation of entitlement relief was founded on the broad grant of congressional authority to make adjustments in the exception process.

On the TECA's review of the exceptions process in the energy agencies, see Amtel, Inc. v. FEA, 536 F.2d 1378 (Temp. Emer. Ct. App. 1976); Powerine Oil Co. v. FEA, 536 F.2d 378 (Temp. Emer. Ct. App. 1976); Texaco, Inc. v. FEA, 531 F.2d 1071 (Temp. Emer. Ct. App.), *cert. denied*, 426 U.S. 941 (1976); Pasco, Inc. v. FEA, 525 F.2d 1391 (Temp. Emer. Ct. App. 1975). *See generally* Cockrell, *Exceptions to Federal Regulations for Management of the Energy Crisis: The Emerging Case Law*, 28 OKLA. L. REV. 530 (1975).

The FEA has improved on the dismal record of the Economic Stabilization agencies by setting forth the agency criteria in determinations of "serious hardship or gross inequity" under 10 C.F.R. § 205.55(b)(2) (1977). *See* 40 Fed. Reg. 33,489 (1975); Delta Refining Co., [1975 Transfer Binder] ENERGY MANAGEMENT (CCH) ¶ 83,275.

118. The literature on the judicial review of "notice and comment" rulemaking reflects the interest in this area of administrative law. *See* Verkuil, *supra* note 29; Wright, *supra* note 23; Note, *Model Review of Informal Rulemaking: Recommendation 74-4 of the Administrative Conference of the United States*, 1975 DUKE L.J. 479; Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750 (1975). *See also* Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721 (1975).

119. Verkuil, *supra* note 29, at 187. Verkuil has concluded "that 'record' now means whatever the agency produces on review." *Id.* at 204.

has not only suffered because of the limitations inherent in review of "notice and comment" rulemaking, but it has also had the added problem of dealing with regulations that were published without even the rudimentary procedures of "notice and comment."[120] In these cases, the TECA review has proceeded without the benefit of agency rationale or comments of interested parties. The only "administrative record" for review consisted of the final regulations.

The question raised is whether the TECA, or any reviewing court, absent a trial de novo,[121] can scrutinize agency decisionmaking that is derived from informal rulemaking proceedings where the record consists solely of the agency rule. The question has no single or simple answer. Fundamentally, the issue is whether the agency is limited to producing as a "record" only that which was considered during the formulation of the regulations, or whether a "record" may be embellished by post hoc rationalizations which the agency presents to support its earlier decisionmaking.[122] The answer to

120. *See, e.g.*, Nader v. Sawhill, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975), where the TECA upheld COLC action implementing a one dollar per barrel increase in the allowable price of certain "old" crude oil. The COLC had proceeded under 5 U.S.C. § 553(b) (1970), which permits an exception to the usual notice requirements "for good cause." The TECA upheld the COLC's use of the "good cause" exception despite the agency's failure to adequately state reasons for using the expedited procedure, as required by the statute. 514 F.2d at 1068. This failure, the TECA found, was "a technical violation of normal procedures" which will not be the basis for overturning agency action where "good cause in fact was present." *Id.* at 1068-69. The TECA did "warn that repeated technical noncompliance will not be tolerated. . . . Assuming less calamitous circumstances, we fully expect that any future decisions will take the utmost advantage of full and open public comment." *Id.* at 1069.

See also Texaco, Inc. v. FEA, 531 F.2d 1071 (Temp. Emer. Ct. App.), *cert. denied*, 426 U.S. 941 (1976), where the regulation in question was to become effective before the thirty days notice required by 5 U.S.C. § 553(d) (1970). In addition, the FEA had failed to state the reasons for making the regulation immediately effective. The TECA upheld the regulation, despite the procedural defects, since "there obviously was good cause for the regulation to be made effective immediately." 531 F.2d at 1082. Finding no "substantial departure from the requirements of the APA or prejudice from technically flawed procedures," the TECA determined that the case fell within the principle established by *Nader* and upheld the regulation. In further support, the TECA cited its decisions in California v. Simon, 504 F.2d 430 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 1021 (1974), and DeRieux v. Five Smiths, Inc., 499 F.2d 1321 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974). *But see* Tasty Baking Co. v. COLC, 529 F.2d 1005 (Temp. Emer. Ct. App. 1975); Shell Oil Co. v. FEA, 527 F.2d 1243 (Temp. Emer. Ct. App. 1975).

121. An inadquate administrative record can be corrected by a de novo review in the trial court. One commentator has noted that

> the reviewing court would be warranted in undertaking a de novo review where the fact finding procedures were inadequate and the decision of the administrative agency was, therefore, arbitrary and capricious. In such a case, the court would be unable to review the decision for lack of an adequate evidential record. The reviewing court would therefore be forced to make its own findings of fact in order to grant relief.

Fourth Circuit Review, *supra* note 106, at 272 n.69. Illustrative of the problem are Peoples Bank v. Saxon, 373 F.2d 185 (6th Cir. 1967), and First Nat'l Bank v. Saxon, 352 F.2d 267 (4th Cir. 1965).

122. It has not been determined to what extent an administrator can supplement the record

this question depends not only upon consideration of the functional purpose of the record but also upon the need for "principled fairness" to parties affected by agency rulemaking. While the efficiency and expediency to be gained by informal rulemaking may justify limitations on judicial-type hearings, rulemaking should not serve as the means by which administrative urgency overcomes administrative fairness.

In the absence of records, both district courts and the TECA have permitted the affidavits of policy decisionmakers to be used to explicate the rationale for both informal rulemaking and agency orders affecting individual parties. The TECA, ignoring the principles of the *Chenery* cases and the statutory requirements of section 555(e) of the APA, has predicated judicial review upon affidavits which present the post hoc rationale of the economic stabilization agencies. This review procedure was approved by the TECA in *Plumbers Local 519 v. Construction Industry Stabilization Committee*.[123] There, the CISC did not fully explain the rationale for its decision that proposed wage increases were inconsistent with stabilization policies until the government moved for summary judgment in the district court. At that time, Dr. John Dunlop, then chairman of COLC, submitted an affidavit setting forth the CISC rationale. The TECA upheld this procedure despite an argument that Dr. Dunlop's affidavit was a post hoc rationalization for a record which contained a decision without factual basis. The court observed

of informal rulemaking procedures on appeal. *Compare* SEC v. Chenery Corp., 318 U.S. 80 (1943), *with* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). *Overton Park* was a major success for environmental litigants because it imposed the requirement that administrative records contain an adequate explanation of the agency's decision on a proposed project at the time the challenged decision was made by the agency. Mere litigation affidavits or post hoc rationalizations by agency officials, unaccompanied by the administrative record, were deemed to be an inadequate basis for applying the "arbitrary and capricious" standard of review, and were found not to constitute the "whole record" as required by the APA. *Id.* at 416, 419-20.

In Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968), the District of Columbia Court of Appeals considered the validity of a motor vehicle safety standard issued pursuant to the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1970), requiring all new cars to be equipped with factory installed front seat head restraints. The Act provided that, upon challenge, the agency was required to file with the court a record of the proceedings upon which the Secretary based his order. The court held that the "record" envisioned by the statute was whatever the agency had before it during rulemaking. However, the court warned that:

> [O]n the occasion of this first challenge to the implementation of the new statute [National Traffic and Motor Vehicle Safety Act] it is appropriate for us to remind the Administrator of the ever present possibility of judicial review . . . . We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking. We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement of . . . basis and purpose" mandated by [the Act] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

407 F.2d at 338.

123. 479 F.2d 1052 (Temp. Emer. Ct. App. 1973).

that "Dr. Dunlop's post-litigation affidavit was merely expository of the Committee's obvious, although implicit findings, and the district court therefore properly accepted and used it."[124]

The use of a post-litigation affidavit was again approved by the TECA in *Chrysler Corp. v. Dunlop*,[125] where Chrysler challenged a COLC decision to delay a proposed price increase. The issue raised was whether the COLC had substantial evidence to support the order. The court permitted a post-litigation affidavit to provide the "substantial evidence" needed to support the COLC order.[126]

The use of post-litigation affidavits by the federal energy agencies is also commonplace.[127] In *Nader v. Sawhill*,[128] the appellants argued that the rationale contained in post-litigation affidavits of the decisionmakers presented "new" justifications for agency action which should be disregarded by the court in its review of the agency action. The court responded by reaffirming that the use of such affidavits is permissible,[129] concluding that they are appropriate "where the reviewing court does not have the benefit of a detailed administrative record developed in the course of normal rulemaking procedures."[130]

While litigation affidavits are commonly used as a means of summarizing or synthesizing the rationale for an agency action, this in no way justifies an agency's use of litigation affidavits to formulate in the first instance a rationale for its action.[131] A number of objections can be raised to this

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124. *Id.* at 1056.

125. 490 F.2d 985 (Temp. Emer. Ct. App. 1973).

126. *Id.* at 988. *See also* League of Voluntary Hosp. & Homes v. Local 1199, Drug & Hosp. Union, 490 F.2d 1398, 1402 (Temp. Emer. Ct. App. 1973), where an affidavit of Dr. Dunlop was used to supply detailed reasons for a COLC decision to selectively continue wage controls on the health industry.

In Chrysler Corp. v. Dunlop, 490 F.2d 985 (Temp. Emer. Ct. App. 1973), the agency had difficulty articulating a rational basis for delaying the price increases requested by Chrysler. The court found that

> affidavits submitted to date do not provide a rational explanation for the deferral of Chrysler's proposed price increase. We do not suggest that there might not be a rational basis, but observe merely that the present affidavits do not contain factual evidence to support . . . [the COLC conclusion].

490 F.2d at 988. The affidavit was "the sole evidentiary basis for COLC's order." *Id.* at 989.

127. *See* Nader v. Sawhill, 514 F.2d 1064, 1066, 1068 (Temp. Emer. Ct. App. 1975); Gulf Oil Corp. v. Simon, 502 F.2d 1154, 1155 (Temp. Emer. Ct. App. 1974).

128. 514 F.2d 1064 (Temp. Emer. Ct. App. 1975).

129. *Id.* at 1067 n.6.

130. *Id.*

131. The TECA's acceptance of litigation affidavits setting forth the agency's rationale is somewhat akin to a mandamus action where new evidence is taken without affording a trial de novo. In a mandamus procedure, judicial review is conducted "on the basis of the record as it stands upon the completion of the mandamus trial; thus, although there may not have been adequate evidence at the time the officer acted, the evidence at the hearing may suffice to uphold it." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 187 (1965).

practice. First, without previously stated reasons for an agency action, the plaintiff's burden in challenging the agency decisionmaking is significantly increased. In the absence of a statement of reasons for the agency action, the challenging party is effectively precluded from focusing on the specific rationale of the agency's decision. Second, and of primary importance, the affidavit permits the agency to use hindsight in order to create a rationale for its action. The TECA decisions approving the use of litigation affidavits are inconsistent with both appellate[132] and Supreme Court decisions[133] outlining the requirements of judicial review of agency actions, and they undermine the goal of "reasoned" decisionmaking.

Concededly, the TECA has been charged with reviewing acts of agencies which Congress contemplated would use abbreviated procedures, giving rise to somewhat "barren" records. However, the TECA could have acted consistently with its policy of "great deference" to the economic stabilization agencies without resorting to the use of post hoc litigation affidavits by remanding the cases back to the agency for a statement of agency rationale.[134]

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132. The dangers inherent in the use of litigation affidavits have been noted by the Third Circuit:

> [A] conclusionary statement of reasons places too great a burden on interested persons to determine and challenge the basis for the standard, and makes possible in any subsequent judicial review the use of *post hoc* rationalizations that do not necessarily reflect the reasoning of the agency at the time the standard was issued.

Dry Colors Mfrs. Ass'n v. Department of Labor, 486 F.2d 98, 106 (3d Cir. 1973). An even stronger objection was stated by the Tenth Circuit:

> The integrity of the administrative process must be judged by what took place in the administrative proceedings as reflected on the administrative record unaided by affidavit proof in the reviewing court.

Garvey v. Freeman, 397 F.2d 600, 611 (10th Cir. 1968). *See also* Trailways of New England, Inc. v. CAB, 412 F.2d 926, 931 (1st Cir. 1969).

The courts have often indicated that post hoc rationalizations of counsel will not suffice to support agency actions. *See, e.g.*, Hooker Chemicals & Plastics Corp. v. Train, 537 F.2d 620, 634 (2d Cir. 1976); American Meat Inst. v. EPA, 526 F.2d 442, 465 (7th Cir. 1975); Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 777 (D.C. Cir. 1974); NLRB v. Gibson Prod. Co., 494 F.2d 762, 768 & n.9 (5th Cir. 1974); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 395 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); International Harvester v. Ruckelshaus, 478 F.2d 615, 632 (D.C. Cir. 1973).

133. The Supreme Court in the seminal *Chenery* cases, SEC v. Chenery Corp., 318 U.S. 80, 87 (1943), and SEC v. Chenery Corp., 332 U.S. 194, 196 (1947), enunciated what has become a fundamental rule in administrative law: in reviewing agency decisions, courts may only consider agency records and the grounds stated by the agencies as the rationales for their decisions. The Court reaffirmed this principle in Burlington Truck Lines v. United States, 371 U.S. 156, 167-68 (1962), and in subsequent cases. *See* FPC v. Texaco, Inc., 417 U.S. 380, 397 (1974); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419 (1971); NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965).

134. On the use of remands, see Freedman, *The Uses and Limits of Remand in Administrative Law: Staleness of the Record*, 115 U. PA. L. REV. 145 (1966). Freedman observes that a remand for development of the record "would at least provide an enlarged factual context in which to explore the reach of the questions and might well cast them in a different light." *Id.* at 152. The remand procedure "has the capacity for inviting a dialogue with an agency," *id.* at

Because it has permitted agencies to generate "records" ex post facto for the purposes of judicial review, the TECA has encountered a number of undesirable consequences that could have been avoided by confining the agency record to the administrative agency file. Even though the concern for administrative urgency was paramount at the time of the decisionmaking, it must be asked whether the TECA properly balanced the need for expedient administrative action with the long-range goals of "principled fairness." It seems that fairness would require that where an agency has engaged in decisionmaking without compiling sufficient written data and a sufficient rationale to support its conclusion, the administrative action should not be upheld on review.

VI. The Effect of the Congressional Delegation of Authority on the Role of Judicial Review by the TECA

Obviously, courts are constrained in defining the judicial-agency relationship. They must act within the parameters set by Congress in the organic legislation which created the agency and established its mandate. Congress may also, as it has in the case of the economic stabilization and energy agencies, set forth the jurisdictional scheme for judicial review, including a prescribed standard for trial and appellate review. While this Article is concerned primarily with the relationship between the TECA and the agencies, this relationship is in important respects structured by the congressional legislation which created the agency, and it should be considered in that light.

Both the economic stabilization and energy programs are characterized by a statutory delegation of authority which confers broad powers upon the agencies without suggesting how these vital national programs are to be implemented.[135] The congressional legislation in each case consists of little more than a skeletal outline and does not purport to dictate the techniques to be applied by the agencies in pursuit of the national policies mandated by the statutes. Consequently, the economic stabilization and energy agencies were left with an unprecedented degree of administrative latitude to control this nation's peacetime economy and to manage energy allocations.

153, and "can have an effect upon an agency's achievement of the substantive policies that have been entrusted to its keeping." *Id.* at 167.

135. Even though the breadth of the delegation of authority in the Economic Stabilization Act elicited a constitutional challenge, broad delegations of authority are now commonplace. One commentator has observed that "[t]he ambivalence that has frustrated our attempts as a society to arrive at a coherent ideology of governmental activism has also caused Congress to legislate most economic regulation in evasive generalities, leaving to the respective administrative agencies the essential tasks of evolving regulatory policies." Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1054 (1975). *See also* Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1407 (1975); Boyle, *Economic Controls, Executive Power and the Delegation of Congressional Authority*, 2 NEW DIMENSIONS IN LEGISLATION 6, 18-43 (1971).

The first and only serious challenge to the constitutionality of the delegation of authority in the original economic control legislation came in *Amalgamated Meat Cutters & Butcher Workmen v. Connally*.[136] This suit, brought prior to the establishment of the TECA, challenged the Economic Stabilization Act of 1970 as an unconstitutional delegation of legislative power to the President, relying primarily upon *Schechter Poultry Corp. v. United States*[137] and *Panama Refining Co. v. Ryan*,[138] the only cases in which the Supreme Court has struck down delegations of authority in federal legislation. Since it is commonly accepted that the delegation doctrine is no longer a viable means of attacking the constitutionality of federal legislation[139] one might ask why a challenge was made on this implausible ground. A reading of the Economic Stabilization Act in its entirety, however, suggests the logic in the plaintiff's challenge.[140] The statute consisted of only five provisions. The President was delegated authority "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries."[141] The authority delegated to the President was limited in a significant way only by the provision stating that

136. 337 F. Supp. 737 (D.D.C. 1971). *See generally* Friedelbaum, *The 1971 Wage-Price Freeze: Unchallenged Presidential Power*, 1974 SUP. CT. REV. 33.

137. 295 U.S. 495 (1935).

138. 293 U.S. 388 (1934).

139. *See* Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

140. The unamended Act is set out here in its entirety:

§ 201. Short title.
This title may be cited as the "Economic Stabilization Act of 1970."
§ 202. Presidential authority.
The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970. Such orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities.
§ 203. Delegation.
The President may delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he may deem appropriate.
§ 204. Penalty.
Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000.
§ 205. Injunctions.
Whenever it appears to any agency of the United States, authorized by the President to exercise the authority contained in this section to enforce orders and regulations issued under this title, that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order under this title, it may in its discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the agency, any such court may also issue mandatory injunctions commanding any person to comply with any regulation or order under this title.
§ 206. Expiration.
The authority to issue and enforce orders and regulations under this title expires at midnight February 28, 1971, but such expiration shall not affect any proceeding under section 204 for a violation of any such order or regulation, or for the punishment for contempt committed in the violation of any injunction issued under section 205, committed prior to March 1, 1971. Approved August 15, 1970.

Economic Stabilization Act of 1970, Pub. L. No. 91-381, 84 Stat. 799 (1970).

141. Economic Stabilization Act § 202.

stablization could not be ordered at price, rent, wage and salary levels less than those prevailing on May 25, 1970, and that "orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities."[142] Nevertheless, Judge Leventhal, writing for a three-judge panel, upheld the delegation of authority in the Act on the basis of *Yakus v. United States*[143] in which the Supreme Court had sustained the broad price-fixing authority delegated to the President during World War II.[144] The holding in *Amalgamated Meat Cutters* was based upon the theory that the sole limitation on a legislative delegation of authority is the requirement that there be a statement of principles to guide executive action so that future compliance with the legislative intent can be judicially ascertained.[145]

Given the absence of explicit standards in the delegated authority, the court found several *implied* limitations on administrative action: first, the requirement of fairness and equity;[146] second, the *expectation* that the stabilization agencies would promulgate additional standards which would "limit the latitude of subsequent executive action";[147] and finally, the pressures to comply with the standards caused by the scrutiny of Congress, the courts and the public.[148] No attempt was made to "define the contours of the standard of broad fairness and avoidance of gross inequity"[149] required by Congress, although presumably the standards were to evolve from the informal rulemaking of the economic stabilization agencies and the application of these rules in particular factual settings. The court did make clear, however, that the "fairness" standard and its application were subject to scrutiny by the courts and that judicial review of administrative decision-making was of particular importance where administrative agencies are given broad grants of legislative power.[150]

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142. *Id.*

143. 321 U.S. 414 (1944).

144. Judge Leventhal noted that it was in *Yakus* that the Supreme Court upheld "perhaps the broadest delegation yet sustained . . . for the ultimate standard in the 1942 statute was only that the maximum prices 'be generally fair and equitable.'" 337 F. Supp. at 747.

145. 337 F. Supp. at 746-55. Judge Leventhal's understanding of the limited scope of the delegation doctrine conforms with the statements on the subject by the Supreme Court. The Court stated in *Yakus* that "[t]he essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." 321 U.S. at 424. In upholding the delegation of power by Congress in *Yakus*, the Court noted that

> [o]nly if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

146. 337 F. Supp. at 755-58.

147. *Id.* at 758.

148. *Id.* at 759.

149. *Id.* at 755.

150. *Id.* at 759-60.

The decision in *Amalgamated Meat Cutters*, upholding a broad, essentially standardless delegation of congressional authority, is consistent with the current constitutional pattern, as enunciated by the courts[151] and recommended by the commentators.[152] Under the modern view of delegation, administrative discretion is best limited not by detailed delegations of authority, but through agencies' actions circumscribing their own discretion.[153] This view is premised on the theory that agency decisionmaking which is open, reasoned and published confines the discretion of the agency. Such an approach would appear to have merit only when the courts require the agency to promulgate standards and then, by way of judicial review, ensure adherence to the agency standards as well as to the statutory mandates.

It is clear from the *Amalgamated Meat Cutters* decision that Judge Leventhal did not envision a standardless exercise of administrative discretion by the economic stabilization agencies. In fact, he stressed "the role of ongoing administrative standards,"[154] which "limit the latitude of subsequent executive action" and allow the courts to "assess the Executive's adherence to the ultimate legislative standard."[155] The decision thus makes clear the judicial expectation that an emergency economic stabilization agency created by a broad delegation of authority would be adequately controlled by the evolution of standards enforceable through judicial review.

Within the context of this study, the delegation of authority doctrine is of primary interest as a factor affecting the vigor of TECA review of stabilization agency decisionmaking. The broad delegation of authority upheld in *Amalgamated Meat Cutters*, even though indirectly modified by subsequent congressional amendment,[156] could be viewed as either inducing or discouraging "close scrutiny" by a reviewing court of agency action. On one hand, the TECA, faced with the prospect of reviewing the decisionmaking of administrative agencies which have been given "blank checks" by Congress, could adopt a policy of stringent judicial review to assure adequate safeguards against arbitrary and unreasonable agency action. A

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151. *See, e.g.*, Permian Basin Area Rate Cases, 390 U.S. 747 (1968); American Trucking Ass'n v. Atchison, T. & S.F. Ry., 387 U.S. 397 (1967). *See also* Boyle, *supra* note 135, at 32-43.

152. *See* K. DAVIS, DISCRETIONARY JUSTICE (1969). Arguments opposing limitless and standardless delegations can be found in Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968); Wright, Book Review, 81 YALE L. REV. 575 (1972). *See also* Note, *Phase V: The Cost of Living Council Reconsidered*, 62 GEO. L.J. 1663, 1668 (1974).

153. *See* K. DAVIS, *supra* note 152, at 54.

154. Leventhal, *supra* note 2, at 71.

155. 337 F. Supp. at 758-59.

156. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 2, 85 Stat. 743 (1971) (Economic Stabilization Act § 203).

broad delegation of authority, coupled with an exemption from APA requirements, could be viewed as a substantial threat to the procedural rights of individuals affected by agency action. Under this view, a concern for "principled fairness" would seem to dictate close scrutiny by the TECA to ensure that minimal procedural and substantive safeguards are jealously guarded.[157] On the other hand, the broad delegation of authority could be seen as evidence of a legislative intent to limit the scope of review of agency actions. This has been the view unabashedly adopted by the TECA.[158] The practical effect of the TECA's position has been to substantially increase the plaintiff's burden in showing that a particular agency action was arbitrary and capricious. In *Pacific Coast Meat Jobbers Association v. COLC*,[159] the court found that the beef price ceiling was

> supported by substantial evidence in the record such that we cannot say that the C.L.C. [Cost of Living Council] was acting in an arbitrary or capricious manner, or that the decision of the District Court was erroneous. Also, since the President and those to whom he delegates this power are specifically given by the Economic Stabilization Act the power to institute price controls, and the regulations involved here were enacted in furtherance of the statutory goals of fighting inflation and stabilizing the economy, plaintiffs have failed to show that the C.L.C. actions were illegal.[160]

The effect of the broad delegation of authority also surfaced in *DeRieux v. Five Smiths*,[161] where the court confronted a major challenge to its "due deference" doctrine.[162] The TECA stood by its reliance upon the deference to the economic stabilization agencies expressed in *University of Southern*

157. Beyond the concern for procedural fairness, one author has argued that the courts, rather than the agencies, should be the final arbiters of national economic policy where Congress has failed to clearly order priorities. *See* Schwartz, *supra* note 70. But note the contrary view of Judge Skelly Wright, who warns against the appellate courts sitting as "scientific or economic policy review boards." Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 AD. L. REV. 199, 211 (1974). Judge Wright has stated that the judge's "task is not to supplant the experts by conducting an independent review of their scientific or economic methodology." *Id.* Rather, the goal of reviewing courts should be to ensure a "productive dialogue" between the agency and the interested public. *Id.*

158. *See, e.g.*, DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1329 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974). One commentator has found that the stage for judicial abdication of responsibility is set by a broad, standardless delegation of authority. *See* Schwartz, *supra* note 70, at 475.

159. 481 F.2d 1388 (Temp. Emer. Ct. App. 1973).

160. *Id.* at 1391.

161. 499 F.2d 1321 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974).

162. *DeRieux* is the only case in which the TECA directly considered the validity of the delegation of legislative authority in the Economic Stabilization Act, as amended in 1971. In *DeRieux*, the TECA noted its substantial agreement with *Amalgamated Meat Cutters* and, on the authority of that decision and without discussion, the court held that the amended Act was not an unconstitutional delegation of legislative power to the President. *See also* Murphy v. O'Brien, 485 F.2d 671 (Temp. Emer. Ct. App. 1973).

California v. COLC,[163] based in part upon the broad delegation of authority. The TECA found it "no abdication of our constitutional role for this court to recognize the breadth of the delegations involved in this particular statute and this particular Order."[164]

The problem presented by the broad delegation of authority in the Economic Stabilization Act cannot be wholly attributed to the administrative agencies since they have generally proceeded to employ informal rulemaking (although abbreviated in form) to set standards affording a measure of elemental fairness to regulated parties. The failure lies with the TECA in its reluctance to compel agency compliance with procedural safeguards and with the broad standards of fairness in the statute itself.

A further problem with broad statutory standards arose in the TECA review of matters stemming from the Emergency Petroleum Allocation Act (EPAA).[165] The Act outlines a series of policy objectives, the most prevalent characteristic of which is their conflicting nature.[166] In upholding the congressional delegation of authority contained in the EPAA, the court stated:

> Where the obvious intent of Congress is to give to the President and his delegates broad power to do what reasonably is necessary to accomplish legitimate purposes rendered necessary by a recognized emergency, and regulations are fashioned to implement the Congres-

163. 472 F.2d 1065 (Temp. Emer. Ct. App.), *cert. denied*, 412 U.S. 949 (1972).

164. 499 F.2d at 1329.

165. 15 U.S.C. §§ 751-760h (Supp. V 1975).

166. The EPAA specifies nine objectives which the FEA is to pursue in its regulatory effort:

(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;
(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);
(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;
(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;
(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;
(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, non-branded independent marketers, branded independent marketers, and among all users;
(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—(i) fuels, and (ii) minerals essential to the requirements of the United States, and for required transportation related thereto;
(H) economic efficiency; and
(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

15 U.S.C. § 753(b) (Supp. V 1975).

sional mandate, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate.[167]

The TECA noted in *Reeves v. Simon*[168] that "[i]t would have been an impossibility to achieve *all* of the objectives" of the EPAA.[169] Thus, given a rational basis for the choice of conflicting policies and the traditional deference to the economic stabilization and energy agencies, the TECA reversed the district court decision enjoining the FEO from implementing a regulation prohibiting retail gasoline service stations from limiting sales to regular customers during the height of the gasoline shortage.[170] Whenever, as here, the congressional delegation of authority provides for conflicting policy objectives or objectives which require a degree of balancing, it is unlikely that any court, and especially the TECA, will closely scrutinize agency decisionmaking.[171]

With regard to the nature and scope of TECA review, it is suggested here that a broad delegation of authority presents a court with divergent and contrary frames of reference for structuring review of agency action. The court can find in the broad delegation the rationale for either stringent or "passive" judicial review. Judge Leventhal, who was faced with the impossible task of reconciling the need for emergency price and wage controls

167. Condor Operating Co. v. Sawhill, 514 F.2d 351, 359 (Temp. Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975).

168. 507 F.2d 455 (Temp. Emer. Ct. App. 1974).

169. *Id.* at 460. *See also* Basin, Inc. v. FEA, 552 F.2d 931, 935 (Temp. Emer. Ct. App. 1977).

170. 507 F.2d at 455.

171. *See* Amtel, Inc. v. FEA, 536 F.2d 1378 (Temp. Emer. Ct. App. 1976); Pasco, Inc. v. FEA, 525 F.2d 1391, 1397 (Temp. Emer. Ct. App. 1975); Consumers Union of the United States, Inc. v. Sawhill, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975); Air Transport Ass'n of America v. FEO, 520 F.2d 1339 (Temp. Emer. Ct. App. 1975). The TECA has stated that "[t]his type of judgment, involving the balancing of interrelated economic factors, is peculiarly within the scope of the expertise with which . . . [the Economic Stabilization agencies are] presumptively endowed." Plumbers Local 519 v. Construction Indus. Stabilization Comm., 479 F.2d 1052, 1056 (Temp. Emer. Ct. App. 1973); *accord*, Amalgamated Meat Cutters & Butcher Workmen v. COLC, 497 F.2d 1360 (Temp. Emer. Ct. App. 1974).

Another example of congressional legislation which calls for administrative action to meet conflicting criteria is the Regional Rail Reorganization Act, 45 U.S.C. §§ 701-794 (Supp. V 1975).

> The Regional Rail Reorganization Act . . . requires the Final System Plan for the new eastern rail system to meet criteria of economic viability, effective competition, adequacy of freight service, establishment of improved high-speed passenger service, attainment of environmental quality standards and maximum efficiency consistent with safety and protection of labor and communities against losses—criteria that, if taken literally as having equal priority, could be achieved only in utopia.

Cutler & Johnson, *supra* note 135, at 1407-08.

In situations such as that illustrated by the EPAA and the Regional Rail Reorganization Act, the question arises as to the flexibility of the administrative agency "to develop a preferential relationship among competing values." Note, *Recent Changes in the Scope of Judicial Control Over Administrative Methods of Decisionmaking*, 49 IND. L.J. 118, 120 (1973). *See also* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

with the total absence of standards in the first Economic Stabilization Act, argued that the broad delegation implicitly called for close judicial scrutiny of agency action. A review of TECA decisions clearly indicates that the court subscribes to neither Judge Leventhal's view nor the thesis of this Article that stringent standards of review are necessary.

VII. CONCLUSION

A review of the decisions of the TECA supports the conclusion that the court has shown little concern for "principled fairness." The TECA has abdicated its judicial responsibility by its deference to administrative agencies, its failure to secure agency compliance with procedural safeguards and its unwillingness to closely scrutinize the series of emergency economic regulatory programs which were spawned during the 1970's.

The origin, nature and structure of the court leave no doubt that it was specifically designed as an integral part of an administrative program and was expected by its creators to save legislative programs from undue judicial interference and to ensure uniform judicial review of the national economic control programs. In the performance of this function, however, the TECA has developed an "institutional bias" in favor of agency policy and has become "caught up in the agency's mission as its reason for being and basis for succeeding."[172] Just as agencies may be "captured" by the industries which they are charged with regulating,[173] a specialized court such as the TECA may become a passive partner with the agencies it reviews.

The TECA was fully clothed with the external trappings of a judicial court and thereby created certain expectations with respect to its judicial role. However, the court has in fact acted as the "guardian angel" of the economic stabilization and energy programs. The TECA has prompted and sanctioned administrative urgency to the detriment of "principled fairness." This result may have been occasioned by the TECA's misconception of the proper allocation of power between the stabilization and energy agencies and itself. There is little or no evidence in the legislative history of the programs to support the TECA's circumspection of its own role in scrutinizing agency decisionmaking. The congressional concern for immediate mobilization of administrative machinery in the Economic Stabilization Act of 1970 was significantly modified by the 1971 amendments to ensure greater procedural and substantive fairness and a formal channel for judicial

172. Leventhal, *Environment Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 515 (1974).

173. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 745-47 (1972) (Douglas, J., dissenting); M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 294-95 (1955); Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952); Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1107 (1954).

review. While the agencies may have failed in some instances to provide adequate standards to confine their broad discretion, the greater failure lies with the TECA for its cavalier application of the procedural and general "fairness" standards which were to guide the agencies. In short, the TECA has consistently failed to provide the close judicial scrutiny which acts as a safeguard against agency disregard of procedural requirements.

The broad delegations of authority and absence of congressional standards in the economic stabilization and energy legislation has enabled the TECA effectively to surrender its power to influence substantially the procedural or substantive work of the agencies. The TECA's response to the broad delegation may be due in part to the nature of the government programs involved. The government embarked for the first time in its history on an experimentation with price and wage controls in a peacetime economy. The TECA clearly did not want to inject itself into or interfere with either agency policies or their procedural implementation.

The absence of standards has had two effects. First, it has undermined the effectiveness of judicial review. Although the TECA has from time to time trimmed agency overreaching,[174] the bounds of legislative acceptability are so broad and ill-defined that there has been virtually no substantive control of ongoing programs. The second and more far reaching effect of the delegation lies in its limiting influence upon the TECA's scope of judicial review. Thus, inadequate standards affect the quantity (scope) of judicial review as well as its quality (effectiveness).

While the judicial review of the TECA is limited to stabilization and energy programs, its work is of broader significance. This study of the TECA's role in the economic stabilization and energy programs may reflect the need for further study of: the judicial control of administrative decisionmaking during national emergencies; the effect of specialized courts or courts of limited jurisdiction on judicial review of administrative agency action; and the relationship between effective judicial and legislative control of administrative agencies created to deal with national emergencies. This study raises substantial question as to the relationship between specialized courts and the agencies which they review and suggests greater caution in the creation of and use of specialized appellate courts.

The deference of the TECA to the administrative agencies is significant in that it is contrary to recent trends toward closer judicial scrutiny of administrative agency decisionmaking.[175] Judge Skelly Wright has noted that

174. *See, e.g.*, Atlantic Richfield Co. v. FEA, 532 F.2d 1363 (Temp. Emer. Ct. App. 1976); Shell Oil Co. v. FEA, 527 F.2d 1243 (Temp. Emer. Ct. App. 1975); Consumers Union of the United States, Inc. v. COLC, 491 F.2d 1396 (Temp. Emer. Ct. App. 1974); Associated Gen. Contractors of America, Inc. v. Laborers Int'l Union, 476 F.2d 1388 (Temp. Emer. Ct. App. 1973). *See also* Chrysler Corp. v. Dunlop, 490 F.2d 985, 988-89 (Temp. Emer. Ct. App. 1973).

175. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); Mobil

in recent years courts, without requiring over-proceduralization, have assumed a more vigorous attitude toward review of informal agency rulemaking than toward review of actual legislation. Once it was the general judicial practice to treat rules much like legislation. Once the question of the limits of the agency's statutory authority was settled, the main question was the traditional Brandeisian one: Whether any set of facts could be imagined to support the rule in question.[176]

The judicial review of economic stabilization was, and the judicial review of energy matters continues to be, of vital concern because Congress has delegated immense unstructured authority to the executive branch to deal with pressing national problems in these areas. Consequently, the ultimate burden in assuring "principled fairness" in the rules and decisions of the economic control agencies lies with the TECA. Judge Wright has recently focused attention

> on the role courts are currently playing in ensuring that agency decisions are first, decided in a way that is consistent with our notions of fairness and adequate public participation and second, supported by sufficient data and sufficiently comprehensible projections and policy arguments to prevent our regulators from acting arbitrarily or shooting in the dark.[177]

The TECA has abdicated this fundamental role by creating an unnecessarily large sphere of administrative action in which agency decisionmaking goes virtually unscrutinized. The TECA deference to the agencies has failed to maintain the "precarious balance between judicial deference and self-assertion."[178]

Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Note, *supra* note 171. *See also* Wright, *supra* note 74, at 580.

176. Wright, *supra* note 157, at 208.

177. *Id.* at 200.

178. Wright, *supra* note 23, at 378.