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Pressing the NCAPA Paradigm: Too Much Form for Ad Hoc Adjudicatory Rulemaking

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PRESSING THE NCAPA PARADIGM: TOO MUCH FORM FOR AD HOC ADJUDICATORY RULEMAKING

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Administrative law has long struggled to delineate the constraints upon an administrative agency's decision to promulgate a rule during the course of an adjudication. The North Carolina Supreme Court recently had its first opportunity to review such ad hoc agency rule-making procedures in North Carolina ex rel. Commissioner of Insurance v. North Carolina Rate Bureau, *in which the court invalidated a rule adopted by the Insurance Commissioner during an adjudication to approve a proposed rate increase. In this article, Professor Powell scrutinizes this supreme court decision in light of the North Carolina Administrative Procedure Act. Concluding that the court's decision places an undue burden on agency discretion to proceed by adjudicatory rulemaking, Professor Powell calls for judicial recognition that unless an agency is subject to specific legislative limitations, it should be given wide discretion under the Act to respond to the varying circumstances that come before it.*

Perhaps the most problematic area in administrative law is determining when it is appropriate for an agency to hold a party to a duty that is announced and applied in the pending adjudicatory proceeding. Thirty years of federal and state litigation provide ample evidence that judicial review of an agency decision to proceed by ad hoc rulemaking[1] in the course of an adjudication[2] involves reconciling strong expressions of the need for fairness[3] with demands for preserving agency discretion to respond to the facts of a particu-

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1. The concept of ad hoc adjudicatory rulemaking (meaning quite literally "for this special purpose") recognizes that situations will arise in which the practical need of the agency to conclude a proceeding collides with the agency's realization that the novelty of the issues presented raises questions for which there are no preexisting standards. Despite the generally endorsed view that "adjudication is the process by which the agency applies either law or policy, or both, to the facts of a particular case," B. SCHWARTZ, ADMINISTRATIVE LAW 183 (1976); *See* 1 F. COOPER, STATE ADMINISTRATIVE LAW 177-78 (1965), the agency may be forced by circumstances to choose either a new proscription to govern those subject to its authority or to acquiesce in conduct that it disapproves. Of course, this unenviable choice does not arise if the agency is authorized to act solely by adjudication or solely by rulemaking. *See infra* note 10.

2. Ad hoc adjudicatory rulemaking is here contrasted with general statutory rulemaking. In its broadest outline, rulemaking pursuant to a general statutory scheme envisions that, at a minimum, the public will be given notice of the proposed rule and will be provided an opportunity to comment on its merits prior to its promulgation. This approach, known as informal or notice and comment rulemaking, may also be made more elaborate by imposing other preadoption duties on the agency. An important additional requirement for what is called formal rulemaking is that the agency's decision be made solely on the basis of a record adduced at a hearing. *See infra* note 6. Ad hoc adjudicatory rulemaking, on the other hand, involves agency adoption of a rule during a rule-application proceeding rather than during the formalized statutory rule-making proceeding.

lar case.[4] These competing considerations serve to remind agencies of the constraints under which they operate. Agency awareness of these considerations serves as a self-limiting device, often making it unnecessary for courts to strike down the specific mode of procedure chosen by the agency.[5] The process is one of reaffirming the validity of the paradigmatic structure[6] implied by the

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The rule adopted, therefore, is ad hoc because it has not had the benefit of notice and comment envisioned by the formalized procedures for statutory rulemaking.

3. The Supreme Court's quintessential comment on restricting agencies to the use of rulemaking when they have both rule-making and adjudicatory powers came in SEC v. Chenery Corp., 332 U.S. 194 (1947). In *Chenery* the Court held that an agency was not barred from applying a new rule in the course of an adjudication simply because it also possessed powers to proceed by rulemaking. In upholding the imposition of an ad hoc prohibition on the purchase of securities by corporate officers during the period when their proposed plans for reorganization were before the SEC, the Court allowed the Commission to use its adjudicatory authority even though it was empowered to act by formalized rulemaking. The Court affirmed the need to resist stultifying the administrative process, even though the new rule was applied retroactively. 332 U.S. at 202. The Court, however, balanced its affirmation with a reminder that fairness implies that agencies have less reason to rely upon ad hoc adjudication to formulate new standards of conduct if they also possess rule-making power. *See also infra* text accompanying note 37.

4. *See, e.g.*, Citizens to Save Spencer County v. EPA, 600 F.2d 844, 879-81 (D.C. Cir. 1979); Niagara Mohawk Power Corp. v. Federal Power Comm'n, 379 F.2d 153, 159-60 (D.C. Cir. 1967); H. & F. Binch Co. v. NLRB, 456 F.2d 357, 365 (2nd Cir. 1972); Laidlaw Corp. v. NLRB, 414 F.2d 99, 103-07 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), all of which preserved ad hoc rulemaking.

5. A typical way in which the Supreme Court has applied the *Chenery* considerations to the practical needs of a difficult case is demonstrated by NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). During the course of an unfair labor practice proceeding, the Board surprised the employer by announcing that certain buyers for the company, although "managerial employees," were protected by the National Labor Relations Act and, therefore, were entitled to organize and bargain. The court of appeals agreed with the employer that the Board's arguably new rule (abandoning a policy of excluding from the NLRA all managerial employees) could be validly announced only through rulemaking. Reversing the court of appeals in part, however, the Supreme Court specifically noted that "the choice between rulemaking or adjudication lies in the first instance within the Board's discretion." 416 U.S. at 294. Significantly, the Court pointed out that the limitation on the Board's procedural choice was whether the choice would amount to an abuse of discretion or violation of the NLRA. *Id.*

6. The paradigm emerges from a juxtaposition of the general rules for agency action provided by federal and state administrative procedure acts. While mathematical precision is not possible, *see, e.g.*, B. SCHWARTZ, *supra* note 1, at 183, the broad categories on which the federal Administrative Procedure Act, ch. 324, Pub. L. No. 79-404, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 551-59 (1976 & Supp. IV 1980)) [hereinafter cited as APA] is premised contemplate: (1) informal rulemaking under 5 U.S.C. § 553 (also referred to as notice & comment rulemaking); (2) formal rulemaking, pursuant to §§ 553, 556-57; (3) formal adjudication under §§ 554, 556-57; and (4) informal adjudication, as an implied category arising out of the APA's most minimal requirements: the requirement of "prompt notice" in response to "the denial in whole or in part of a written application, petition, or other request . . . made in connection with any agency proceedings" under § 555(e); the grant of an opportunity to achieve license compliance under § 558(c); and the grant of the right to petition for repeal of a rule under § 553(e). *See* W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW, 176 (7th ed. 1979) [hereinafter cited as GELLHORN & BYSE].

Though not exactly parallel, the comparable categories under the North Carolina Administrative Procedure Act, ch. 1331, 1973 N.C. Sess. Laws 691 (1974) (current version at N.C. GEN. STAT. §§ 150A-1 to -64 (1978 & Cum. Supp. 1981)) [hereinafter cited as NCAPA] would involve (1) informal rulemaking under § 150A-12; (2) formal rulemaking under §§ 150A-12,-23,-34,-36; (3) formal adjudication under §§ 150A-23,-34,-36, *see also* § 150A-3, "Special Provisions on Licensing"; and (4) informal adjudication as an inferred category which includes the vast majority of agency actions that do not involve rulemaking, notice and comment opportunities, or the formalities of a record preserving the process of the determination. *See* Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. REV. 833, 846-47 (1975).

In a schematic representation, a quadrant might be drawn with an activity line defining the "X-axis" moving from "Adjudication" to "Rulemaking," while the procedural line is defined

categorization of functions under the federal Administrative Procedure Act (APA) and its state progeny.[7] At the same time, however, it must be acknowledged that distinct categories for informal or formal adjudication[8] and rulemaking[9] more realistically serve theoretical rather than functional purposes.

Nevertheless, insistence upon a "pure" paradigm continues to motivate

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along the "Y-axis," moving from "Informal" procedures towards the "Formal." Which considerations apply will depend upon the particular organic statutory language. In the clear case, the legislature has responded with explicit instructions that agency action is to be accomplished by one or the other activities using either informal or formal procedures.

Absent the use of a "Formal Procedures" instruction, however, judicial construction has mandated formality when the statutory language uses such code phrases as "notice and full hearing," or when the Constitution so requires. *See, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33, 48-50, *modified*, 339 U.S. 908 (1950). To invoke formal hearing procedures under N.C. GEN. STAT. § 150A-23 (1978), the newly enacted "Uniform Standards for Mobile Homes" provides that after written notice of a hearing "the licensee or applicant shall have the right to be heard in person or through counsel. *After the hearing* the Board shall have the power to deny, suspend, revoke or refuse to renew the license . . . or to impose a civil penalty . . . ." N.C. GEN. STAT. § 143-143.14 (Cum. Supp. 1981) (emphasis added).

Nevertheless, Professor Davis' caution that precise definitions in the abstract are not necessarily desirable or obtainable remains the key consideration, because procedures for one purpose or context may be inapplicable for another purpose or context: "Here as elsewhere throughout the law a proper classification requires that both the purpose and the effect of the particular classification to [sic] be taken into account." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.2, at 6 (2d ed. 1979). *See also* Daye, *supra* note 6, at 845-48.

7. The APA was enacted June 11, 1946, *see* note 6 *supra*, and was repealed and incorporated into Title 5 of the United States Code by Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378. The MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1981) [hereinafter cited as the Model Act] was approved by the American Bar Association and the National Conference of Commissioners on Uniform State Laws in 1946 and revised in 1961 and 1981. North Carolina and twenty-five other states have passed statutes that show influences of the Model Act. *See* N.C. GEN. STAT. §§ 150A-1 to -64 (1978 & Cum. Supp. 1981); GELLHORN & BYSE, *supra* note 6, (pt.2) app. B, at 1148.

8. The APA defines "adjudication" as "the agency process for the formulation of an order." 5 U.S.C. § 551(7) (1976). An "order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." *Id.* § 551(6).

NCAPA uses the term "contested case" in lieu of "adjudication." A contested case is defined as "any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing." N.C. GEN. STAT. § 150A-2(2) (1978).

9. The APA defines "rulemaking" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (1976). "Rule" is defined as:

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

Id. § 551(4).

NCAPA provides two definitions of "rule." N.C. GEN. STAT. § 150A-10 (1978) provides that for rule-making purposes, " 'rule' means each agency regulation, standard or statement of general applicability that implements or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency." N.C. GEN. STAT. § 150A-58 (1978) provides that for the purposes of The Registration of State Administrative Rules Act, "rule" means every rule, regulation, ordinance, standard, and amendment thereto adopted by any agency and shall include rules and regulations regarding substantive matters, standards for products, procedural rules for complying with statutory or regulatory authority or requirements and executive orders of the Governor."

those who seek to ease the responsibility of the reviewing court, to give certainty to the operations of agencies, and to minister to the expectations of aggrieved parties.[10] They urge that notwithstanding the need to disavow formalistic solutions, agency decisions exercising the rulemaking/adjudication choice should be limited by strict judicial oversight.[11] By rigidly limiting each judically allowed departure from the model, future departures can be all but eliminated. Under this view, the need for agency flexibility in the exercise of

10. The asserted need to draw inviolate lines has provided more than a few occasions to discuss administrative law theory. Condemning the lack of formalism that often characterizes the operation of federal agencies, in 1937 the President's Committee on Administrative Management went so far as to state that the federal agencies "constitute a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers." PRESIDENT'S COMM. ON ADMIN. MANAGEMENT, REPORT ON ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 40 (1937). Mr. Justice Jackson's colorful dissent in FTC v. Ruberoid Co., 343 U.S. 470 (1952), beautifully captures formalist sentiments:

> Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

Id. at 487-88 (Jackson, J., dissenting).

Protection of our constitutional framework, however, is no more assured by a prohibition on the blending of functions within government agencies than by a flatly chosen prohibition of other managerial tools (e.g., subdelegation of authority, ex parte contacts in informal rulemaking, intraagency communications prior to an agency's final decision). Prohibitions provide little protection, because the danger is not in the managerial choice but in abuse of the choice. Accordingly, our basic governmental framework must be protected through the assurance that there exist adequate safeguards to control possible abuses. As Professor Davis has eloquently observed: "We have gone far beyond Montesquieu. We have learned that the danger of tyranny or injustice lurks in unchecked power, not in blended power." K. DAVIS, ADMINISTRATIVE LAW TEXT § 108, at 25 (3d ed. 1972).

11. See, for example, Professor Schwartz's vigorous denunciation of the Court's decision in NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). In *Wyman-Gordon* the Court upheld enforcement of a "rule" issued during an adjudication. The Court reasoned that though the agency's previously announced general requirement that employers furnish lists of employees to unions involved in elections (the so-called prospective "rule" of Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966)) could not be enforced as an official rule (since it lacked the APA's formalities), it was nonetheless applicable to the *Wyman-Gordon* parties as part of the order requiring the holding of the election. This attempt by the Court to endow the agency's action with both the substance of an APA rule requiring formal rulemaking and the benefits of enforcement as an order led Schwartz to declare:

> *Wyman-Gordon* weakened the inducement to promulgate rules by failing to distinguish between the proper spheres of legislative and judicial power. Agencies such as the NLRB will be given such an incentive only if the courts recognize that the use of rulemaking to make innovations in agency policy is fairer than total reliance on case-by-case adjudication and are willing to condemn substitutions of adjudications for rulemaking to accomplish marked policy departures.

B. SCHWARTZ, *supra* note 1, at 188.

The more common issue, however, is whether rulemaking should be permitted when the agency has not committed itself to "*total* reliance on case-by-case adjudications," but rather has chosen between procedures in response to strategic factors. The same problems of information gathering, surprise, and retroactivity exist in those situations. In the strategic case, however, cost-allocation questions are involved, not merely problems arising out of competing legislative and judicial roles. When the agency has made a rational assessment of the problem and has concluded that exigencies justify placing the burdens of surprise and unfairness on the adjudicating party, adherence to rule formalism is a less compelling concern because the factors that cause that party to cry "Why me?" have already been weighed in the balance.

discretion about how to proceed is affirmed in principle but allowed only to the extent this need is not foreclosed by strictly applied judicial demands for adherence to prior precedent. Thus, what begin as judicial considerations harden over time into judicial constraints.

This tendency towards a restrictive view of the extenuating "considerations" justifying departures from the model was illustrated most recently in *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*.[12] *Commissioner v. NCRB* afforded the North Carolina Supreme Court its first opportunity since the adoption of the North Carolina Administrative Procedure Act (NCAPA)[13] to review an agency decision to announce a rule in the context of an adjudicatory proceeding rather than to use a formal rule-making procedure.[14] The case arose when, after public hearing, the Commissioner of Insurance disapproved the North Carolina Rate Bureau's 1977 revised premium rate schedule for automobile insurance written within the state. The Commissioner concluded that the filing failed to comply with statutory requirements because it was based upon unaudited data. The Commissioner deemed unaudited data inherently unreliable.[15]

The supreme court, in overturning the court of appeals' decision affirming the Commissioner,[16] held his order to be null and void, approved the rate-filing, and ordered escrowed funds to be remitted to member insurers. The court applied a two-step analysis. First, it concluded that the scope of judicial review was controlled by the revised NCAPA[17] rather than the Insurance Act.[18] Second, it held that even though the Commissioner had general authority to require that company data in insurance rate-making hearings be audited, his action was improper in this instance because he failed to comply with lawful procedures[19] and acted arbitrarily and capriciously.[20]

Certainly there are benefits that accrue from applying precedent narrowly to check discretionary determinations with which the court disagrees. To the extent that a reviewing court can analogize the issues to prior cases, agency

12. 300 N.C. 381, 269 S.E.2d 547 (1980). *Commissioner v. NCRB* involved several appellees: the North Carolina Rate Bureau, a body established pursuant to N.C. GEN. STAT. §§ 58-124.17, -124.18 (Cum. Supp. 1981) (to which all insurance companies writing essential lines of insurance in the State must belong); the State Reinsurance Facility, a body established by §§ 58-248.26 to -248.39 (to which all insurance companies licensed to write motor vehicle insurance in the state must belong for purposes of participating in a statutory reinsurance pool for high-risk drivers); and various insurance companies doing business in the state.

13. N.C. GEN. STAT. § 150A-1 to -64 (1978 & Cum. Supp. 1981).

14. See *supra* notes 6 & 9 for statutory provisions concerning "rules" and "rulemaking."

15. 300 N.C. at 392-94, 269 S.E.2d at 577-78.

16. 41 N.C. App. 310, 255 S.E.2d 557 (1979).

17. The former statute, N.C. GEN. STAT. § 143-307 (1974), was repealed and replaced by the current version, codified at N.C. GEN. STAT. § 150A (1978 & Cum. Supp. 1981). *See supra* note 6. For a discussion of related aspects of the predecessor statute, *see* Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North Carolina*, 49 N.C.L. REV. 635 (1971); Comment, *Administrative Law—Evidence Before North Carolina Tribunals*, 49 N.C.L. REV. 568 (1971).

18. N.C. GEN. STAT. §§ 58-9 to 27.2 (1975 & Cum. Supp. 1981).

19. 300 N.C. at 419, 269 S.E.2d at 572. Consequently, the court held that lawful procedure under NCAPA required formal adoption, prior to prospective application, of all substantive rules adopted by ad hoc adjudicatory rulemaking. 300 N.C. at 417, 269 S.E.2d at 571.

20. 300 N.C. at 420-21, 269 S.E.2d at 573.

predictability will emerge. Rigorous use of precedent also responds to the often expressed judicial fear that exceptions to otherwise clear standards risk swallowing up the rules themselves.[21] But these gains are short-term and are purchased at the price of subtle erosion of legislative judgments about overlapping and competing considerations to which statutory enactments must respond. Ultimately, the desire to limit an agency's choice to proceed by ad hoc rulemaking during adjudication must be tempered by the demands of legislative intent, even at the expense of paradigmatic considerations and the desire to reaffirm precedent.

Though the temptation is great to seek rule formalism, courts cannot escape the hard fact that in those instances in which the legislature's intent is not explicitly stated, there is a need for a conscious and straightforward policy choice between affirming the agency's view of the best method to resolve a dilemma or substituting the court's own views. When faced with such a choice the primary focus should be upon the legislature's judgment of who should resolve the problem rather than upon the particular solution that the court subjectively deems to be best suited to the purpose of the legislation. The latter course imposes the legislative vision preferred by the court and subordinates the agency to the court's perception. The former course, however, affirms the legislature's faith in the agency's ability wisely to exercise judgment and emphasizes judicial cooperation in the agency's discretionary decision-making. The judicial need for unqualifiedly reaffirming a legislative decision to allow substantial agency discretion is the lesson suggested by NCAPA's formal/informal rule-making and adjudication framework. An agency's choice to proceed either by rulemaking or adjudication should be upheld absent a showing that the agency has exceeded its delegated authority, violated some other source of law or policy, failed to follow a mandatory procedural directive, abused its discretion, acted arbitrarily or capriciously, or committed some similar breach of its administrative function.[22]

Despite the author's sympathy for the supreme court's objectives, this article concludes that in *Commissioner v. NCRB* the court's response to an overzealous agency official was undesirably restrictive and will prove burdensome to North Carolina's administrative agencies. Afforded the opportunity to prohibit the Insurance Commissioner's actions based upon the narrow grounds that he abused his discretion under the Insurance Act, the court eschewed that direct course in favor of a resolution based squarely upon NCAPA. As a result, the North Carolina Supreme Court pressed to a point almost beyond rec-

21. *See infra* text accompanying note 38.

22. As the Supreme Court said in *Chenery*:

> In performing its important functions . . . [of filling in the statutory interstices] an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity. . . . There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.

332 U.S. at 202-03.

ognition the paradigmatic considerations that underlie NCAPA's distinctions between rulemaking and adjudication. Three arguments summarize this criticism: first, the court too hastily decreed the primacy of NCAPA as the State's administrative review vehicle for insurance rate-setting; second, the court too broadly defined NCAPA's constraints on agency rule-making procedures; and third, the court reduced NCAPA's prohibition of arbitrary and capricious conduct to a catch-all classification barring conduct not otherwise prohibited by NCAPA but of which the court disapproves.

The necessity for and manner of each of the court's interpretations are here challenged. This article attempts to provide a foundation for judicial review of agency decisions that is sympathetic to the need for agency discretion in general and for agency discretion in the context of ad hoc adjudicatory rulemaking in particular. The discussion proceeds in two parts. Part I presents the supreme court's three principal determinations: (1) the choice of statutory basis for reviewing the Commissioner's actions, (2) the procedural limits on the Commissioner's actions, and (3) the appropriateness of exempting the Commissioner's actions from the general requirements of statutory rulemaking. The possible motivations for the court's approach also are examined. Part II is a three-part response to the positions taken by the North Carolina Supreme Court. The first section examines the consequences of the court's decision to resolve the case on the basis of NCAPA rather than the Insurance Act. The second inquiry critically examines the court's interpretations of two key NCAPA provisions—the prohibition on agency actions taken pursuant to improper procedures and the prohibition against agency action that is arbitrary or capricious. The concluding response is a call for continual and sympathetic judicial reappraisal of the need for agency discretion in the context of ad hoc adjudicatory rulemaking.

I. THE DECISION TO PRESS THE PARADIGM

A. The Choice Between Statutory Review Provisions

Although the supreme court's disposition was based upon ten distinct holdings,[23] it is the first holding that reflects the court's views about the basic categories of the NCAPA paradigm. In that initial holding the court addressed the question whether the Commissioner was forbidden from requiring audited rate-filing data because of his failure to comply with lawful procedures. To make that determination the court first had to decide whether the appropriate statutory authority for review was the Insurance Act or NCAPA.[24] Since the court viewed many of the provisions of the statutes to be virtually identical, it held that the proper course was to proceed, to the extent consistency was possible, by applying the scope of judicial review standards of

23. 300 N.C. at 392-94, 269 S.E.2d at 557-58.

24. The judicial review provisions of NCAPA were initially held applicable to the Insurance Act in Occidental Life Insurance Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977).

both the Insurance Act and NCAPA.[25] The court observed that both statutes empower reviewing courts to affirm, reverse, modify, or remand a decision for further proceedings.[26] The court, however, noted that there were differences between the two acts. Under NCAPA the reviewing court can act in those instances when the substantial rights of a petitioner "may have been prejudiced" by improper agency action. The Insurance Act, however, authorizes judicial review when substantial rights of an aggrieved party "have been prejudiced" because the Commissioner's determination was impermissible for any of six reasons also forbidden under NCAPA.[27] Under the provisions of the Insurance Act, the Commissioner's order additionally can be declared "null and void." Upon consideration of the slightly wider scope of review under NCAPA and the need to harmonize practically identical statutes, the court held NCAPA to be the controlling judicial review statute in insurance rate-making cases.[28] Nevertheless, consistent with the search for a salutary harmonization of the statutes, the court looked to the Insurance Act —and its authorization to declare actions "null and void" —for a definition of its full remedial powers.[29]

B. The Commissioner's Scope of Authority

The determination of which statute would apply was of crucial impor-

25. 300 N.C. at 395, 269 S.E.2d at 559.

26. G.S. § 150A-51 (1978) provides in pertinent part:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150A-51 (1978).

27. The Insurance Act provides in pertinent part:

> So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any action of the Commissioner. The court may affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commissioner, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 58-9.6(b) (1975).

28. 300 N.C. at 395, 269 S.E.2d at 559.

29. *Id.* at 395-96, 269 S.E.2d at 559.

tance. Given the North Carolina Supreme Court's holding that the scope of review provisions of NCAPA and the Insurance Act are essentially the same, it could dismiss the significance of the arguably lower threshold for judicial review under NCAPA while at the same time applying the more extensive remedies of the Insurance Act. Moreover, by basing its review on NCAPA, the court was able to reach beyond the Insurance Act to pronounce broad principles of agency restraint that are grounded upon the terms of a generally applicable statute.

Thus, with the case cast as a vehicle for a general discussion of proper agency rule-making procedures under NCAPA, there remained only the specific task of deciding whether the Commissioner's demand for audited data was "in excess of statutory authority or jurisdiction of the Agency," "made upon unlawful procedure," or "arbitrary or capricious."[30]

The court held that the Commissioner had not acted beyond his authority, because he had implicit power to declare unaudited data unreliable in an insurance rate-making hearing.[31] It nevertheless found the Commissioner's actions impermissible on the ground that the demand for audited data was "made upon unlawful procedure" as contemplated by G.S. 150A-51(3).[32] The court stated that this provision, while seemingly repetitious of the prohibition against agency action "in excess of statutory authority," addresses a quite different concern. The phrase "in excess of statutory authority" refers to the general authority of an administrative agency properly to discharge its statutory responsibilities.[33] The court viewed the phrase "made upon unlawful proceedings" as referring to the procedures in fact employed by the agency in discharging its statutorily authorized acts.[34] Distinguishing these two provisions, the court reasoned that while the Commissioner had the general statutory authority to require audited data in the particular agency proceeding, he had failed to follow lawful procedures in attempting to do so.[35]

The unlawfulness of the procedure turned ultimately upon whether the Commissioner's order was exempt from formal rulemaking under one of the six exclusions from the definition of a rule under G.S. 150A-10, or was instead subject to the minimum procedural requirements of G.S. 150A-9, which provides that all rules must be adopted in substantial compliance with NCAPA rule-making provisions.[36] Only the exclusions at G.S. 150A-10(4) and (6)—

30. N.C. GEN. STAT. §§ 150A-51(2), (3), (6) (1978). *See supra* note 26.

31. 300 N.C. at 396-400, 269 S.E.2d at 560-62. The Insurance Act provides that the Commissioner shall:

> have power and authority to make rules and regulations, not inconsistent with law, to enforce, carry out and make effective the provisions of this Chapter, and to make such further rules and regulations not contrary to any provision of this Chapter which will prevent practices injurious to the public by insurance companies . . . . The Commissioner may likewise, from time to time, withdraw, modify or amend any such regulation.

N.C. GEN. STAT. § 58-9(1) (Cum. Supp. 1981).

32. 300 N.C. at 419, 269 S.E.2d at 572.

33. *Id.* at 408, 269 S.E.2d at 566 (emphasis in original).

34. *Id.*

35. *Id.*

36. *Id.* at 409-12, 269 S.E.2d at 567-68.

"statements of policy or interpretation that are made in the decision of a contested case" and "interpretative rules and general statements of policy," respectively—were deemed pertinent to the question of the order's exemption.[37] The Commissioner contended that the auditing requirement was "interpretative," but the court responded that "the interpretative-rule exclusion, if not confined to proper boundaries, could well subsume the rulemaking provisions."[38] The auditing requirement was thus held to be subject to the rulemaking provisions of NCAPA because it filled the interstices of the Insurance Act by imposing substantive requirements.

C. The Exemption for Ad Hoc Rulemaking

In his alternative argument, the Commissioner asserted authority to establish rules through the case-by-case process of administrative adjudication. The Commissioner relied primarily upon dictum in *SEC v. Chenery Corp.*,[39] in which the Supreme Court noted the "stultification" of agency procedures that would result from denying informed administrative discretion to proceed by either general rulemaking or by individual ad hoc adjudication. The United States Supreme Court declared that a review of agency action is complete "when it becomes evident that the. . . action is based upon substantial evidence and is consistent with the authority granted by Congress."[40]

While conceding that the choice between statutory and ad hoc adjudicatory rulemaking rests primarily within the informed discretion of the agency, the North Carolina Supreme Court stressed that the agency's discretion to proceed by ad hoc adjudicatory rulemaking could not be viewed as "unbridled" or exercisable without considering other factors.[41] The court pointed to the Supreme Court's observation in *Chenery* that the discretion to use ad hoc rulemaking in adjudications was necessary to respond to situations in which (1) the type of problem could not have been foreseen; (2) the agency had no relevant general rule upon which to rely; (3) the agency lacked sufficient experience with the particular problem; or (4) the problem was so specialized and varying in nature that formulation of a general rule was impossible.[42]

In addition to referring to *Chenery*'s restrictive language, however, the North Carolina Supreme Court asserted that clarification in this area of the law was required because the Supreme Court had inadequately defined the limits of ad hoc adjudications. The court found the Supreme Court's opinion in *NLRB v. Wyman-Gordon*[43] to be uninstructive on whether an administrative agency can overrule prior rules through adjudication after private parties have acted in reliance on them.[44] Furthermore, the North Carolina court

37. *Id.* at 410, 269 S.E.2d at 567.
38. *Id.* at 412, 269 S.E.2d at 568 (quoting Daye, *supra* note 6, at 853).
39. 332 U.S. at 202-03. *See supra* note 3.
40. *Id.* at 207.
41. 300 N.C. at 414, 269 S.E.2d at 569.
42. *Id.*
43. 394 U.S. 759 (1969). *See also supra* note 11.
44. *Id.* at 415, 269 S.E.2d at 570; *see supra* note 11. The court's treatment of *Wyman-Gordon*

viewed the two Supreme Court cases as contradictory.[45] The court contrasted the holding in *Morton v. Ruiz*[46] that an agency, even when it had first opened the way by adopting interpretive rules, could not make law through ad hoc decisions reflecting those interpretive rules,[47] with the holding in *NLRB v. Bell Aerospace Co.*,[48] that the Labor Board, even without first issuing an interpretative rule, could make new law in an adjudication.[49] The North Carolina Supreme Court's assault upon these crucial cases was more than a rhetorical flourish, however. A need to clarify supposedly unresolved questions about the federal APA's view of the choice between rulemaking and adjudication was critical to the court's implicit shift away from the established federal maxim that the choice between rulemaking and adjudication is ultimately the agency's.[50]

The North Carolina Supreme Court's "superior rule" to guide agencies in choosing between basic statutory rulemaking and ad hoc adjudicatory rulemaking was patterned after an analysis by Professor Frank Cooper.[51] Cooper's theory relies upon the language in *Chenery* relating to "sufficient [agency] experience with a particular problem" and the recognition of problems "so specialized and varying in nature as to be incapable of capture within the boundaries of a general rule."[52] Cooper adds the admonition that "the process of rulemaking should be utilized except in cases where there is a danger that its utilization would frustrate the effective accomplishment of the agency's functions."[53] Thus, by adopting Cooper's approach,[54] the court endorsed a rather stringent balancing test as a check upon a choice that was

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apparently relies upon a consensus in that case of four opinions in which a majority of six justices agreed that the so-called "rule" announced for prospective application in *Excelsior* did not constitute a rule within the meaning of the APA. The four justices in the plurality, however, thought that to the extent the *Excelsior* "directive" could be given effect, it was as an order to the parties in the particular case. 394 U.S. 759, 770 (1969). Despite the confusion, however, the Court's refusal to require formal rule-making procedures confirmed the legitimacy of a procedure that subsequently has been utilized almost exclusively by the NLRB: ad hoc adjudicatory rulemaking. Such consistency belies the suggestion of ambiguity.

45. 300 N.C. at 415, 269 S.E.2d at 570.

46. 415 U.S. 199 (1974).

47. 300 N.C. at 415, 269 S.E.2d at 570.

48. 416 U.S. 267 (1974).

49. 300 N.C. at 415, 269 S.E.2d at 570. The rhetorical treatment of *Bell Aerospace Co.* and *Ruiz* leaves one unable to fix the outer boundary of the court's position. One commentator, seeking to harmonize these Supreme Court decisions, has suggested:

> It would be a mistake to conclude on the basis of the *Ruiz* holding that the use of agency adjudication to develop policy generally is newly restricted by the decision. The Court's reaffirmation in NLRB v. Bell Aerospace Co., decided two months later, of the Board's authority to develop new policies by adjudication, emphasizes the point. In Bell Aerospace, the *Ruiz* decision was neither cited nor distinguished and seemingly was not regarded as relevant to the regulation of collective labor relations.

Fuchs, *Development and Diversification in Administrative Rulemaking*, 72 NW. U.L. REV. 83, 102 (1977). *See generally*, *supra* note 5; *infra* note 111.

50. *See supra* note 22.

51. 1 F. COOPER, *supra* note 1, at 181-82.

52. 332 U.S. at 202-03.

53. 300 N.C. at 416, 269 S.E.2d at 570 (quoting 1 F. COOPER, *supra* note 1, at 181-82).

54. 300 N.C. at 415-16, 269 S.E.2d at 570-71.

previously within "the informed discretion of the administrative agency."[55] The new test, as explained by Cooper, provides that "[u]nless the balance clearly preponderates in favor of the ad hoc adjudication method, the agency should utilize rule-making procedures."[56]

The need to move from the specific concerns of the Insurance Act to the broad principles of NCAPA was justified, at least in part, by the court's desire for uniform standards for review of agency decisions and the resulting ease of judicial management. Because the court viewed NCAPA and the Insurance Act as providing virtually identical remedies, however, the court's decision simultaneously addressed all other agencies except those specifically exempted from NCAPA.[57] Moreover, since the court had interpreted the procedural limitations of G.S. 150A-51(3) as proscribing the *use* of procedural channels and standards not specifically provided by NCAPA, as well as the *substantive effects* of using procedural channels and standards that were, in fact, provided by NCAPA, it followed that the creation of a rule by the use of ad hoc adjudication in preference to statutory rulemaking was a result "made upon unlawful procedure," as prohibited by G.S. 150A-51(3), and "arbitrary and capricious" rulemaking as prohibited by G.S. 150A-51(6).[58]

D. Assessing the Court's Motivations

In *Commissioner v. NCRB* the impact of unarticulated constraints was

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55. 332 U.S. at 203. Assessing the exercise of the choice between "form" and "necessity" has, however, been seen as a traditional endeavor. As Professor Nathanson has noted:

> [W]hichever method the agency chooses, the same fundamental elements of administrative discretion are present, and the same fundamental standards of judicial review must be applied—whether the agency has acted within the scope of the delegation and whether there was a rational basis for the exercise of its judgment. Similarly when the agency is authorized to act only by individual order, . . . the same area of discretion may be present and the same general standard of judicial review be applicable . . . .

Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 489-90 (1950) (footnote omitted).

56. 300 N.C. at 416, 269 S.E.2d at 570 (citing 1 F. COOPER, *supra* note 1, at 182).

57. N.C. GEN. STAT. § 150A-1(a) (Cum. Supp. 1981) makes NCAPA inapplicable to the extent that "any statute makes specific provisions to the contrary." That section specifically exempts five agencies: the Employment Security Commission, the Occupational Safety and Health Review Board, the Department of Correction, the Utilities Commission, and the Industrial Commission. The exemption of the first three is probably explained by their substantial federal regulation, but the reasons for the exemption of the Utilities and Industrial Commissions are unclear. Daye, *supra* note 6, at 841.

In addition, § 150A-1(a) partially exempts three agencies. The Department of Revenue and the Department of Transportation are exempt from the rule-making and adjudication provisions of Articles 2 and 3. These exemptions probably recognize the large numbers of revenue and driver's license proceedings and reflect the General Assembly's concern that the technical requirements of NCAPA might prove burdensome. Daye, *supra* note 6, at 841. The University of North Carolina is exempt from the judicial review provision of Article 4. *See* McDonald v. University of North Carolina, 299 N.C. 457, 263 S.E.2d 578 (1980).

Finally, because NCAPA is applicable only to "agencies," it does not apply to agencies of the legislative or judicial branches of the state government, or to cities, counties, other municipal corporations or political subdivisions of the state, or any agency of such subdivision. N.C. GEN. STAT. § 150A-2(1) (1978). *See also* Markum, *A Powerless Judiciary? The North Carolina Courts' Perception of Review of Administrative Action*, 12 N.C. CENT. L.J. 21, 63-64 (1980).

58. 300 N.C. at 419-21, 269 S.E.2d at 572-73.

evidenced by the supreme court's choice of statutory review. Although NCAPA was deemed controlling in order to ease the judicial review process and to harmonize only subtly different statutory mandates,[59] more was required of the court. It might be granted that applying NCAPA while saving as much of the Insurance Act as was helpful eased judicial discomfort about the prospect of deciding which of competing review procedures should govern. In addition, since the Insurance Act authorizes a court to declare agency action null and void, reliance on both acts had the complementary effect of providing stronger judicial sanctions.[60] What was required of the court, however, and what is conspicuously lacking from the court's discussion, is a convincing justification for the more basic assumption that the General Assembly intended the generally applicable NCAPA to apply in the face of the alternatively declared and specifically tailored review standards of the Insurance Act.[61]

While it is not known precisely what motivated the court's decision, two facts should be highlighted. First, the court suggested that it (and apparently the General Assembly) was exasperated by the dilatory action of the Insurance Commissioner.[62] Second, as a result of the court's decision to resolve the case on the basis of the more broadly applicable NCAPA, judicial authority was enhanced at the expense of executive and legislative powers.

These considerations, however, do not address deeper concerns that may have motivated the court. Even disregarding as a plausible explanation for the court's reaction its desire to foreclose all but the most innocuous uses of ad hoc adjudicatory rulemaking, the possible rationales are numerous. Besides satisfying the obvious desire to chastise this particular commissioner, the decision to "press the paradigm" might well reflect a philosophical commitment to rule formalism. The need to fashion a general rule-making and adjudication scheme and to bend all available considerations towards that end might have influenced the court's approach. Political and psychological considerations may also exist. The psychological motivation might be rooted in an underly-

59. *Id.* at 395, 269 S.E.2d at 559; *see also supra* Section I-A.

60. *See supra* text accompanying notes 27-29.

61. As a general rule of statutory construction, the passage of a remedial act warrants deference to new expressions of legislative intent to the extent that the legislature has not specifically preserved the previously existing scheme. *See, e.g.*, Weston v. J.L. Roper Lumber Co., 160 N.C. 263, 75 S.E. 800 (1912). The court, however, did not apply this rule; rather, it relied upon the rule for statutes *in pari materia*:

> Where two statutes on the same subject, or on related subjects, are apparently in conflict with each other, they are to be reconciled, by construction, so far as may be, on any fair hypothesis, and validity and effect given to both, if this can be done without destroying the evident intent and meaning of the later act.

State Bd. of Agriculture v. White Oak Buckle Drainage Dist., 177 N.C. 222, 226, 98 S.E. 597, 599 (1919). Resort to the *in pari materia* doctrine required an analysis of the Insurance Act in order to determine its meaning and intent for purposes of harmonization. Thus, the court had to consider the public interest, the purpose of the act, and public policy as declared in legislative acts. *See id.*

62. Since he took office on January 5, 1973, the Commissioner has had difficulty in having his orders upheld by the appellate courts. As of October 1981 in reported decisions in which the Commissioner has been a party, his position has either been reversed (at least in part) or remanded in 41 of 50 cases (82%). In the court of appeals, reversals or remands occurred in 28 of 34 cases (82%); in the North Carolina Supreme Court reversals or remands were ordered in 13 of 16 cases (81%).

ing insistence that rules set forth for a rule-making and adjudication scheme must maintain meaningful limits on legislative delegations of authority to the executive branch. This consideration may reflect judicial concern that by failing to strictly limit legislative delegations of discretionary authority courts could open the door to the expanded exercise of power by individuals who cannot be held directly accountable by the electorate.[63] Furthermore, these psychological and political considerations can combine to reflect more practical judicial concerns about limiting bureaucratic excesses. A court might desire not only that rules should be set to limit the role of bureaucrats, but less obviously, that once the bounds are set, bureaucrats should be continuously reminded of their demarcation. In this view, paradigmatic distinctions between rulemaking and adjudication are required not only to rein in agency officials, but also to remind other agencies of the dangers of conduct at the extremities of their delegated powers.

Finally, one cannot overlook the possibility that the North Carolina Supreme Court may have reached this result on some other basis. Further speculation is of limited utility, however, and would only distract from the more important inquiry into whether the decision withstands scrutiny on its stated terms. The precise motivation of the court notwithstanding, it is hoped that future cases will clarify the court's views on the three points considered in the next section: harmonizing alternative scopes of review with NCAPA; limiting ad hoc rulemaking; and applying NCAPA restrictions on unlawful procedures and arbitrary or capricious agency action.

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63. Agency overreaching is one aspect of the larger problem of the delegation of discretionary authority. The general concern is that power will be inappropriately transferred to unauthorized persons. A transfer can be inappropriate, however, either because the power is not one that the legislature may transfer, or because a delegable power has not in fact been transferred. The first of these concerns is a delegation doctrine issue; the second is an issue of agency operation ultra vires. GELHORN & BYSE, *supra* note 6, (pt.1), at 52-56. Common to both concerns is the fear that the representative concept of democracy is being undermined. Professor Louis Jaffe attributes that fear to our country's accepted political philosophy that controverted issues of policy should be settled by the organ of government that the people vested with the power to make laws. Jaffe, *An Essay on Delegation of Legislative Power* (pt. 2), 47 COLUM. L. REV. 561, 563 (1947). Jaffe traces this "doctrine that the legislature cannot delegate power to 'make laws' " over a four hundred year period to Locke, Coke, Story, Kent, and the "rule that an agent cannot delegate a power entrusted to it because of fitness or confidence." *Id.* at 563-64.

Commenting upon the ultra vires aspect of the problem, Professor Stewart observed that Congress frequently has granted broad discretion to agencies because of:

> 1) the impossibility of specifying at the outset of new governmental ventures the precise policies to be followed; 2) lack of legislative resources to clarify directives; 3) lack of legislative incentives to clarify directives; 4) legislators' desire to avoid resolution of controversial policy issues; 5) the inherent variability of experience; 6) the limitations of language.

Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1677 n.27 (1975). Despite these practical concerns, courts continue to have problems with broad delegations because of the increased risk that heads of agencies will exercise powers beyond those intended by the legislature. For example, Judges J. Skelley Wright and Henry Friendly have urged that to the greatest extent possible, legislative bodies should temper their delegations of power with guidelines, standards, and sympathetic responses to the concerns of judges, commentators, and the public. Wright, Book Review, 81 YALE L.J. 575, 586-87 (1972); H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 163-75 (1962). Judge Wright concedes that the task of fashioning such limits may ultimately have to be worked out by the courts. WRIGHT, *supra*, at 587.

II. PUTTING THE PROCEDURE ACT PARADIGM IN PERSPECTIVE

A. The Implications of the Choice of Statutory Review

The major shortcoming of the supreme court's analysis is that NCAPA, as well as its predecessor statute,[64] limits judicial review to those instances in which "adequate" procedure for review is not available under some other statute.[65] While the court reaffirmed the view announced in *Jarrell v. Board of Adjustment*[66] that review procedures are adequate only if the scope of review is equal to that under NCAPA, it did not elaborate upon what has been called a "problem which merits further attention."[67] There was no definitive explanation whether the court viewed the Insurance Act as "adequate" but containing specific provisions contrary to NCAPA, "inadequate" and thus requiring complete substitution of NCAPA procedures, or "partially inadequate" and thus requiring substitution of NCAPA procedures only to the extent non-equivalent provisions might otherwise have to be applied.[68]

These distinctions involve important considerations. If an organic act's provisions are specifically contrary to a subsequent act, the organic act cannot apply, because a new legislative direction has been announced. Inadequacy of an organic act, on the other hand, signifies that what the legislature originally provided under the organic act can no longer be viewed as complete, because added legislative provisions have extended the act to new, though substantively similar, matters. Finally, a conclusion of partial inadequacy—that is to say, adequate in some specific respects, but requiring some NCAPA substitutions—recognizes a mixed result: some of what the legislature said in the organic act has continuing applicability, but statutory extensions have included new matters that depart in wholly incompatible ways from the original statute.[69] The supreme court, however, saw no need to address these comparative

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64. N.C. GEN. STAT. § 143-307 (effective February 1, 1976). G.S. 143-307 was replaced by G.S. 150A-43, Law of March 24, 1975, 1975 N.C. Sess. Laws 44, ch. 69, § 4; Law of April 12, 1974, 1973 N.C. Sess. Laws 691, ch. 1331, § 2.

65. N.C. GEN. STAT. § 150A-43 (1978) provides in pertinent part that "[a]ny person who is aggrieved by a final agency decision . . . is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute." *See* Daye, *supra* note 6, at 899.

66. 258 N.C. 476, 480, 128 S.E.2d 879, 883 (1963).

67. *See* Daye, *supra* note 6, at 900 n.306.

68. *Id.* at n.305.

69. These categories are only illustrative. It is certainly not always the case that "inadequate" connotes a total lack of adequacy. Professor Daye addressed the ambiguous nature of the term "inadequate" when he noted that even though "it would be infinitely preferable to conclude as a policy judgment that if another statute is inadequate in any aspect, judicial review may be had under the NCAPA in its entirety . . . it is not unreasonable to argue that the NCAPA's provisions are applicable only *to the extent that* another statute is inadequate." *Id.* at 900 n.306. He cautioned that if the courts treated "partial inadequacy" as requiring total substitution, problems could arise in connection with individual judicial review statutes that provide "specific provisions to the contrary" of NCAPA. *Id.* at 841 n.39. In response to such possibilities, Daye urged that effectuating all parts of NCAPA requires that courts distinguish between statutes that are "inadequate" and those that contain "specific provision to the contrary." *Id.*

The difficulty is that there are at least two categories, each of which contains two subsets. The "adequate" category contains: (1) those organic acts that are wholly adequate in that they require no substantive embroidering, because they are the equivalent of the subsequent act, and (2) those

considerations. The court's efforts focused instead upon a determination of which statute provided the widest judicial review mandate. Difficulties of interpretation relating to the Insurance Act's purpose were bypassed with a mere recognition that "there are of course subtle differences"[70] between the Act and NCAPA, as if to suggest that the broader scope of NCAPA review, coupled with the subtleties of the statutory differences, would sustain the conclusion that "[f]or this reason, and in the interest of uniformity in judicial review of administrative decisions . . . we hold that G.S. 150A-51 is the controlling judicial review statute in insurance ratemaking cases."[71]

In its desire to make NCAPA the applicable review provision, the court inadequately explored possible competing expressions of legislative intent represented by the Insurance Act. Due to the General Assembly's flat refusal to provide that NCAPA would be the controlling provision for review of all agency actions, courts were obliged to explore the significance of at least three possible impacts upon the various organic acts not specifically exempted from NCAPA. First, courts could conclude that the review schemes under an organic act and NCAPA are identical and no substantive analysis was warranted. Review under either of identical provisions would produce the same result. Second, courts could conclude that because of slight differences in the language of an organic act and NCAPA, the General Assembly necessarily intended that one or the other control. This approach would mean that the "virtually identical" scope of review provisions under the Insurance Act and NCAPA nevertheless required analysis in order to explain the significance, if any, of their different threshold requirements for review. For example, judicial review is authorized only when the petitioner's actions "have been prejudiced" under the Insurance Act,[72] but when the petitioner "may have

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statutes that must be deemed adequate because they provide *more* than the threshold protections of the subsequent act. On the other hand, the "inadequate" category contains those organic acts that are: (1) partially inadequate, in that they are in some respects less than the substantive minimum of the subsequent act, and (2) wholly inadequate, in that they totally fail to provide the minimum requirements of the subsequent act.

For practical purposes relating to the ease of judicial implementation, partially adequate organic acts are treated as if they are wholly inadequate. *See infra* text accompanying note 70. This treatment allows the substantively equivalent provisions of the organic act to be given effect (though under the guise of the subsequent act) while also assuring the additional minimum protections of the new act. While this approach eases judicial interpretation, it fails to address the possibility that the reason the organic act appears partially inadequate, and thus in need of substitution, is because procedural protections available under the subsequent act were intentionally not granted by the organic act. In response to this possibility, a close examination of the conceptual framework of the organic act is required in order to determine whether the apparent inadequacy is real (*viz.*, an oversight or the product of superseding legislation) or apocryphal (as when the new protection would be inconsistent with the policies of the existing organic scheme).

70. 300 N.C. at 395, 269 S.E.2d at 559.

71. *Id.* The supreme court noted that "to the extent that G.S. 58-9.6(b) adds to the judicial review function . . . and in light of the virtually identical thrust of the two statutes, we elect to proceed by applying the review standards of both G.S. 58-9.6 and G.S. 150A-51, where those standards may be construed as being consistent with each other." *Id.*

72. N.C. GEN STAT. § 58-9.6(b) (1975) provides in pertinent part, "The court may affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants *have been prejudiced* . . ." (emphasis added).

been prejudiced," under NCAPA.[73] Though NCAPA's lower threshold for court intervention suggests the strict judicial oversight position adopted by the supreme court, this interpretation does not address the express words of the Insurance Act, which limit judicial review to those instances in which the aggrieved party has first demonstrated something more than the theoretical possibility of agency wrongdoing.

Finally, courts could conclude that given the existence of an organic act and the General Assembly's failure to make NCAPA explicitly applicable, it is unclear whether the General Assembly intended NCAPA to apply. In this instance, as in the second, a court would be called upon to resolve the uncertainty by referring to the legislative history, weighing the demands of competing interpretations upon the legislative, executive, and judicial roles, and considering the public policy implications of the contending courses of action. Only after such an analysis, however, would it be appropriate to conclude, as the supreme court concluded, that the generally applicable NCAPA should be read as controlling the Insurance Act's existing scheme of integrated provisions.

Given the court's practical concerns with standardizing agency review procedures and easing judicial administration, its preference for NCAPA is understandable. But its decision to apply the review standards for both the Insurance Act and NCAPA, where consistent, suggests that the court was also aware that application of NCAPA alone might upset implicit legislative balances represented by the statutes' subtle differences. Consequently, the larger issue that the court left unaddressed is troublesome: whether the legislative scheme envisioned by the Insurance Act depended so significantly on precisely those subtleties that application of NCAPA should have been precluded. We need only focus upon what was gained on behalf of judicial power (and the NCRB) in one regard to suggest the magnitude of the possible loss of power by the Commissioner.[74] The court construed a statute that arguably sought to

73. N.C. GEN. STAT. § 150A-51 (1978) provides in pertinent part, "The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify if the substantial rights of the petitioners *may have been* prejudiced. . . ." (emphasis added).

74. Note the specific analysis of the court. The court began with the canon of construction that favors a harmonization of subsequent acts with an existing act dealing with the same subject matter. *See supra* note 57. Thus, the Insurance Act was to be followed only if: (1) it were statutorily preserved by an exemption under NCAPA, or (2) its provisions gave more protection than those of NCAPA. The court then noted that NCAPA provided wider remedial authority for reviewing courts than did the Insurance Act. Accordingly, the court had to decide whether the Insurance Act was adequate or inadequate. The court's decision to have NCAPA govern but to apply the Insurance Act when possible indicates that the court, in effect, found that the Insurance Act was inadequate. Thus, NCAPA was to be applied.

The court was required to do more than note those differences. Even if there were differences, the court failed to realize that the Insurance Act could govern if it were designed to meet a different statutory objective than NCAPA. As Llewellyn pointed out "a statute is not *in pari materia* if its scope and aim are distinct or if a legislative design to depart from the general purpose or policy of previous enactments may be apparent." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 402 (1950). In order to determine whether the seemingly wider remedial powers under NCAPA were actually contemplated as enlargements of the Insurance Act, the court should have analyzed whether the wider authority of NCAPA was: (1) wider and compatible with the conceptual scheme of the Insurance Act, or (2) wider but antithetical to that conceptual scheme. Resolu-

vest the Commissioner with broad discretion to act as an instrument of the General Assembly's will as a more limited authorization to act subject to the restraint of strict judicial oversight. Court review is now triggered by a showing that a significant possibility of prejudice exists to a petitioner.[75] The basis for judicial review has become one of showing a *risk* of harm, rather than actual harm itself.[76]

The supreme court's desire to have the decision turn upon NCAPA's paradigmatic considerations involved the court's weighing far more subtle issues than the decision actually addressed. The court's difficulties in interpretation are partly traceable to a statutory scheme in which the Commissioner's general statutory authority to engage in rulemaking and NCAPA's designation of rate-setting procedures as quasi-adjudicatory "contested cases"[77] combine to create the possibility for mixed rulemaking and adjudication. The court needed to be sensitive to the limits of NCAPA. The Act's paradigmatic vision of distinct categories for rulemaking and adjudication does not resolve the question whether general authority to proceed by rulemaking is available when, in the course of an adjudication, there arises the need to apply standards that did not predate the proceeding.[78] Though the Insurance Act also

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tion of this issue required a textual analysis of the policies and procedures of the Insurance Act, so as not to conflict with the Insurance Act's established framework. Because statutory intent is more faithfully realized by a presumption that the legislature did not intend to make needless changes in the preexisting law, statutory construction required an analysis in light of the whole system, of which NCAPA judicial review provisions form but a part, and the already existing judicial review provisions of the Insurance Act. *See* H. BLACK, CONSTRUCTION AND INTERPRETATION OF THE LAWS §§ 104-06 (2d ed. 1911).

75. *See supra* text accompanying notes 25-29.

76. *See* Daye, *supra* note 6, at 912. Additionally, more than a cursory incorporation into NCAPA of the power to declare agency action "null and void" was required. While it is true that NCAPA's grant of judicial authority to reverse, remand, or modify agency action carries with it the power to prohibit agency conduct, the power to declare conduct null and void goes beyond merely preventing enforcement of irregular agency action. That power is not only the power to declare that the action cease, but also the power to reach every vestige of agency conduct in order to declare that, for legal purposes, the action never occurred.

Such far reaching judicial authority would offset delegations of authority to the Commissioner that involve substantial interferences with personal or economic interests (e.g., the authority to arrest under warrant any person or persons about whom, in the Commissioner's opinion, there is evidence of the commission of a crime, N.C. GEN. STAT. § 58-9.2 (1975), or to regulate the solicitation of proxies in connection with capital stock or other equity securities of insurance companies, *Id.* § 58-9(2)). The failure to make the power to declare actions null and void available under NCAPA suggests that the General Assembly was aware of the lower threshold for judicial review contemplated under N.C. GEN. STAT. § 150A-51 (1978). *See supra* text accompanying notes 22-37.

77. N.C. GEN STAT. § 150A-2(2) (1978).

78. Reliance might well be placed upon the policy declaration in N.C. GEN. STAT. § 150A-9, that establishes "basic minimum procedural requirements for the adoption, amendment or repeal of administrative rules." The conclusion that ad hoc rulemaking is prohibited by NCAPA must ultimately turn upon a policy choice. While the inclusion of the provisions may express the General Assembly's preference for formalized rulemaking, the General Assembly specifically called for "substantial compliance" and not for literal compliance with NCAPA's provisions. The objectives of NCAPA are better served by reading "substantial compliance" as a recognition of the continuing need for procedures that will not stultify agency action. Especially in light of long federal experience predating NCAPA, the "substantial compliance" clause should be interpreted as the equivalent of a "harmless error" provision. Judicial review should be focused upon specific concerns with fairness of the agency's choice, not upon mere assertions of rule formalism. *See supra* text accompanying notes 68 & 69.

fails to address directly the problem of an adjudication/rulemaking mix, an attempted resolution under NCAPA merely compounds the difficulty. Had the court limited its review to an interpretation based solely upon the Insurance Act, it not only would have limited the precedential effect of allowing an adjudicatory/rulemaking mix, but could have avoided altogether the problem of interpreting the Insurance Act's grant of adjudicatory/rulemaking authority under the scope of review and policy determinants provided in NCAPA.

In pursuing a solution based upon NCAPA, the court failed to consider that formalistic notions based upon categorical distinctions between rulemaking and adjudication are by definition insensitive to subtleties. Paradigmatically, the considerations must be oversimplified: adjudication looks retrospectively to determine whether specific parties have complied with previously existing standards; rulemaking envisions consideration of a standard that is to be prospectively applied. Accordingly, once the supreme court identified the putative rule as a new standard and ascertained that it did not qualify for exception from formal procedural requirements, it followed that the demand for audited data was a rule which must be published as provided in the formalized rule-making scheme. Without a specific NCAPA rule to govern situations involving an adjudication/rulemaking mix, however, the court was relegated to declaring that a general policy favoring formalized rulemaking over ad hoc adjudicatory rulemaking was consistent with the General Assembly's definition of rulemaking under G.S. 150A-10.[79]

The need to evolve agency standards in an informed, regularized fashion, often stated as the justification for formalized rulemaking, could not alone have sufficed to preclude ad hoc adjudicatory rulemaking. The same need existed in the more problematic early days of the APA when the *Chenery* rule upholding ad hoc rulemaking was announced.[80] Over two decades later the Supreme Court in *Wyman-Gordon* reaffirmed the necessity for agency flexibility with respect to the adjudicatory process when it allowed enforcement, as an order applicable to the parties, of what was at best a prospectively applicable, but unpublished, new rule from a prior proceeding.[81] Indeed, the North Carolina Supreme Court itself has implicitly conceded the pragmatic nature of its concerns for informed public participation and formality. Although endorsement of Professor Cooper's higher requirement for ad hoc adjudicatory rulemaking makes plain the supreme court's general aversion to its use, the court's need to distinguish *Chenery* on the facts also makes clear that it would find no absolute bar to ad hoc solutions when the facts present the "proper" case.[82]

79. 300 N.C. at 417, 269 S.E.2d at 571.

80. 332 U.S. at 209. *See also supra* note 3.

81. 394 U.S. at 762-66. *See also supra* note 11.

82. The court is willing to accept retroactivity and surprise in those cases in which the need for using ad hoc rulemaking is clear. Thus, the source of the supreme court's objections to ad hoc rulemaking is primarily the agency's information base—whether the agency has availed itself of the comments of similarly situated or otherwise interested parties. *See also supra* text accompanying notes 52-56. If the court is willing to accept *Chenery*-type retroactivity, it is difficult to understand why it rejects the *Wyman-Gordon* solution, which limits retroactivity and surprise by

Thus, the supreme court's resolution ultimately is unsatisfactory despite its practical intent. While, in principle, support for eased judicial management and opposition to potentially overreaching agency conduct is widespread,[83] the view of administrative agencies suggested by the decision is disquieting. For the sake of uniformity and judicial convenience, the court has substituted inflexibly interpreted policies underlying a statutory framework[84] designed as a guide for an assortment of agencies, for the existing framework of the Insurance Act. Absent the underlying statutory analysis, however, this presumption of NCAPA's primacy was unjustified. In *Commissioner v. NCRB* there was no meaningful exploration of the significance of the apparently different thresholds for review, no recognition that those differences may have been intentional, no reference to the existence, if any, of legislative history, and no consideration that the Insurance Act may have represented a legislative decision to place substantial discretionary authority in the Commissioner to meet the exigencies of a highly technical field requiring strict agency oversight. Although the North Carolina Supreme Court's decision to turn to NCAPA may well have been justified on practical grounds, the lack of an explanatory analysis suggests that the court's conclusion was compelled by other considerations. These considerations merit closer examination.

B. Reassessing NCAPA's Provisions

1. The Prohibition on Unlawful Proceedings

The supreme court ultimately concluded that the demand for audited data was a substantive rule that required compliance with NCAPA's rulemaking provisions.[85] In the court's view compliance was required even for rules announced in the course of an adjudication.[86] Only nonsubstantive rules announced during a contested case were characterized as exempt from the publication requirements of statutory rulemaking.[87] Thus, the agency actions upheld by the Supreme Court in *Chenery* and *Wyman-Gordon*, which involved agency application of ad hoc adjudicatory rules to a subsequent case without the publication and hearings formally required for rulemaking, were held statutorily precluded under NCAPA.

The supreme court concluded that two considerations made it apparent that substantive rules could not be given effect without the requisites of formal

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making the agency's order prospective only. More troublesome is the rejection of *Wyman-Gordon* in a case that did not raise the issue and which involved a statutorily designated class of required participants, so that the probability of not receiving representative opinions was negligible. *See supra* note 11.

83. *See supra* note 63.

84. N.C. GEN. STAT. § 150A-1(b) (1978) provides: "The purpose and intent of this Chapter shall be to establish as nearly as possible a uniform system of administrative procedure for State agencies." This provision is qualified by the proviso in G.S. 150A-1(a): "This Chapter shall apply except to the extent and in the particulars that any statute makes specific provisions to the contrary."

85. 300 N.C. at 412, 269 S.E.2d at 568.

86. *Id.* at 417, 269 S.E.2d at 571.

87. *Id.*

rulemaking. First, NCAPA contemplates that substantive rules will be treated differently from nonsubstantive interpretive rules and policy statements.[88] More importantly, the court reasoned that G.S. 150A-10(6), which excludes "interpretative rules and general statements of policy of the agency," would be unnecessary if the "contested case" exemption of G.S. 50A-10(4) were applied to rules having effect beyond the limits of a particular case. In the court's view, if the requirement of subsection (4) were interpreted to mean that exempted rules need only be "made in the decision of a contested case," it would be redundant, since subsection (6) already generally exempted all nonsubstantive rules.[89] The court concluded, therefore, that G.S. 150A-10(4) provides for a different kind of exemption—one limited solely to substantive statements and policies that are applied *within* the particular case.[90]

By precluding all prospective applications of ad hoc rules, the court went beyond what was statutorily required or desirable. The court correctly observed that G.S. 150A-10(6) specifically contemplates an exception from rulemaking requirements for the nonsubstantive rules arising from the resolution of contested cases.[91] But it does not follow from this exemption for nonsubstantive rules that prospectively applicable *substantive* rules created by ad hoc adjudicatory rulemaking may not also be freed from the formalized requirements of statutory rulemaking. The court read with a bias the provisions of G.S. 150A-9 applicable to "the exercise of any rule-making authority conferred by any statute" and calling for "substantial compliance" with its terms.[92]

Ad hoc adjudicatory rulemaking does not arise by explicit statutory authorization.[93] Ad hoc adjudicatory rule-making authority arises under the Insurance Act by implication from the General Assembly's simultaneous conferral of rule-making and adjudicatory authority. Because ad hoc adjudicatory rulemaking is a concept that encompasses both rulemaking and adjudication, its designation as pure rulemaking or adjudication is inadequate and improper. Accordingly, ad hoc adjudicatory rulemaking should have been treated as a special class of rule requiring a determination whether the general policy requirements of G.S. 150A-9 should be read as applicable solely to rulemaking in its pure, explicitly designated "statutory" form, or should be extended as well to adjudicatory/rulemaking hybrids.

The better reading is that by reference to rule-making authority "con-

88. N.C. GEN. STAT. § 150A-10(6) (1978).

89. NCAPA's six different exceptions to the definition of "rule" led the court to find that different types of rules must have been contemplated. Furthermore, distinctions between various types of rules were deemed important in determining the procedural requirements for promulgating a particular rule, as well as the legal effect of a challenged rule. 300 N.C. at 410, 269 S.E.2d at 567.

90. 300 N.C. at 417, 269 S.E.2d at 571.

91. Thus, an agency may announce its policy and statutory interpretations without using rulemaking procedures.

92. N.C. GEN. STAT. § 150A-9 (1978); *see id.* § 150A-1(b).

93. *See supra* note 84.

ferred by any statute,"[94] the General Assembly desired only to make clear its intent with respect to explicitly conferred "pure" rulemaking. Even with respect to such explicitly conferred rulemaking, however, exceptions from the general requirement for formalized rulemaking exist for two situations. Under G.S. 150A-10(6), nonsubstantive interpretive and policy statements—both of which are within the technical definition of a rule[95]—need not be published, since the agency's intent is solely to state positions that lack the force of law. The exemption from publication is necessary in order to overcome a statutory definition of "rule" that is so broad that it would otherwise trigger the formalities of rulemaking. In the other situation, formal rulemaking under G.S. 150A-10(4) is exempt when the formalities of an adjudication have, in effect, been substituted for the otherwise applicable requirements of formal rulemaking. Because substantive ad hoc adjudicatory rulemaking is such an intimate part of an adjudication, its presumption of due deliberation arises from the adjudicatory proceeding, and its publication, if any, is by means of the order. It is for this reason that the court's assertion that a redundancy of nonsubstantive rules occurs is more an allusion to form than substance. Nonsubstantive rules are indeed already exempt under G.S. 150A-10(4), but for a reason entirely different from the reason for their exemption under subsection 10(6). The formalities of rulemaking are unnecessary under G.S. 150A-10(6) because the *intended use* of the rule is nonsubstantive, whereas the exemption under subsection 10(4) arises because of the *manner of creation* of the rule, in the context of a "contested case." In short, nonsubstantive rules are exempt from the rigorous scrutiny of formalized rulemaking because the agency does not intend to apply them as law (and this is so even if the agency diligently scrutinizes them through an adjudication). On the other hand, substantive rules are exempt precisely because they are diligently scrutinized by the adjudication. Absent a clearly expressed legislative intent to have ad hoc adjudicatory rules treated as if they are purely rules, their existence as case precedents is all that should be required.[96]

The source of the problem is the supreme court's insistence upon the rulemaking/adjudication dichotomy. It interpreted NCAPA's provisions to impose the paradigm as a curb on agency discretion. Faced with the Commissioner's contention that he was free to make ad hoc adjudicatory rules without publication, the court responded that the Commissioner's failure to use statutorily formalized rulemaking in ordering that the data be audited resulted in

94. N.C. GEN. STAT. § 150A-9 (1978) (emphasis added) states:

> It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules. Except for emergency rules which are provided for in G.S. 150A-13, the provisions of this Article are applicable to the exercise of any *rulemaking authority conferred by any statute,* but nothing in this Article repeals or diminishes additional requirements imposed by law or any summary power granted by law to the State or any agency thereof. No rule hereafter adopted is valid unless adopted in substantial compliance with this Article.

95. N.C. GEN. STAT. § 150A-10 (1978).

96. *See supra* note 82.

an agency decision that was "[m]ade upon unlawful proceedings."[97] Though the order issued from an adjudicatory proceeding, the court acknowledged that it was not the mode of the proceeding that was determinative of the Commissioner's underlying authority to make the demand.[98] Rather, the court reasoned that because ad hoc adjudicatory rulemaking is permissible only when the dangers of formal rulemaking would frustrate the agency's functions, the absence of that danger (1) marked the Commissioner's action as "[m]ade upon unlawful procedure," and (2) precluded enforcement of the rule as an order for future cases. The court's analysis, however, is questionable both in terms of statutory construction and the practical results it portends.

First, involving as it did the exercise of acknowledged discretionary authority to make the demand, the propriety of the Commissioner's request for audited data did not raise a question of lawful proceedings, but rather one of responsible exercise of lawful authority. The issue was whether the Commissioner's determination that audited data were required was made in a procedurally lawful manner. That issue turned solely upon the existence *vel non* of proper Commissioner procedures to make such a demand. In *Commissioner v. NCRB*, after an agency hearing, the Commissioner made subsidiary findings. He thereafter concluded that there existed the need for audited data and his order followed.[99] The court's discussion was merely confused by the equivocal use of "unlawful proceedings" as an additional characterization of what would have been an already adequate charge: the agency *abused its discretion* to choose to act in one way or another. This confusion was, in part, prompted by the court's failure to see that the NCAPA provision at G.S. 150A-51(4), "[a]ffected by other error of law," serves both as a prohibition on agency violations of other relevant statutes and as the expressed statutory basis for the exercise of the court's equitable powers. The limitation anticipates other sources of *law*, not merely other statutes.

Furthermore, an interpretation of the phrase "[a]ffected by other error of law" as providing one of the means by which a court reviews the *appropriateness* of agency action[100] speaks more directly to the true concern of the court: whether the agency exercised good judgment given the existence of alternative procedures. It also speaks to an important formalistic consideration—the avoidance of redundancy—which the court thought important in distinguishing the limitations on excess authority and unlawful procedures under G.S.

97. 300 N.C. at 419, 269 S.E.2d at 572.

98. *Id.* at 413, 269 S.E.2d at 569.

99. *Id.* at 392, 269 S.E.2d at 557.

100. Conceptually, judicial review under the "affected by other error of law" standard should invite judicial consideration beyond the limited categories provided under N.C. GEN. STAT. § 150A-51 (1978). The reviewing court should be empowered to invalidate agency actions that amount to constitutional or statutory violations, actions that ignore specifically mandated nondiscretionary procedures, actions that are not supported by substantial evidence, and actions that are arbitrary and capricious. But beyond these specific concerns for proper delegation, proper procedures, and proper application of standards, NCAPA's broad prohibition of any "other error of law" should forbid, among other things, agency actions commonly described as abuses of discretion. When discretion has not been justly and properly exercised under the circumstances of the case, the action is clearly against the logic and effect of the facts presented.

150A-51(2) and (3).[101] While the court's view of that distinction was sound, its own analysis gives rise to a second redundancy. Under the court's analysis, inappropriate procedures are treated as substantive errors of law to the extent they reflect breaches of a legal standard. A prohibition of this sort, however, is already provided by the phrase "[a]ffected by other error of law."[102] Limiting G.S. 150A-51(3) to review of nondiscretionary procedural concerns, therefore, avoids the redundancy of two prohibitions addressing substantive violations.

The weakness of the result in *Commissioner v. NCRB* is also suggested by the practical implications of the court's decision to ground the procedural limitation of G.S. 150A-51(3) on an interpretation of the exemption at G.S. 150-10(4) that bars the prospective application of substantive ad hoc adjudicatory rules. After *Commissioner v. NCRB*, an agency decision to proceed by ad hoc rulemaking during an adjudication, while not entirely foreclosed, is to be measured by (1) the agency's ability to demonstrate clearly preponderating considerations in the particular instance, and (2) the agency's posthearing submission of the ad hoc rule to the statutorily formalized rule-making procedures prior to future application.[103] These requirements risk the stultification of the administrative process.[104] Their weakness is the court's insistence upon viewing NCAPA as a control on agency actions rather than as a framework reflecting a reasonable formula for cooperative interaction among the legislature, agencies, the public, and the courts. In North Carolina the so-called choice between statutorily formalized rulemaking and rulemaking during the course of an adjudication will often be a hollow choice. The choice that is left to North Carolina's administrative agencies is not the choice of an expert acting after serious consideration of the facts, law, and policy. A reasonable basis is not enough; agency expertise no longer enjoys the benefit of the doubt. A requirement that the balance of considerations favoring adjudication must clearly preponderate will rule out ad hoc adjudicatory rulemaking for the close case, when all that can be said is that long experience has triggered the expert's doubts.

The need for agency flexibility has not only been subordinated to the desire for stringent judicial oversight, but even in the newly limited instances in which the court's considerations favoring ad hoc rulemaking can be met, the agency is restricted to applying its new rule in only that particular proceeding. Agency discretion is thus "discretion," for example, to conduct a six-month adjudicatory hearing (replete with extensive briefs by the parties and dozens of

101. *See supra* text accompanying notes 31-35.

102. N.C. GEN. STAT. § 150A-51(4) (1978).

103. Analyzing the Insurance Commissioner's authority to proceed by formal rulemaking or ad hoc adjudicatory rulemaking, the court concluded that the "superior rule" had been announced by Professor Cooper and generally adopted by numerous courts some fifteen years earlier. Although the court was in favor of agency discretion to proceed by either rulemaking or adjudication, the rule endorsed by the court urges that the process of rulemaking be utilized unless there is a danger of frustrating the agency's function. In weighing such dangers, moreover, the court included the admonition, "Unless the balance clearly preponderates in favor of the *ad hoc* adjudication method, the agency should utilize rule-making procedures." 300 N.C. at 415-16, 269 S.E.2d at 570-71 (quoting 1 F. COOPER, *supra* note 1, at 181-82).

104. 332 U.S. at 202.

witnesses), to compile several thousands of pages of evidence, to review numerous amicus briefs, and when necessary in the course of the proceeding, to issue a rule that is limited to the parties of record. Without resort to formalized rulemaking, the rule apparently does not even extend to that identically situated individual or corporation that has perhaps even submitted an amicus brief while continuing to engage in the putatively wrongful conduct. This procedure is not the exercise of discretion, but a waste of agency expertise, money, time, and information. This result could not have been the legislative intent, but it is precisely the situation that prevails in light of *Commissioner v. NCRB*. In its effort to offer predictability, protection, and fairness, the North Carolina Supreme Court has pressed the constraints of the procedure paradigm to their very limit. By reducing agency flexibility, the court has needlessly tipped the scale against legislative assessments of the appropriate balance between potentially aggrieved parties and agencies.

Had the court been content to limit its resolution to a simple declaration that under either the Insurance Act or NCAPA, the Commissioner abused his discretion, the case would have had a de minimis impact upon the administrative process. Pressing the paradigm instead, the court rejected a straightforward analysis based solely upon equitable considerations. It sought to ground its determination on NCAPA's specific prohibition of procedural violations and on the prohibition of arbitrary and capricious conduct. The statutory basis of the decision not only served the court's announced aim of easing judicial administration, but it served equally well to preclude the Commissioner's anticipated prospective application of the ad hoc rule.[105] The supreme court's effort to maximize the constraints on the Commissioner implicitly suggests the political and bureaucratic concerns noted previously. In the process, however, what was gained in consistency by the pronouncement of new limitations may well be offset by the need for future clarifications.

2. The Prohibition on Arbitrary or Capricious Conduct

An additional concern is raised by the suggestion made earlier that use of the "unlawful procedure" standard was a curious way of controlling supposedly irregular use of discretion.[106] The court ultimately had to consider whether the Commissioner's demand for audited data could be viewed as an exercise of discretionary rulemaking that might have then resulted in either a valid order to the parties or a prospectively applicable rule.[107] In effect, the

105. Writing for the Supreme Court in *Bell Aerospace*, Justice Powell stated that the Court has made it clear that agencies are not precluded from announcing new principles in adjudicative proceedings:

> The plurality opinion of Justice Fortas, joined by Chief Justice Burger, Mr. Justice Stewart, and Mr. Justice White, recognized that "[a]djudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein," and that such cases "generally provide a guide to action that the agency may be expected to take in future cases."

416 U.S. at 293-94 (citing NLRB v. Wyman-Gordon Co., 394 U.S. at 765-66).

106. *See supra* text accompanying notes 21-22.

107. *See supra* notes 11, 44 & 82.

court concluded that the Commissioner's action could not have been achieved under either result because in these circumstances ad hoc rulemaking amounted to arbitrary and capricious conduct. In support of this conclusion, the court suggested numerous difficulties that might stem from the Commissioner's decision.[108] The court primarily was concerned that the request needlessly imposed ambiguous, unexpected, and extremely expensive demands on the NCRB—demands that could have been avoided if the Commissioner had proceeded by formal rulemaking. Balancing the possible gains to the agency from proceeding by ad hoc rulemaking against the detriments to petitioner, the court saw the equities as clearly in favor of the latter.[109]

There is, of course, little room for disagreement with the basic desire to balance the equities; this approach has long been appropriate.[110] What is troublesome, however, is the failure of the court to address evidentiary and procedural concerns. For example, at no point does the decision reveal that concerns with ambiguity, burden to petitioner, and costs of compliance, were ever laid before the agency for resolution. It is unclear to what extent any or all of these concerns could have been remedied through the normal give-and-take of the administrative process.[111] Equally unclear is whether the Commissioner would have clarified or modified his demand in response to specifically stated needs if he had been confronted by more than a general claim of abuse on the part of petitioner. It is not that the court has failed to assert justifications for its result; the problem is that its blast at the Commissioner inevitably will reverberate down the corridors of other agencies. Those reverberations may well sound disharmoniously.[112]

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108. The supreme court noted:

> We agree with appellants that the Commissioner's order with respect to audited data is arbitrary and capricious for these reasons: The order is vague and uncertain in that (1) it does not establish the extent to which examination of "original source documents" is required, (2) it does not make clear whether the auditing must be performed by Certified Public Accountants, other accountants, or actuaries, (3) it does not specify the degree of precision and reliability required of "statistical sampling," (4) it generally does not provide appellants with adequate guidelines for compliance with the general conclusion that data in a ratemaking hearing be audited, (5) it includes no determination by the Commissioner as to the possibility of performance of his new rule nor whether implementation of the rule would be economically feasible, (6) it includes no determination whether the statutory time limits could be complied with in face of the new rule, and (7) it includes no determination whether the "original source data" contemplated by the new rule is even available for the past years involved in this filing or whether such data, if available, is located in North Carolina or outside the State in the case of the several hundred companies writing insurance in this State.

300 N.C. at 420, 269 S.E.2d at 573.

109. *Id.* at 419, 269 S.E.2d at 572.

110. *See, e.g.*, Coburn v. Board of Comm'rs, 191 N.C. 68, 74, 131 S.E. 372, 375 (1926).

111. *See, e.g.*, Bell Aerospace, 416 U.S. at 295. *Bell Aerospace* is notable for the extent to which the Supreme Court went to avoid interfering with the NLRB's discretion. In permitting the Board to announce a position contrary to its past conduct, which had the effect of extending Labor Act protection to a previously unprotected class, the Court referred to the great weight that was due the Board's discretionary judgment, and closed by reminding protestants that the hearing—not the court—was the appropriate forum in which to argue the consequences of a rule. *See also supra* notes 4 & 5.

112. The difficulty with the "arbitrary and capricious" standard is that it often masks the court's real reasoning and thus discourages thoughtful analysis. Daye, *supra* note 6, at 921. The

An irregularity that leads to a shocking result is not alone reason for labeling an agency process arbitrary and capricious. A decision is arbitrary and capricious if it is based upon either an authoritarian refusal to apply a required standard or an unprincipled refusal to treat like cases alike. It is equally true that the phrase applies when an irregular result arises because an agency has failed to consider legislative intent when it exercised its powers. In contrast, if in exercising its power to choose either of two permitted courses, the agency selected the one that under the circumstances departed from the intended use of its authority, that action would be an abuse of discretion. It would not be conduct that is arbitrary and capricious, because it lacks the required departure from past standards of conduct that the phrase connotes.[113]

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criterion "arbitrary and capricious" when applied to contested cases seems to function as a "catchall." *Id.* Since most cases that may be reversed or modified as "arbitrary or capricious" will fall under one of the more discrete criteria of N.C. GEN. STAT. § 150A-51 (1978), Daye urges that courts reviewing contested cases use the criterion "only in those rare instances in which reversal or modification is necessary because substantial rights may have been prejudiced, but cannot be justified under the more specific and discrete criteria authorizing judicial intrusion." Daye, *supra* note 6, at 921.

The admonition should be carried a step further. The use of "arbitrary and capricious" as a catchall is never warranted. The term is a term of art, as are NCAPA's other discrete categories, and should be used as such.

Proper judicial application of these terms was illustrated in Ford Motor Co.v. FTC, 673 F.2d 1008 (9th Cir. 1981). On facts reminiscent of *Commissioner v. NCRB*, the Ninth Circuit prohibited the FTC from proceeding by adjudication that would prohibit automobile dealerships from repossessing cars, crediting their defaulting owners with the wholesale value of the car, and then pocketing any "surplus" upon the deficiency resale rather than applying it to the defaulter's account. Under the APA, the court had to determine whether the agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" [the equivalent of N.C. GEN. STAT. §§ 150A-51(4), (6) (1978)]. Citing *Chenery*, *Bell Aerospace Co.*, and Patel v. Immigration & Naturalization Serv., 638 F.2d 1199 (9th Cir. 1980), the court of appeals concluded that when the rule announced through adjudication would have general application, and would create a national interpretation of the U.C.C., the FTC exceeded its authority by proceeding by adjudication rather than by rulemaking. 673 F.2d at 1009-10.

The court of appeal's resolution in *Ford Motor Co.* is distinguishable from *Commissioner v. NCRB*. The court's concern was with a different kind of impact stemming from the FTC's attempted rulemaking. Had the situation been otherwise, the court of appeals made it clear that a different result would have been warranted. Given the scope of the proposed rule's likely effect, the court took exception to the FTC's information gathering capacity:

> It [the ad hoc rule] will not apply just to Francis Ford . . . . To allow the order to stand . . . would do far more than remedy a discrete violation of a singular Oregon law. . . . [I]t would create a national interpretation of U.C.C. §9-504 and in effect enact the precise rule the F.T.C. has proposed, but not yet promulgated.

Id. at 1010. Thus, the FTC was confronted with a need for a quasi-legislative information gathering approach. In *Commissioner v. NCRB*, however, all parties concerned were required participants in the adjudication and were on notice of the action through the NCRB and Reinsurance Facility. *See supra* note 12. Adjudications involving statutorily mandated participation by those primarily affected by the proposed ad hoc rulemaking were beyond the court's concern in *Ford Motor Co.*

113. Thus, the supreme court's discussion of arbitrary and capricious conduct makes analysis problematic. Although reliance was placed upon Board of Educ. v. Phillips, 264 Ala. 603, 89 So. 2d 96 (1956), the analogy is not persuasive. In that case the Alabama Supreme Court held that once it is determined that a government agency acted pursuant to delegated authority, "[i]t is within the discretion of the County Board of Education to determine the need for and location of schools . . . and in the absence of fraud or bad faith or gross abuse of discretion, the courts will not interfere and . . . substitute their judgment . . . ." *Id.* at 606, 89 So. 2d at 98. The Alabama Supreme Court defined gross abuse of discretion as such "an arbitrary and unreasonable act or conclusion as to shock the sense of justice and indicate lack of fair and careful consideration." *Id.* at 607, 89 So. 2d at 98-99 (quoting Mullins v. Board of Educ., 249 Ala. 44, 29 So. 2d 339 (1947)).

C. *The Continuing Need for Flexibility Under NCAPA*

In *Commissioner v. NCRB* the court thought it appropriate to express its recognition of the fundamental necessity for legislative delegations of power to agencies. Absent such delegation, it doubted the practicability of requiring the General Assembly to engage in long term or technical oversight of agencies.[114] The court, however, called upon the Commissioner not to forsake the effort to develop a pattern of integrated, flexible decisionmaking, but "to follow the clear lawful procedures prescribed by our Legislature."[115] Simultaneously the supreme court invited the legislature to review and clarify the applicable statutes.[116] The court's endorsement of the principles of delegation, when coupled with its reservations, suggests its primary concern with the interface of these particular statutes, rather than a desire to attack directly the exercise of agency discretion. We can hope that this more limited concern marks the interpretive bounds of the decision.

We can also hope for a realization on the part of the North Carolina Supreme Court that if the existence of administrative discretion is restricted by a highly formalistic application of procedural rules, agencies' capacities for positive responses will be limited and our long term interest ill served. We must now reestablish the idea that NCAPA's paradigm can fulfill its purpose of effectuating policy, if at all, only to the extent that it is utilized to make projections about the ideal manner in which agencies might operate. Because no statutory classification can be expected to capture fully the nuances and shadings of circumstance that exist in the real world, meaningful review of agency action should not proceed by inquiring whether the exercise of discretion can be analogized to previously sanctioned departures. The focus must be upon determining whether adequate safeguards exist to prevent abusive departures from model solutions. Only in this way can courts avoid the too easy slide into substantive review. What is called for is a clear declaration that subject to specifically stated legislative limitations, agencies are presumed free to exercise wide discretion to respond flexibly to the circumstances before them.[117]

Thus, despite the North Carolina Supreme Court's intimation that the Alabama Supreme Court was expressing substantive disagreement with the rule, the Alabama Supreme Court probably was suggesting no more than the requirement that agency decisions be consistent. *See* 300 N.C. at 420, 269 S.E.2d at 573 (citing 2 F. COOPER, *supra* note 1, at 762). It was for this narrower proposition that Professor Cooper cited the case, noting that agency decisions condemned as "capricious" are commonly "whimsical, unreasoning departure[s] from established norms or standards." 2 F. COOPER, *supra* note 1, at 761-62. Moreover, this narrower meaning is supported by Cooper's failure to include cases involving substantive review considerations within the list of cases illustrating capricious conduct. Capriciousness was limited to cases involving "mercurial, unstable, inconsistant, or fickle" agency rule application. *Id.* at 762. Similarly, Cooper failed to mention *Phillips* in connection with the "arbitrary" aspect of the standard. Cooper described arbitrary agency action as that which "fails to manifest a purpose of complying with the law, or . . . [action] based alone upon will, and not upon any course of reasoning and exercise of judgment." *Id.* at 763.

114. 300 N.C. at 421-22, 269 S.E.2d at 573-74 (citing L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 35, 37 (1965)).

115. 300 N.C. at 422, 269 S.E.2d at 574.

116. *Id.*

117. In the separate but related area of delegation of authority, the role of the judicial watch-

The statutory paradigm suggested by NCAPA does not require the imposition of a burden on the agency to justify its actions by a preponderance of the evidence or by any other standard, save the now rigorously tested "reasonable basis" standard. Absent definitive evidence of legislative intent, higher thresholds arise not as requirements of NCAPA, but from judicial antipathy based upon distrust of agency discretion. The fundamental consideration is that the paradigm itself is neutral. It maps the General Assembly's pattern for only the clear case. As a practical matter this means that where ambiguity arises under NCAPA, solutions should be found that preserve the widest agency discretion not expressly prohibited by the legislative scheme, while providing safeguards for alleged aggrieved parties that are commensurate with the degree of exposure.

The challenge before the courts, agencies, and legislature is to reconsider whether our concerns about the sanctity of the paradigmatic model are rooted in a fear of abuse of agency judgment (and the corresponding urge for the protective limitations of a highly formal system) or in a commitment to utilize our models as illustrative points of reference. The first choice carries with it the danger that the desired limitations will distort the very system we seek to uphold. The second choice offers the steadier course; our reverence for the model is not measured by our unwillingness to allow departures from its ideal results, but by the absence or presence of safeguards against the abuse of such departures. Our continuing consideration will require, however, the most

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dog has long been an important consideration in North Carolina. Declarations of the need for limits on delegations of authority have been frequent.

The doctrine rests on the bedrock principle gleaned from N.C. CONST. art. I, § 6, which provides that "the legislature may not abdicate its power to make laws nor delegate its supreme legislative power to any coordinate branch or to any agency which it may create." Turnpike Auth. v. Pine Island, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965).

This assertion could be read literally to mean that agency discretion is to be controlled by preventing the legislature from delegating authority in the first place. The supreme court, however, has identified and confronted the delegation of discretion dilemma and has attempted to strike a balance. In a series of cases beginning with Jernigan v. State, 279 N.C. 556, 565, 184 S.E.2d 259, 266 (1971), the court has elaborated upon the "inherent conflict between the need to place discretion in capable persons and the requirement that discretion be in some manner directed . . . ." Although the General Assembly needs to delegate to administrative bodies in order to legislate effectively, such delegations must be subject to court scrutiny to ensure that they are indeed necessary and do not constitute a total abdication of legislative power by the General Assembly.

Nevertheless, resolution of the conflict between practical necessity and formalism did not require resort to a newly discovered and more stringent standard of administrative responsibility. *Cf. supra* note 4 & text accompanying note 40. The growing trend of authority, with which the supreme court has recently aligned itself, was said to recognize that it is "the presence or absence of procedural safeguards that is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards." Adams v. North Carolina Dept. of Natural & Economic Resources, 295 N.C. 683, 698, 249 S.E.2d 402, 411 (1978) (citing 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 3.15, at 210 (2d ed. 1978)). Moreover, one of the sources of procedural safeguards that the court cited was NCAPA. *Id.* at 701, 249 S.E.2d at 412.

With respect to the decision to proceed by rulemaking or adjudication, recognition of discretionary administrative authority coupled with the procedural safeguard of judicial review for a rational basis would have been more desirable. If the North Carolina Supreme Court insists that rule-making procedures should be used unless the balance clearly preponderates in favor of ad hoc adjudication, the court needlessly and at untold cost has elevated form over substance in precisely the analytical manner that it so recently rejected in the context of delegation.

careful construction of NCAPA provisions in order to distinguish between those considerations that are essential to NCAPA's application and those that are not. In short, we can either continue to press the paradigm under a generalized view that the need for agency discretion ought to be minimized, or we can temper our concern for limits with a far more useful attentiveness for results that give the widest breadth possible to the legislative will as reflected in NCAPA.