A Study of Informal Adjudication Procedures*

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Procedures for informal adjudication¹ by federal and state administrative agencies and departments have come under increasing scrutiny in the last six years. The impetus for this focus on procedural regularity was provided by the landmark decision in *Goldberg v. Kelly*,² where the Supreme Court embarked on the difficult course of defining the procedural ingredients necessary to satisfy the due process clause. Since then the Court has looked at all manner of

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¹ The term "informal adjudication" has no commonly accepted meaning. As used in this article, it broadly refers to administrative decisions that are not governed by statutory procedures, but which nevertheless affect an individual's rights, obligations, or opportunities. Perhaps it is easier to say what the term does not mean. It does not mean rulemaking, either formal or informal under section 553 of the Administrative Procedure Act. Nor does it mean formal adjudication, as defined either by sections 554, 556, and 557 of the APA or by organic agency legislation that establishes comparable procedural formality. A key indicium of formality in this context is the presence of an administrative law judge as the presiding official. In essence, informal adjudication is a residual category of procedural entitlement that grows or diminishes in "formality" more by judicial and administrative notions of fairness than by legislative plan or design. By this definition *Goldberg v. Kelly*, 397 U.S. 254 (1970), falls within the ambit of informal adjudication, even though some would see the elaborate procedures mandated in that case as constituting formal adjudication. See, e.g., K. DAVIS, ADMINISTRATIVE LAW TEXT 169-70 (3d ed. 1972). Finally, "adjudication" and "hearing" will be used interchangeably in this article. While some feel that "hearing" has a fixed meaning in terms of procedural ingredients, recent cases have indicated a willingness to view a "hearing" as also including proceedings with fewer ingredients than the traditional hearing was thought to contain. Compare *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973) (contemplating a hearing without oral argument or confrontation), with K. DAVIS, ADMINISTRATIVE LAW TEXT 157 n.1 (3d ed. 1972). In any event, the purpose here is not to contribute to a terminological debate, but to look at the kind of procedures that can be utilized to implement the process of informal adjudication unhampered by definitional preconceptions.

² 397 U.S. 254 (1970). While *Goldberg v. Kelly* is generally credited with starting what has become known as the procedural due process "revolution," it has noteworthy antecedents. For example, in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the Court articulated explicit hearing procedures not directly as a matter of due process, but as a condition of the NYSE obtaining immunity from the antitrust laws for its disciplinary actions. The NYSE subsequently enacted these procedural requirements into its constitution; they include each of the *Goldberg* procedural ingredients except right to an attorney, right to see opposing evidence, and a decision based on the record. See NYSE Constitution Art. XIV, CCH NYSE GUIDE § 1664 (Oct. 1972); note 172 *infra*.

government decision making and has measured the interests at stake and the procedures employed against what appear to be vague and shifting standards. However, while not expressly adopted by the Court, the criteria of fairness, efficiency, and satisfaction to participants emerge inferentially from the opinions.³ These three criteria reflect well-known legal and social science measures of the appropriateness of official behavior that, once identified, offer basic measures of performance that are without substantial controversy.⁴

The controversy occurs when one seeks to apply these criteria in particular contexts. When it comes to termination of welfare benefits (*Goldberg* itself), an impressive array of procedures is required by due process, and informal adjudication is virtually converted into a trial-type hearing.⁵ Outside the welfare area, however, the requirements of procedural due process are interpreted differently, depending upon a judicial application of the three criteria implicit in the *Goldberg* cases to the facts at hand. For example, prison and school disciplinary "hearing" requirements bear only slight resemblance to the elaborate procedural model imposed by *Goldberg*.⁶ Other examples of procedural choices within the spectrum abound in the many Supreme Court, circuit court, and district court opinions that have interpreted *Goldberg*.⁷ These opinions exhibit the common difficulty of having to apply the general *Goldberg* criteria in specific situations. What is lacking is a theory for refining the criteria and establishing a methodology for applying them to evaluate informal adjudication procedures in particular cases.

³ In *Goldberg*, the fairness and efficiency criteria are implicit in the Court's concern with preventing an "erroneous termination" of important benefits, which, given the prospect of the terminated recipient's "brutal need," justifies a potential drain on the public fisc. Justice Brennan's majority opinion also reflects concern with the satisfaction criterion when he observes that adding pretermination procedures to the welfare system "guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity." 397 U.S. at 265. Two of these criteria, satisfaction and efficiency, are the province of the social sciences (sociology, psychology, and economics), while the third, fairness, is primarily within the province of the law. It is assumed here, however, that all three criteria are, or should be, relevant to legal analysis.

⁴ Fairness implies procedural justice; efficiency, optimum resource allocation; and satisfaction, participant trust in the process. See Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591-93 (1972), where the three criteria are identified as accuracy, efficiency, and acceptability.

⁵ The *Goldberg* majority does not require "a complete record and a comprehensive opinion" at the pretermination stage. 397 U.S. at 267. As to what the Court does require, see text and note at note 80 *infra*. For a useful checklist of required and excluded procedures, see K. DAVIS, *ADMINISTRATIVE LAW: CASES-TEXT-PROBLEMS* 288 (5th ed. 1973).

⁶ See *Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1974).

⁷ By informal count over 20 Supreme Court, 100 circuit court, and 250 district court opinions have cited and dealt with *Goldberg* as of January 1976. Several of these opinions will be discussed in the pages that follow.

Post-*Goldberg* cases indicate that there is room for considerable experimentation in designing agency procedures in many areas where judicial constraints on informal adjudications have not yet been clarified. Indeed, the subsequent opinions in *Arnett v. Kennedy*⁸ and *Mathews v. Eldridge*⁹ have raised speculation about the continued commitment of a majority of the Supreme Court to the basic propositions underlying *Goldberg* itself. In *Arnett*, the Court may have reduced the procedural due process entitlement to the vanishing point by approving a pretermination procedure that allowed a supervisor accused of improper conduct by a nonprobationary civil servant to determine whether the accusations were sufficiently unwarranted to justify the employee's dismissal. In *Eldridge*, the Court distinguished *Goldberg* and approved mere written pretermination procedures, rather than the full arsenal of *Goldberg* ingredients, for Social Security Act disability benefits. Whether the principles of *Goldberg* are perishing is not yet clear, but certainly the Court has shown it intends to preserve flexibility in the designation of particular procedural ingredients. In *Wolff v. McDonnell*,¹⁰ for example, the majority reemphasized:

We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."¹¹

This desire for principled flexibility reinforces the need to develop criteria and establish a methodology for applying them. So long as *Goldberg* concerns play a role in the choice of procedures in the informal adjudication context, this task will occupy much of the courts' time.

Since the phrase "informal adjudication" describes about 90 percent of what the government does with respect to the individual,¹² it is fair to say that the *Goldberg* cases, numerous as they are, have only scratched the surface of informal governmental action. It

⁸ 416 U.S. 134 (1974).

⁹ 424 U.S. 319 (1976).

¹⁰ 418 U.S. 539 (1974).

¹¹ *Id.* at 560, quoting *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

¹² See Gardner, *The Procedures by Which Informal Action Is Taken*, 24 *Ad. L. Rev.* 155, 156 (1972).

seems likely that a wealth of informal adjudications occur daily in a procedural framework that is untouched by *Goldberg*-inspired considerations of procedural due process. This supposition raises several inquiries of importance to courts and administrators. To what extent do informal adjudications in fact reflect principles of the *Goldberg* procedural due process revolution? In what respect are the procedural ingredients of *Goldberg*, or some of them, appropriate or inappropriate in these kinds of informal adjudications? In what way might satisfactory alternatives to *Goldberg* procedures be made available? Each of these inquiries builds to the ultimate question of what methodology should be used to determine whether a procedural framework meets the underlying criteria of fairness, satisfaction, and efficiency implicit in *Goldberg* and its progeny.

This study endeavors to answer these questions theoretically and in terms of an empirical analysis of informal adjudication procedures. The organization is as follows: Part I presents the beginning of a theory for determining and applying criteria of good informal procedures; the discussion is largely deductive and intuitive, but it draws from selected legal and social scientific studies and hypotheses. The core of the article is in Part II, where an empirical survey of the informal procedures utilized by four federal agencies in four functional categories is described and analyzed. Part III assesses the data collected in Part II in terms of the theories and postulates of Part I; an attempt is made to integrate theory and practice in such a way as to create an overall scheme for determining appropriate and constitutional procedures across a variety of informal adjudicative settings. Part IV makes specific recommendations for future research and draws conclusions from this study.

I. A PRELIMINARY THEORY OF INFORMAL ADJUDICATION PROCEDURES

Few would disagree with the proposition that all government decision making should employ procedures that produce fair and accurate results, that are seen as doing this by those subjected to the process, and that do so at the lowest system cost. If it were possible to maximize each of these goals in every case the ideal administration would be at hand. Unfortunately, it is rarely possible to do so in any particular case, let alone across the system as a whole. Ironically, the tendency is for the conflicts among these goals to intensify when the government's activity takes on critical importance to the individual.¹³ For example, the concern with fairness and

¹³ Part of the reason for this conflict among criteria stems from the fact that each discipline of the social sciences is inhibited from relating its own measures of individual behavior

satisfaction in the individual Social Security disability determination must be tempered by the realization that the efficiency of the disability decision system is currently undermined by an overwhelming backlog of undecided cases.¹⁴ The difficulty is that there is no available theory for deciding which one or ones among the criteria should play a subordinated role. Each commands respect as a fundamental measure, and that makes the task of reconciliation in particular contexts formidable indeed. A theory of reconciliation becomes, in essence, a basic guide to the way government authority over the individual in the context of informal adjudication is to be legitimated in our society. Its importance can hardly be overstated.

As a matter of Anglo-American culture, the historically favored system for dispute resolution is the adversary system, where control is reserved to the litigants, and the decision maker assumes a passive role. But there has long been a tension between the adversary system and large-scale government decision making. The adversary system reflects the noninterventionist values of the early American experience that were premised upon a distrust of government power. Roscoe Pound, writing in 1913, captured this spirit well.

[T]he chief problem of the formative period of American law was to discover and lay down rules; to develop a system of certain and detailed rules which, on the one hand, would meet the requirements of American life, and, on the other hand, would tie down the magistrate by leaving as little to his personal judgment and discretion as possible, would leave as much as possible to the initiative of the individual, and would keep down all governmental and official action to the minimum required for the harmonious coexistence of the individual and the whole. This problem determined the whole course of our legal development until the last quarter of the nineteenth century.¹⁵

to those of other disciplines. Thus, the economist's maximization principle has not been coordinated with the sociologist's or psychologist's satisfaction principle in any effective way. Much interdisciplinary theorizing needs to be done if problems like those addressed in this article are to be solved by the social sciences. A notable attempt to integrate the social sciences through the discovery of a "meta-ethics" common to economics, sociology, and psychology (as well as political science) has been undertaken recently by Professor Duncan Macrae. Macrae advocates union of the social sciences within the framework of policy analysis. "The social sciences aim at reasoned understanding and prediction of human behavior. They aim to supplement or replace intuition, which is particularly important in anticipating the consequences of large-scale policy choices." D. MACRAE, *THE SOCIAL FUNCTION OF THE SOCIAL SCIENCES* 29 (1976). This is the kind of approach that could improve understanding of the procedural policy choices described here.

¹⁴ See *Hearings on Delays in Social Security Appeals Before the House Ways and Means Comm.*, 94th Cong., 1st Sess. 37 (1975) (referring to a 100,000 case backlog).

¹⁵ Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 306 (1913).

The shortcomings of this kind of procedural approach in the context of twentieth century government social programs are not difficult to discern. Dean Pound, for example, was writing to legitimate the magistrate's court of the City of Chicago, which provided the magistrate with the power to control litigation in the manner of the continental inquisitor. The need for this control was due to the "accumulated mass of litigation" generated by the "conditions of urban life."¹⁶ Today the concern is with mass justice in the social welfare area. But the question remains the same: to what degree should the adversary system be modified or supplanted in order to meet the decision-making needs of the modern state?

Adversary procedures have typically been reserved for the formal side of the dispute resolution process, whether it be criminal, civil, or administrative. In federal administrative decision making, the Administrative Procedure Act (APA) supplies the requisite adversary formality for "formal" rulemaking and adjudication in sections 554, 556, and 557. But administrative decision making labeled here as informal adjudication is largely unaddressed procedurally by the APA,¹⁷ even though those decisions have long been considered "truly the life blood of the administrative process."¹⁸ When it comes to designating procedures for informal adjudication as a matter of due process, or of prudent agency practice in anticipation of judicial intervention, the adversary system and the formal adjudication side of the APA often provide conclusive analogies. But there is no reason to mimic adversary model solutions automatically, es-

¹⁶ *Id.* at 312. Pound's article contains valuable insights, which are entirely relevant today. Of the role of judges in "petty causes" he notes: "Thus the judge cannot be a mere umpire. He must actively seek the truth and the law, largely if not wholly unaided." *Id.* at 319. See also text at notes 71-72 *infra* (Judge Friendly's views on inquisitorial alternatives). Pound's article was instrumental in the development of informal decision making at the state and municipal levels, such as small claims and magistrates courts. See W. HAEMMEL, CONSUMER LAW 301 (1975). A few years earlier Pound had shocked the established lawyers of the day by addressing the American Bar Association on the inefficiencies and inequities of the adversary system of justice or, as he called it, the "sporting theory of justice." Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906), reprinted in abridged form, 57 A.B.A.J. 348 (1971). Recently the ABA convened to honor Pound's 1906 speech on its 70th Anniversary. Significantly, the Chief Justice of the United States keynoted the convocation by endorsing many of Pound's insights into nineteenth century jurisprudence and his inquisitorial system alternatives. Burger, *Agenda for 2000 A.D.—Need for Systematic Anticipation*, excerpted in *The Direction of the Administration Justice*, 62 A.B.A.J. 727 (1976).

¹⁷ The only "informal" procedural formulation relates to informal rulemaking in section 553(c), which allows rules to be promulgated after notice, an opportunity for public written or oral comment, and a concise statement of basis and purpose. See also text and note at note 228 *infra*.

¹⁸ ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 35 (1941).

pecially in the mass justice area. What is increasingly needed are some minimum procedural guidelines that ensure fairness without unduly encumbering the decision system.¹⁹ The Government has long employed investigation, inspection, testing, examination, and conference procedures without reliance upon the adversary model,²⁰ and without any apparent adverse consequences. This experience should indicate that even though the adversary solution is instructive, its use should be at most a presumptive one, rebuttable upon a showing of "better" procedural solutions. If agencies were encouraged to explore system alternatives as well as procedural modifications within the adversary system, they might be better able to evaluate *how much* adversariness is necessary in a particular situation and *when* the adversary system should be turned to at all. But a systematic approach to these questions is currently lacking, and it remains a major task to develop a theory of good informal procedures that can examine methods of selecting procedural ingredients in the adversary context and conditions under which it may be appropriate to depart from the adversary model altogether. Such a theory might proceed by deciding whether the presumptive criteria of fairness, efficiency, and satisfaction can be of assistance in designing guidelines for the selection of good informal adjudication procedures.

A. Fairness and Efficiency: Valuing Interests

Is there an optimum level of fairness? The question, which presupposes a balance of benefits and costs, is a disturbing one,²¹ but it is nonetheless being asked (and answered) in many informal adjudication cases. The courts are concerned with the importance of the particular government benefit to the individual and with the costs to the Government of being denied summary disposition and of having to provide the desired procedures. In *Goldberg*, the importance of continued welfare payments pending a decision on eligi-

¹⁹ In *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975), the Court appeared to be searching for such a procedural minimum when it required the "rudimentary precaution" of "an informal give-and-take between student and disciplinarian, preferably prior to suspension from school." 419 U.S. at 581, 584.

²⁰ See *K. Davis, supra* note 5, at 290-91. See also *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975) (an unlimited right to retake Georgia bar examination is an acceptable due process alternative to review of failing grades).

²¹ One thoughtful commentator has suggested that this kind of utilitarian interest balancing (cost to government outweighing individual benefits) "is difficult to reconcile with the traditional view that the Bill of Rights limits the power of government to pursue even policies which benefit the majority." Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1525 (1975).

bility was emphasized by the individual's "brutal need" and "immediately desperate" situation.²² After this characterization, the government's interest in summary procedures to protect the "public fisc" receded in importance. In other situations, however, the importance of the issue to the individual is less and the government interest in summary procedures will be accorded commensurately greater weight. In these circumstances, the balance shifts away from elaborate procedural protections. This occurred in *Arnett v. Kennedy*,²³ where the Supreme Court approved a civil service procedure that granted a federal employee only the minimal adversary procedures of notice, written comments (answer and affidavits), and a statement of reasons before dismissal for cause.²⁴ Distinguishing *Goldberg*, the Court approved these procedures as a matter of due process because of the employee's less severe income deprivation (he could presumably get another job or go on welfare) and the Government's interest in reducing substantial overhead costs pending a full posttermination hearing.²⁵

Striking the balance between benefits (to the individual) and costs (to the system) requires the court to value opposing interests on a case-by-case or class of cases basis. It would seem inevitable, unless each case is to become an endless inquiry into personal idiosyncrasies, that broad decisions have to be made about the value and importance of particular government benefits to affected individuals.²⁶ A social scientist would be reluctant to make such large-scale value judgments that ignore individual differences and involve interpersonal comparisons of utility that are necessarily subjective.²⁷ But this reluctance, while understandable as a scientific matter, is too often an impermissible luxury for judges and administra-

²² *Goldberg v. Kelly*, 397 U.S. 254, 261, 264 (1970).

²³ 416 U.S. 134 (1974).

²⁴ 5 U.S.C. § 7501(b) (1970).

²⁵ 416 U.S. at 155; *id.* at 169 (Powell, J., concurring). The absence of "brutal need" was also used by the Court in *Mathews v. Eldridge*, 424 U.S. 319, 339-43 (1976), to distinguish *Goldberg* in denying a full-blown pretermination hearing to an applicant for Social Security disability payments. While *Eldridge* had far fewer opportunities than *Arnett* to find alternative sources of income (welfare based on disability—*viz.*, Supplemental Security Income—was not available, and job opportunities were apparently nonexistent), the Court nonetheless found his condition less severe than *Goldberg's* because of the potential availability of state and local assistance and food stamps. *Id.* at 342 n.27.

²⁶ Although the judgments are not made in terms of each individual's interests, but rather by some average of interests for a particular class of beneficiaries, see Note, *supra* note 21, at 1522, at some point the interest in providing additional procedural ingredients may well become an individual one. For example, cross-examination of a witness will frequently be considered only after a showing of particularized prejudice. See note 19 *supra* & note 39 *infra*.

²⁷ See, e.g., K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 3-6 (1951).

tors involved in day-to-day decision making. It is the fate of these policy makers to act on the best data available at the time,²⁸ which may consist largely of their untutored notions about the relative importance of government benefits to different classes of individuals.

Obviously common sense valuations of individual benefits received from government activities are rough approximations, and attempts made to refine the process deserve attention. Judge Friendly, for example, has offered a hierarchy of government action ranked in terms of seriousness to the individual that is particularly useful here.²⁹ He would first distinguish between action that changes the individual's existing status and that which denies a request or benefit.³⁰ In the former category he ranks, in order of seriousness, (1) actions depriving an individual of liberty (parole revocation, civil commitment, deportation); (2) revocation of professional licenses; (3) termination of public benefits (welfare, school, housing); and (4) reduction of those public benefits. While one might disagree with certain rankings, such a valuation scheme can become an indispensable first step to selecting appropriate procedures for a particular class of cases. It would seem that government departments or agencies that undertake to rank programs in terms of these interests are bound to refine their awareness of the appropriate procedural ingredients for various informal adjudications.³¹

²⁸ See generally Lindblom, *The Science of "Muddling Through,"* 19 PUB. AD. REV. 79 (1959); notes 222, 225 *infra*.

²⁹ See Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1295-304 (1975).

³⁰ *Id.* at 1295-96. The Court has long distinguished for due process purposes between termination of existing benefits and denial of future benefits. See generally B. SCHWARTZ, *ADMINISTRATIVE LAW* 238-43 (1976).

³¹ Further agency investigation along these lines could include an empirical study of existing procedures to determine client satisfaction. Such a study might inquire as follows: Are there a significant number of requests for additional procedures, and complaints about existing informal adjudication schemes? If there are internal review procedures, how many initial informal decisions reach that level, are then overturned, and for what reasons? Have there been a significant number of judicial decisions relating to particular procedures, and what have the courts advised? While some courts have mandated specific procedural ingredients as a matter of due process, *Goldberg* being a prominent example, many courts (including the Supreme Court in other cases) have preferred to let the agency work out satisfactory procedures. For arguments against a federal judge "evolving a code of administrative procedure" in particular cases, see Friendly, *supra* note 29, at 1301-02; Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 25-26 (1975).

If these kinds of inquiries are made in the context of procedural rulemaking, a forum is established that would serve to enlighten the agency further about the choice of informal procedures. Comments on proposed rules could be received directly from those affected by the system and their representatives. The advantage of employing this approach is that both the agency and the courts would be better informed about the need for procedural ingredients from the clients' perspective. While an agency need not follow section 553 procedures for

B. Fairness and Efficiency: Valuing Procedures

The balancing process employed to value individual interests in government programs has been used as well to value the need for each of the procedural ingredients traditionally attaching to adversary decision making. In *Frost v. Weinberger*,³² Judge Friendly assessed the Supreme Court's opinions since *Goldberg* and concluded,

The Court's decisions can fairly be summarized as holding that the required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and other adverse consequences of affording it.³³

This balancing test does not, of course, instruct as to what procedural ingredients are necessary in each case, and that remains the primary challenge. While there are circumstances where the balancing test might yield an individual interest so insignificant that no procedural ingredients will be called for,³⁴ most cases should be able to set limits upon the number and nature of the procedural ingredients that can be balanced away. To discover this informal procedure floor, it is instructive to note that the "informal" procedure reference in the APA—section 553(c), relating to informal rulemaking—provides that rules may be enacted after notice, an opportunity for written or oral public comment, and a concise statement of the reasons for issuance.³⁵ This three-ingredient formulation, while

interpretative or procedural rules, there is no reason it cannot do so, and on occasion this has been done to good effect. See notes 104, 228 *infra*.

³² 515 F.2d 57 (2d Cir. 1975). The Court approved the prereduction procedures under the Social Security Administration's survivor benefit program.

³³ *Id.* at 66. See also Friendly, *supra* note 29, at 1278.

³⁴ In *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 866 (1961), the Court balanced away entirely a government employee's right to procedural ingredients before being excluded from working at a military installation. The logic of the opinion is confined to those seemingly rare circumstances where the private interest in other job opportunities was unaffected by the government action. Cf. *Bishop v. Wood*, 96 S.Ct. 2074 (1976).

³⁵ It should be noted that the courts have seen section 553(c) informal rulemaking procedures as expandable in particular cases. See, e.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631 (D.C. Cir. 1973) (allowing a limited right to cross-examination in informal rulemaking). See generally Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 230-42 (1974); Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975). A similar approach appears to be developing in terms of informal adjudication. One court has held that prereducement oral hearings for overpayments under the Social Security Act should not be required "where the factual disputes are as well suited to resolution by documentary proof and written submissions as by oral hearings." *Mattern v. Weinberger*, 519 F.2d 150, 164 (3d Cir. 1975). This approach tends to support Professor Davis's view that procedures ought to be

it pertains to rulemaking, which is not central to the inquiry here, provides a context for identifying the minimal procedural ingredients in informal adjudication. In a sense, informal rulemaking procedures reflect the core ingredients of any procedural system that is at all concerned with the values of fairness, satisfaction, and efficiency. It would be difficult to imagine even a streamlined adversary system that did not provide an individual with notice, an opportunity to comment, and a statement of reasons before adverse action is taken.³⁶

In addition, *Arnett v. Kennedy*, *Mathews v. Eldridge*, and *Frost v. Weinberger* suggest on their facts clear limits upon the use of the balancing process. All three cases review informal procedures that provide the minimal (informal rulemaking-type) procedures of notice, written comment, and statement of reasons.³⁷ There is no indication that the cases would have approved procedures that were more summary than those presented. Moreover, the cases were decided against a backdrop of full hearing procedures that provided posttermination review. The availability of this kind of review is certainly pertinent to the construction of an acceptable floor for the informal due process hearing.³⁸

In order to balance the valuation ledger above this minimum, it is necessary to place the individual procedural ingredients in a hierarchal order similar to the one established for individual interests. Assuming one had each of the *Goldberg* ingredients to work

determined by the existence of adjudicative facts. See K. DAVIS, ADMINISTRATIVE LAW TEXT 160-61 (3d ed. 1972); note 75 *infra*.

³⁶ In certain informal adjudications, notably rights of tenants in federally subsidized housing to contest rent increases, some lower courts have openly accepted a three-ingredient minimum procedure (of notice, opportunity for written comments, and concise statement of reasons) reminiscent of the informal rulemaking model. See *Paulsen v. Coachlight Apartments Co.*, 507 F.2d 401 (6th Cir. 1974); *Geneva Towers Tenant's Org. v. Federated Mortgage Inv.*, 504 F.2d 483 (9th Cir. 1974); *Marshall v. Lynn*, 497 F.2d 643 (D.C. Cir. 1973); *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1973), *rev'g McKinney v. Washington*, 442 F.2d 726 (D.C. Cir. 1970); *Bloodworth v. Oxford Village Townhouses, Inc.*, 377 F. Supp. 709 (N.D. Ga. 1974); *Keller v. Kate Maremount Foundation*, 365 F. Supp. 798 (N.D. Cal. 1972); *cf. Caulder v. Durham Housing Authority*, 433 F.2d 998 (4th Cir. 1970) (hearing on eviction from subsidized housing). Compare B. SCHWARTZ, ADMINISTRATIVE LAW § 71 (1976) with *Langevin v. Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971) (concluding that governmental rent increases involved adjudicative facts).

³⁷ In *Mathews v. Eldridge*, the S.S.A. additionally offered the applicant an opportunity to rebut in writing its tentative determination to deny disability benefits. 424 U.S. at 338-39.

³⁸ In *Fusari v. Steinberg*, 419 U.S. 379 (1974), the Court remanded a challenge to Connecticut's procedures for termination of unemployment compensation for a determination of the effect of reforms designed to assure prompt administrative review. The Court reemphasized this factor in *Mathews v. Eldridge*, where it found the administrative review process, taking an average of one year, excessively slow. 424 U.S. at 341-42.

with, it would be most helpful to know which ingredients are worth more to the individual and which, in turn, cost more for the Government to provide.³⁹ Two recent studies have sought to evaluate procedural ingredients on empirical and theoretical grounds. Professor William Popkin has focused on the value of the right to counsel ingredient in disability claims proceedings.⁴⁰ His conclusions were most enlightening. While a represented claimant was no better off at the investigatory (nonadversary) stage, his chance of success was significantly improved by the presence of a representative at the adjudicatory stage. Moreover, according to Popkin, "[R]epresentatives make greater use of procedures than unrepresented claimants but there was no support for the proposition that they needlessly complicate the administrative process."⁴¹ These conclusions are valuable aids in assessing the benefits and costs surrounding the right to representation. And even though they pertain directly to only one ingredient—a representative—the presence of that ingredient to a large extent determines the use and need of some of the other procedural ingredients.

Judge Friendly's theoretical study also seeks to establish a hierarchy of procedural ingredients. While this study is nonempirical, it gains stature since it is by an acknowledged procedural expert.⁴² Judge Friendly places the highest value on three fundamentals of procedural due process.⁴³ Two of the three (notice and opportunity for written comment)⁴⁴ have already been characterized as due process minimum ingredients. The third is the right to an "impartial" tribunal, which is a term of many meanings in the administrative context.⁴⁵ Ideally the agency should go outside its own organization

³⁹ Here the inquiry is more related to the individual, since depending on the facts of a given case, some procedures such as cross-examination will be of greater or lesser importance. See note 26 *supra*.

⁴⁰ W. Popkin, Report for the Committee on Grant and Benefit Programs of the Administrative Conference of the United States, June 27, 1975 (unpublished final draft). The views are those of the author, not those of the committee or the conference.

⁴¹ *Id.*

⁴² But not necessarily an institutionally unbiased one. See note 53 *infra*.

⁴³ Friendly, *supra* note 29, at 1279-92.

⁴⁴ Judge Friendly makes *written* comments the usual rule, subject to the need for oral comments in particular cases due to the subject matter or the claimant's ability to understand the case. This flexibility tracks the written/oral hearing choice offered agencies in section 553 rulemaking and further highlights the connection between the informal rulemaking model and informal adjudication. See Friendly, *supra* note 29, at 1281.

⁴⁵ Impartiality does not require total independence from the government agency or the presence of an administrative law judge. *Goldberg* required decision maker independence only from the individual action to be decided. 397 U.S. at 271. But *cf.* note 207 *infra*. Of course, the more independence the decider has, the more unbiased the tribunal appears and becomes. As Judge Friendly has observed, "the further the tribunal is removed from the

to find a suitably unbiased judge, but this will often be impractical.⁴⁶ Nevertheless, there should be every incentive to maximize the independence of deciders within each agency by insulating them from contact with enforcement and investigatory personnel. If the appearance and reality of bias is minimized, not only will two of the essential measures of good procedure—satisfaction and fairness—be enhanced, but in the long run the agency can maximize the efficiency measure as well. This is because, as Judge Friendly suggests, a more impartial tribunal may reduce the need (and perhaps the demand) for additional procedural ingredients such as confrontation, a transcript, and oral presentation.⁴⁷ These additional ingredients would be particularly wasteful if, as it postulated, the satisfaction and fairness measures could be met at lower cost by using a more impartial decider. It may be advisable, then, to consider impartiality (above the *Goldberg* impartiality minimum)⁴⁸ as a shifting fourth ingredient that, when present, can act as a surrogate for other ingredients. In this way, even if the courts will not directly require substantial impartiality from agency deciders, the presence of this factor in the particular case may change the mix of other ingredients required by procedural due process.

Judge Friendly is dubious about the propriety of the other procedural ingredients (such as a right to know opposing evidence, to call witnesses, to cross-examine, and to be represented by counsel) in the informal adjudication context. He points out the tendencies of these ingredients to expand controversies and suggests that a “just decision” might more efficiently be obtained by abandoning the adversary system and employing the continental inquisitorial system.⁴⁹ Since this alternative has frequently been proposed in

agency and thus from any suspicion of bias, the less may be the need for other procedural safeguards; while all judges must be unbiased, some may be, or appear to be, more unbiased than others.” Friendly, *supra* note 29, at 1279.

⁴⁶ Friendly, *supra* note 29, at 1279, 1289.

⁴⁷ *Id.*

⁴⁸ See note 45 *supra*. The Court’s views on decider impartiality have arguably retrenched in *Arnett v. Kennedy*, 416 U.S. 134 (1974), and *Hortonville Joint School Dist. v. Hortonville Educ. Ass’n*, 96 S. Ct. 2308 (1976). See text at notes 8-9 *supra*. In the *Hortonville* case the Court approved of a school board disciplinary hearing against striking teachers presided over by the same board members who had tried unsuccessfully to negotiate a collective bargaining contract. The Court seemed clearly to employ a procedural balancing of interests test to the question of decider impartiality. “A showing that the Board was ‘involved’ in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power.” 96 S. Ct. at 2316. Compare *Withrow v. Larkin*, 421 U.S. 35 (1975), and *Morrissey v. Brewer*, 408 U.S. 471 (1972), with text and note at note 207 *infra*.

⁴⁹ Friendly, *supra* note 29, at 1289.

mass justice informal decision making, it deserves further examination here.

C. Satisfaction and Fairness: Inquisitorial or Adversary Solutions

Informed observers of the administrative process have lately reflected upon our inability to develop alternatives to the adversary model in situations where trial-type procedures appear ill-suited and even counterproductive;⁵⁰ and Judge Friendly has suggested that part of our resistance to "inquisitorial" alternatives may stem from the pejorative connotation of the term itself.⁵¹ While many agree that the continental system has lessons for administration in this country, the difficulty has been to determine when and where such procedures are appropriate. The most progress in this direction has been in the area of scientific "fact finding" in rulemaking,⁵² but the application of inquisitorial, or investigatory, techniques to informal adjudication is the subject of continuing professional debate.⁵³ What is needed is a theory for deciding when inquisitorial solutions are better than adversary ones.

In a behavioral science-legal study by Professors Thibaut and Walker, such a theory is offered.⁵⁴ The authors conclude generally that by satisfaction and fairness measures, the adversary system offers a "just procedure" that is "clearly superior" to the inquisi-

⁵⁰ Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972); Cramton, *supra* note 4; Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966). For earlier expressions of similar concerns, see W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 711-18 (5th ed. 1970).

⁵¹ Friendly, *supra* note 29, at 1290. As a neutral alternative, Judge Friendly offers the term "investigatory." *Id.* Professor Schwartz identifies the outstanding characteristic distinguishing inquisitorial procedure from adversary procedure to be the assumption by the judge of an active role in developing the case. B. SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD* 133 (1954). He sees the inquisitorial type of procedure as operating more "efficiently" and "fairly" than the adversary solution in mass justice situations. B. SCHWARTZ, *ADMINISTRATIVE LAW* 254 (1976).

⁵² See Boyer, *supra* note 50.

⁵³ Compare Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965), with Handler, *supra* note 50. It is not surprising that judges might be the ones most concerned about inquisitorial alternatives to the adversary model because they are firsthand observers of the inefficiencies of the present system. Moreover, federal court judges, with increasing use of the pretrial conference technique, are learning how to assert more control over the adversary process. Judge Friendly and Judge Frankel, two of our most scholarly federal judges, are suggesting major shifts in control when they pose inquisitorial alternatives to traditional adversary solutions, whether or not such shifts are described as investigatory. See Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1034 (1975); Friendly, *supra* note 29.

⁵⁴ J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975) [hereinafter cited as THIBAUT & WALKER].

torial system.⁵⁵ Their core finding is that a just procedure is one where the locus of control remains in the parties.⁵⁶ It is this insight that differentiates the inquisitorial from the adversary system.

The most obvious differences between adversary and inquisitorial models reflect the basic distinction in the locus of control as between the disputants and the third party. In the adversary model each party to the dispute is usually represented by an openly biased advocate who is charged with exercising his party's control while seeking to establish the validity of his or her contentions. The roles of adversarial attorneys are therefore somewhat anomalous: overtly they act in contentious support of conflicting claims, yet they constitute a tacit coalition to maintain a high degree of disputant control over the process. In an inquisitorial system, however, either there are no attorneys at all or attorneys are assigned the primary responsibility of assisting the decisionmaker in developing his decision.⁵⁷

Thibaut and Walker derive the superiority of the adversary system from a series of laboratory experiments which simulated various institutional modes of conflict resolution. The subjects (who were assigned roles as participants and observers) were tested to reveal what form of procedures they favored and for what reasons. The results indicate that a fair or just procedure is seen as one that combats any bias decision makers import into the resolution process.⁵⁸ And the adversary system was found to optimize the condition of fairness or justice, in that it would be chosen by those in John Rawls's *A Theory of Justice* who are behind the veil of ignorance.⁵⁹

These findings lead the authors to speculate that the right to a hearing in the context of informal adjudication should include ingredients of the adversary model, even under conditions involving a heavy caseload.⁶⁰ While the authors have admittedly made no

⁵⁵ *Id.* at 1-2, 118.

⁵⁶ *Id.* at 22-27.

⁵⁷ *Id.* at 23.

⁵⁸ *Id.* at 41-53. See also Lind, Thibaut & Walker, *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decisionmaking*, 62 VA. L. REV. 271 (1976).

⁵⁹ *Id.* at 102-16. See also Thibaut, Walker, La Tour & Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974); J. RAWLS, *A THEORY OF JUSTICE* 18-19, 136-42 (1971).

⁶⁰ THIBAUT & WALKER, *supra* note 54, at 122-24. The ingredient particularly emphasized is an attorney or representative, which the authors see as a central factor contributing to satisfaction with the process. See also text at notes 40-41 *supra* (discussing the empirical conclusions of Professor Popkin on the value of representatives at the hearing stage).

findings based on the efficiency criterion,⁶¹ their conclusions with respect to satisfaction and fairness would appear to contradict those long held by procedural scholars from Roscoe Pound to Henry Friendly. Hence these conclusions must be given careful critical consideration.⁶² For the purposes of the present inquiry, however, much of what Thibaut and Walker conclude can be substantially reconciled with the notion of minimal adversary due process (notice, right to comment, statement of reasons) offered earlier as a basic condition of informal adjudication.⁶³ The authors acknowledge that simple adversary procedures (as the three ingredients certainly are) can be adequate to achieve procedural justice. The only additional ingredient the authors would see as indispensable is the right to a representative, since it is that ingredient which most distinguishes the adversary system from the inquisitorial.⁶⁴

Moreover, the Thibaut-Walker research suggests an approach to deciding when the inquisitorial model might be preferable to the adversary one in the informal adjudication context. The authors found some situations where subjects preferred an inquisitorial, control-in-the-decision-maker, procedural solution. They conclude that "autocratic procedures are likely to be sought by men in hurried pursuit of common goals, who agree on a standard (a credo or an ideological canon) that can be quickly applied to resolve disputes in belief."⁶⁵ The operative elements of this exception to the usually preferred adversary solution are: correspondent interests, existing standards, and time pressure.

The first element, correspondent interests, suggests "conceptual" disputes, where both parties have an interest in a correct or "better" solution. This may be the case when the dispute centers

⁶¹ THIBAUT & WALKER, *supra* note 54, at 123. The authors suggest, however, that their satisfaction-fairness finding might be relevant to efficiency measures if the satisfaction criterion is seen as a reflection of the need to internalize the social costs of procedural systems.

⁶² One criticism is that the authors place their subjects in the posture of litigants, as plaintiffs, defendants, or observers of a civil or criminal case. Conceivably, if the subject matter is less inherently litigious, as many administrative decisions tend to be, the responses of the subjects might be less oriented to the adversary solution.

⁶³ See text and notes at notes 19, 35-37 *supra*.

⁶⁴ See text at note 57 *supra*. The authors provided their laboratory subjects with representatives, so the question of inability to afford counsel was not explored. While this makes the research less relevant to the real world problems of providing representation, the issue of a right to appointed counsel has been addressed as a component of informal adjudication only in the parole hearings context. See *Wolff v. McDonnell*, 418 U.S. 539, 569-70 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778, 787-91 (1973). See also *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

⁶⁵ THIBAUT & WALKER, *supra* note 54, at 16. To take a simple example, one might consider a sports referee to be an ideal autocrat, from the perspectives of both the participants and the observers.

on matters in the scientific realm, as when researchers are testing hypotheses against established standards of truth. But this kind of relationship may also be present in informal adjudications surrounding certain kinds of public grants and benefits.⁶⁶ Even in the social welfare area, where much contention and dissatisfaction appears to arise, the Government's interest in providing those eligible with the appropriate level of benefits suggests some correspondence of interests. Since the role of Government in Social Security disability determinations, for example, is not to allocate limited resources among a few of many eligibles, there are no necessary winners or losers fighting over a fixed sum set aside for disability purposes. In other granting or licensing programs, however, the Government limits the award to one of many deserving applicants. Here interest conflicts among potential beneficiaries and the Government are heightened. Adversary procedures (even including in some situations the comparative hearing process)⁶⁷ are more prevalent in these situations and, by the fairness and satisfaction standards by Thibaut and Walker, would be the preferred institutional approach.

A second condition identified for acceptable inquisitorial solutions is the presence of agreed-upon standards. Lack of clear standards is a common feature of informal adjudication, and for this reason the plea has frequently been made⁶⁸ for agencies to establish standards through rulemaking as a means of checking unfettered discretion.⁶⁹ The Thibaut-Walker research appears strongly to support these reforms. Moreover, if an agency is shown that the formulation of standards can legitimate certain inquisitorial procedures in informal adjudication, the agency's incentive to adopt standards is

⁶⁶ Conceivably, when the matter involved is grants for scientific research, such as National Science Foundation or National Institute of Health grants, the Government tends to act as an autocrat with the tacit permission of the applicants, since in theory both the Government and the applicants are part of a community of scholars working toward the goal of funding the best research applications. To the extent that this theory holds true, the interests of the decider and the applicants can be viewed as correspondent.

⁶⁷ The obvious examples here are the awarding of broadcast licenses and airline routes. *See, e.g.,* *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). But the comparative hearing process can logically be extended far beyond those categories. These situations differ from the scientific grant context (NSF or NIH grants), *see* note 66 *supra*, for even though there is a limited grant pie to be divided in those situations, the nature of scientific inquiry is such that clear choices, understood by all participants, can often be made among applications. *But cf. Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972) (Freedom of Information Act claim for disclosure of consultant memoranda supporting denial of plaintiff's NEH application).

⁶⁸ *See, e.g.,* H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962).

⁶⁹ *See generally* K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 55-59 (1969).

presumably increased. If the parties and the decider share an understanding of the operative elements of the decision process, the demand for adversary procedures and the system costs usually connected with their presence are reduced, and the interests served by the efficiency criterion are maximized. The government inspection process is a good example of how this approach works already. When the regulated parties are aware of the inspection standards to be applied and the government inspector is known to apply these standards, the inspector becomes an inquisitor by mutual assent. An adversary process in this context would in all likelihood be cumbersome, costly, and nonsatisfactory, even though the inspection itself is undoubtedly a form of informal adjudication.

The third condition of the suggested inquisitorial exception to the adversary model is that of time pressure. To some extent the presence of time pressure may merely indicate that the parties do not place a high value on the Government's decision. Thus, for example, no one would dispute the park ranger's inquisitorial decision to deny an applicant a back country use permit because of his somewhat subjective conclusion that the park has reached maximum tolerance limits. Most would probably agree that a hearing on that particular informal adjudication would be a procedural fetish. But there are other situations where the interest may be of considerable value to the participants, but nonetheless conditioned by the need for fast decision making. In the granting process, for example, the government agency will frequently have the assignment to disperse funds for particular projects within a fiscal year. This forces the application process into an inquisitorial mold. And the prospective applicants, while they stand to benefit considerably by a favorable award, will in all likelihood share the need for expedited decision making. What is usually sought are quick answers to requests so that alternative plans can be made. Moreover, even though applications are denied initially, they can often be renewed successfully in subsequent years. Thus, if the applicant gets some indication as to the strengths and weaknesses of his application, he may have received a satisfactory response.

D. Fairness, Efficiency, Satisfaction: A Summary

The foregoing analysis suggests two principal methods of reconciling the criteria of fairness, efficiency, and satisfaction in evaluating procedural choices in informal adjudication. The first method is the use of benefit-cost calculations in valuing procedures on fairness and efficiency grounds. Although such calculations are neces-

sarily imprecise, their application can be refined by a careful focus on the seriousness of the interest at stake, the benefit of the particular ingredient to the individual, and the cost to the Government of providing it. This balancing methodology is inevitably controversial, since it postulates a utilitarian solution to the allocation of basic individual rights. Fairness seems to dictate a procedural minimum of notice, comment, and reasons before informal adjudication can be legitimated.

To go below this threshold of adversary due process, it is necessary to turn to a second method of reconciling the three presumptive criteria, suggested by the new behavioral science research of Professors Thibaut and Walker. They offer findings, based on satisfaction and fairness criteria, that confirm the general superiority of adversary procedures.⁷⁰ But their research also isolates a category of informal adjudications where the inquisitorial system is preferable to the adversary. In controversies involving corresponding interests, clear standards, and temporal urgency, the inquisitorial model is both fair and satisfactory. This theoretical contribution is important and timely because it encourages experimentation with nonadversary procedural solutions in contexts like the mass justice area where the cost of providing adversary ingredients is considerable. Judge Friendly has suggested that "reasonable experimentation"⁷¹ with an administrative law judge employing inquisitorial powers of investigation be undertaken in lieu of adversary decision making in some mass justice situations. Both Judge Friendly and Professors Thibaut and Walker are searching for the "just decision";⁷² it is more likely to be found if the experimentation advocated by the former is undertaken along the lines discovered by the latter. With this spirit of investigation firmly in mind, the following empirical survey of informal adjudication procedures is offered.

II. A SURVEY OF INFORMAL ADJUDICATION PROCEDURES

Since there are so many different ways the federal government adjudicates informally, the study, conducted in the summer of 1975, was designed to reduce the observation process to manageable size. In order to establish a controlled setting, four agencies were selected for study in terms of four typical informal adjudication categories. The agencies selected were the Departments of Agriculture (USDA),

⁷⁰ Especially the attorney-representative ingredient. See note 60 *supra*.

⁷¹ Friendly, *supra* note 29, at 1289-91.

⁷² See *id.* at 1289; THIBAUT & WALKER, *supra* note 54, at 1-2.

Commerce, Housing and Urban Development (HUD), and the Interior.⁷³ The categories selected were: (1) grants, benefits, loans, and subsidies; (2) licensing, authorizing, and accrediting; (3) inspecting, grading, and auditing; and (4) planning, policy making, and economic development.⁷⁴ The resulting "four-by-four" study was intended to permit comparison of intra- and interagency behavior in informal adjudication.⁷⁵

The study focused on forty-two individual programs in the four categories, with the bulk of the programs falling in the first two categories.⁷⁶ The study of each program involved direct contact by

⁷³ The four agencies were selected after consideration of several factors. A review of their statutory responsibilities disclosed a rich variety of informal procedural functions. An attempt was made to select agencies with programs both highly visible from a judicial review standpoint (HUD and, to some extent, Interior), and relatively unnoticed (Agriculture and Commerce), in order to get an idea of the extent to which *Goldberg* procedures were judicially, as opposed to internally, inspired. An attempt was made to include agencies with long-established programs (Agriculture and Interior) and with new responsibilities (Commerce—in some respects—and HUD). Finally, it was thought best to stay away from Health, Education and Welfare since that agency's programs have been the subject of considerable study already. See, e.g., D. BAUM, *THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE* (1974); R. DIXON, *SOCIAL SECURITY DISABILITY AND MASS JUSTICE* (1973).

⁷⁴ These categories were selected for several reasons. All of them involve programs that utilize informal procedures (the first one, of course, contains the *Goldberg* program); and they are suggestive of different degrees of conflict between the parties and the decision maker, and different degrees of seriousness to the individual. It should be noted that the fourth category does not involve programs normally associated with informal adjudication; nevertheless it is believed that since the line between policy making and adjudication is often unclear, informal procedural solutions relevant to policy making might be of value in suggesting procedures appropriate for the more typical forms of adjudication.

⁷⁵ It should be noted that the characterization of these programs as adjudicative rests on the assumption that the procedural ingredients remain constant as to all matters resolved within a given program. This approach does not therefore, completely share Professor Davis's view that trial-type procedural ingredients should be applied on a case-by-case basis depending upon the existence of disputed "adjudicative facts." See K. DAVIS, *ADMINISTRATIVE LAW TEXT* 160-61 (3d ed. 1972). This difference in approach stems from the belief that such an inquiry is often unavailing and that it is probably more reliable to identify particular programs as "adjudicative" or "legislative" at the outset and assume that the procedural ingredients are largely fixed for all purposes at that time. See B. SCHWARTZ, *ADMINISTRATIVE LAW* 203-08 (1976). But in order to check the accuracy of that assumption, the survey asked the relevant agency personnel whether the procedural ingredients contained in their regulations varied when questions of disputed fact had to be resolved. The answer was uniformly negative. See note 77 *infra*, at ¶ 9. But see notes 102, 107, 134 *infra*. It should also be noted that the procedural regulations studied did not generally designate summary judgment or other expedited decision alternatives which would allow procedures automatically to vary according to the presence or absence of disputed issues of fact. Compare the Florida APA, FLA. STAT. ANN. § 120.57 (Supp. 1976-77), which provides for formal, trial-type proceedings when there is a "disputed issue of material fact" and informal proceedings (notice, written comment, and written explanation) in all other cases.

⁷⁶ Seventeen programs fell within category one; twelve within category two; five within category three; and six within category four. Two programs resisted categorization (USDA

the author with responsible agency personnel, usually government lawyers with backgrounds in the particular programs and their attendant procedures. Each contact person was provided with a written request for information (a procedural "checklist") which was further explained in follow-ups both in person and by telephone.⁷⁷ As the data requested were received, they were compiled according to the checklist paragraphs.⁷⁸ From these compilations summaries by program and by agency were produced.⁷⁹

One goal of this empirical phase was to determine how much impact emerging notions of procedural due process were having

reparations procedures under the Packers and Stockyards Act, and Perishable Agricultural Commodities Act).

⁷⁷ An informal procedure checklist, dated June 10, 1975, asked for the following information:

1. description of the informal function and all procedural requirements relating to it with references to relevant United States Code and Code of Federal Regulation citations, including any amendments or revisions in the last five years.
2. description of the agency personnel (number, rank, and education) assigned to make the initial determinations.
3. number of individual transactions handled by assigned personnel for each function for the last five years with year by year totals.
4. percentage of individual transactions decided favorably to the claimant/disputant.
5. costs associated with each transaction decided favorably or adversely to the claimant/disputant.
6. description of each informal procedure function in terms of compliance with the ten *Goldberg* ingredients described in text at note 80 *infra*.
7. extent to which the ingredients apply at the pretermination or preaction stage.
8. description of any alternative procedures developed to achieve purposes similar to those outlined in *Goldberg*.
9. extent to which procedures vary when questions of "disputed fact" arise and a description of the manner of procedural variance.
10. percentage of individual transactions decided adversely to the claimant/disputant that were resolved short of the informal hearing stage.
11. description of any internal review mechanism (*i.e.*, record? oral/written presentation?) and number of cases that reach that stage.
12. number of judicial appeals from adverse decisions under each function in the last five years, year by year.

These inquiries were prepared by the author after consultation with the Informal Action Committee and ACUS staff. They were "pretested" through preliminary discussions with the Acting General Counsel of the Department of Agriculture. In each case the checklist was administered personally by the author, and verbal descriptions supplemented the written checklist. Respondents were also encouraged to telephone the author with questions, and many such contacts were made throughout the data collection process.

⁷⁸ Some agencies were not able to provide all of the information requested by the checklist for each of the programs despite follow-up efforts.

⁷⁹ These summaries were distributed in a memorandum dated Sept. 23, 1975 to the Informal Action Committee. They contained information on the substance of each program and its procedural ingredients. These summaries and their supporting data are on file with the author.

upon the process of informal adjudication. To measure this awareness more precisely, the individual procedural ingredients mandated in *Goldberg* were isolated and tabulated with respect to each of the programs studied. *Goldberg* has been described as requiring the following ten ingredients:

1. timely and adequate notice;
2. confronting adverse witnesses;
3. oral presentation of arguments;
4. oral presentation of evidence;
5. cross-examination of adverse witnesses;
6. disclosure to the claimant of opposing evidence;
7. the right to retain an attorney;
8. a determination on the record of the hearing;
9. a statement of reasons for the determination and an indication of the evidence relied on; and
10. an impartial decision maker.⁸⁰

The survey data will be presented first by program in descending order of the number of *Goldberg* ingredients; then, after noting some significant procedural innovations and other practices worthy of comment, the data will be summarized and cross-tabulated.

A. Presentation by Ingredients

The ten *Goldberg* procedural ingredients were present in their entirety in only two of the forty-two programs studied. Both of these programs are administered by the Department of Agriculture, and involve category one (grants, benefits, loans, and subsidies). They

⁸⁰ See *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970). The ten ingredients extracted from *Goldberg* are substantially as identified by Professor Davis. See K. DAVIS, *supra* note 5, at 288. Their enumeration is not uncontroversial, however. Professor Clark Byse, in discussions with the author, has interpreted ingredient 6 to be of no independent vitality (*i.e.*, as a discovery device) but rather to be only the inevitable consequence of providing ingredients 3, 4, and 5. He would, therefore, find only nine *Goldberg* ingredients. This survey, however, proceeds on the assumption that ingredient 6 has separate meaning as a discovery device, and agency procedures will be measured against its requirements. For a quick overview, the following statistical summary should be helpful. Of the forty-two programs studied, two provided all ten *Goldberg* ingredients, five provided nine, two provided eight, four provided seven, one provided six, one provided five, nine provided four, thirteen provided three, three provided two, and two provided none. These totals were taken from operative procedural regulations, which do not exist for the last two programs. See note 134 *infra*. Alternatively stated, the summary by ingredient shows forty of the functions provided ingredient 1, ten ingredient 2, twenty-one ingredient 3, twelve ingredient 4, nine ingredient 5, ten ingredient 6, sixteen ingredient 7, eight ingredient 8, thirty-seven ingredient 9, and thirty-eight ingredient 10.

are disqualification of recipients under the food stamp program,⁸¹ and establishment of agricultural marketing quotas.⁸² Since the food stamp program has social goals similar to the welfare program, it is not surprising that the full *Goldberg* ingredients should be provided.⁸³ On the other hand, the other USDA program presents an unexpectedly elaborate procedural mechanism. USDA currently sets quotas for support payments to farmers who produce tobacco, peanuts, and extra-long staple cotton.⁸⁴ These quotas are set initially by local county committees. Upon receiving notification of his quota, a dissatisfied farmer has fifteen days to apply for review before the local review committee, which is composed of three farmers appointed from the farmer's locality by the Secretary of Agriculture.⁸⁵ The hearing before this committee contains the full *Goldberg*

⁸¹ Under section 4(a) of the Food Stamp Act of 1964, 7 U.S.C. § 2013 (1970), the Secretary of Agriculture is authorized to formulate and administer a food stamp program at the request of state agencies. The agencies submit plans of operation for approval, and, to be approved, the state plan must provide a "fair hearing." Food Stamp Act § 10(e), 7 U.S.C. § 2019(e) (1970). Regulations have been promulgated describing the fair hearing process, 7 C.F.R. § 271.1(o) (1976), and they are issued as part of the USDA Food Stamp Certification Handbook 1974, which is made available to state agencies. The regulations provide for an evidentiary (*Goldberg*) hearing and an appeals review process (which may be substantial evidence or de novo review, depending upon the claimant's request) at the state level before judicial review can be sought in the federal court. 7 C.F.R. § 271.1(o)(9) (1976). Benefits are continued until an adverse decision is rendered at the initial evidentiary hearing. 7 C.F.R. § 271.1(n)(4) (1976). While the regulations also require the states to keep statistics on the number and disposition of administrative appeals, this information had not been collected by the Department and is not available for statistical comparison. The food stamp program had some 18.8 million participants in October 1975, who received benefits of about \$6 billion annually. See N.Y. Times, Oct. 7, 1975, at 25, col. 1.

⁸² Agricultural Adjustment Act of 1938, 7 U.S.C. § 1363 (1970); 7 C.F.R. § 711 (1976).

⁸³ One apparent distinction between welfare and food stamp administration is the fact that the latter still appears to be largely a self-certification process. The *Goldberg* pretermination procedures, which caused HEW to switch from self-certification because of the difficulty in removing those once certified from the rolls, have not resulted in a similar response from USDA or the state agencies. The "low profile" of the food stamp program in many states may, however, be an alternative means of keeping food stamp rolls under control. To offset this lack of publicity, the USDA mandated an "Operation Outreach" program to require state and local agencies to publicize the availability of food stamps. See The Washington Post, Oct. 1, 1975, § A, at 10, col. 1; cf. notes 150-51, 191 *infra* (discussion of EDA "low profile").

⁸⁴ A related program, containing nine procedural ingredients, is agency review of crop subsidy program matters other than quota reviews. See 7 C.F.R. § 780 (1976) (containing all the *Goldberg* ingredients except number 8—determination on the record). The Agricultural Marketing and Stabilization Service has internal review jurisdiction over penalties for false identification of crops or reductions in quotas determined initially by county committees. The Deputy Director of ASCS has handled 1,399 of these informal appeals in the last five years, mostly on briefs and memoranda from the parties. Judicial review of these decisions is limited to questions of law. See *Phillips v. Simpson*, 353 F. Supp. 1139 (E.D. Ky. 1973); 7 U.S.C. § 1385 (1970).

⁸⁵ 7 U.S.C. § 1363 (1970); 7 C.F.R. § 711 (1976) (committee's procedural regulations). There are 754 members of review committees throughout the United States.

ingredients.⁸⁶ Judicial review of the committee's decision, based upon the substantial evidence test, may be had within fifteen days in the United States district court or a state court of record.⁸⁷

Four programs, all administered by the Department of Agriculture, have procedures containing nine of the ten *Goldberg* ingredients.⁸⁸ Two of the programs have every ingredient but number 8 (a determination resting solely on the record of the hearing): reparations proceedings under the Packers and Stockyards Act (PSA)⁸⁹ and under the Perishable Agricultural Commodities Act (PACA).⁹⁰ Both resist classification within the four categories of informal adjudication established at the outset. Essentially, the Department of Agriculture exacts reparations for farmers injured by the unfair conduct of packers, stockyards, and dealers in perishable agricultural commodities (fresh fruits and vegetables). The informal adjudication procedures established by the Department for making these reparations decisions offer useful insights into the informal adjudication process. Of particular interest is the fact that the reparation proceedings under both acts provide for a *Goldberg*-type (nine ingredient) oral hearing *and* a shortened procedure which is much more summary in form.⁹¹ In addition the Department engages in an informal settlement stage before either procedural route is undertaken.⁹² Attorneys in the Department's Office of General Counsel

⁸⁶ Although the local committees constitute an impartial decision maker in the minimal *Goldberg* sense, see note 48 *supra*, there are grounds for questioning their impartiality, since the farmers are essentially regulating themselves by sitting in judgment of each other's quotas. Cf. *Gibson v. Berryhill*, 411 U.S. 564 (1973). Attempts are made to assure impartiality by requiring that members of the review committee do not have any interest in the case before the committee. The committees reverse about 36 percent of the original quota decisions. See notes 207-08 *infra*.

⁸⁷ 7 U.S.C. §§ 1365-66 (1970). This system of quota review has involved an insignificant number of cases over the last five years. Of the many thousands of quotas set during this period, only 466 have been reviewed by the county committees. The USDA estimates that each review costs \$500, which is largely for a transcript, reporter, and per diem for committee members.

⁸⁸ A fifth nine-ingredient function is discussed at note 84 *supra*.

⁸⁹ 7 U.S.C. §§ 209-10 (1970).

⁹⁰ 7 U.S.C. §§ 499b, 499g (1970).

⁹¹ An oral hearing is available if any party requests it, except that under the PACA, the complaint must exceed \$3000 before an oral hearing can be sought. For procedural regulations, see 9 C.F.R. § 202.39-.60 (1976) (PSA); 7 C.F.R. § 47.6-.25 (1976) (PACA). The shortened procedure involves a complaint, answer, and evidence submitted in affidavit form (occasionally depositions are permitted). Briefs are served and cross-filed, and the hearing officer renders a written decision subject to approval by the judicial officer. It has been estimated by random sampling that PACA shortened procedure cases take ten months and oral hearing cases eighteen months. According to PACA personnel, in many cases both sides prefer the shortened procedure. See PACA memorandum to author (undated).

⁹² In fiscal year 1974, for example, the Packers and Stockyards Administration disposed of 595 complaints at the settlement stage; 38 cases were "docketed" for either oral hearing or

are responsible for administering the reparation proceedings. They first investigate all claims, conduct the oral or shortened hearings at field offices, and prepare recommended decisions for the judicial officer,⁹³ who reviews the transcript of the record and renders the final agency decision.⁹⁴ There does not appear to be any articulated policy for excluding the *Goldberg* requirement for a determination on the record from the otherwise elaborate oral hearings, unless it is that the judicial officer who renders the final decision is not the hearing officer and that the order itself is not directly reviewable.⁹⁵

The two other Department of Agriculture programs that provide nine of the *Goldberg* ingredients are in the licensing and inspection categories: revocation or suspension of veterinary accreditations⁹⁶ and withdrawal of approval of markets or facilities under the animal quarantine laws.⁹⁷ In both cases the missing procedural in-

shortened procedures, and of those, 16 were settled or dismissed by consent, 10 were dismissed on the merits, and 16 resulted in reparation awards (4 had been pending from 1973). The Packers and Stockyards Administration spent \$112,000 in administering the reparation program. Complainants received \$2,084,000 in undocketed consent settlements and \$125,000 in docketed settlements. The Perishable Agricultural Commodities Act reparations are also largely settled with 80 percent of all cases being disposed of before a formal complaint is filed and 5 to 10 percent settled prior to the issuance of an order. *See also* INT. REV. CODE OF 1954, § 7463 (providing written procedures yielding nonreviewable determinations for cases involving deficiencies or overpayments not exceeding \$1,500).

⁹³ The judicial officer is not an administrative law judge, but a USDA attorney out of the Office of General Counsel in Washington, D.C.

⁹⁴ The Department is not usually a party in any subsequent court actions.

⁹⁵ Judicial review of reparation orders is obtained by defending against a complainant's civil suit for payment in the district court, where the reparation order is given *prima facie* effect. 7 U.S.C. § 210(f) (1970). There is no jurisdiction in the court of appeals for direct review of a reparation order. *Maly Livestock Comm'n Co. v. Hardin*, 446 F.2d 4 (8th Cir. 1971).

⁹⁶ 9 C.F.R. §§ 160-62 (1976). The USDA veterinarian in charge determines initially whether the veterinary standards were violated. The rules of practice specifically provide for an informal conference between the veterinarian in charge and the accredited veterinarian. 9 C.F.R. § 162.1(d) (1976). Twenty per cent of all cases are disposed of at this conference stage. In the last five years there have been ninety violation cases; five disputants had cases decided in their favor, fifty-five were sent letters of warning, and thirty had their licenses revoked or suspended after a *Goldberg*-type hearing. The hearing is conducted by a designated hearing officer (an attorney in the Office of the General Counsel or in some cases an administrative law judge, who submits a report and record to the Director of the Animal and Plant Health Inspection Service (APHIS) for final decision. There has been one judicial appeal from these final decisions in the last five years. APHIS memorandum to author, Sept. 3, 1975.

⁹⁷ 21 U.S.C. §§ 111-34 (1970); 9 C.F.R. §§ 76.18(b), 78.25(c) (1976). Under the Horse Protection Act the Department approves livestock markets, stockyards, slaughtering establishments, and quarantine facilities and withdraws approval if inspections show a violation of the established standards. These inspections are coordinated by a USDA veterinarian, but the inspections themselves are usually conducted by USDA accredited veterinarians from private practice, who can have their accreditation suspended or revoked for failure to comply with the appropriate USDA inspection standards. *See* Standards for Accredited Veterinari-

redient is number six, disclosure to claimant of opposing evidence, which is precluded by explicit department policy.⁹⁸

There were two programs with eight *Goldberg* ingredients: debarring of "responsibly connected" employees of licensees who violate the Perishable Agricultural Commodities Act from future employment with PACA licensees, a procedure that omits ingredients 2 (confrontation) and 5 (cross-examination);⁹⁹ and issuing permits under the Offshore Shrimp Fisheries Act,¹⁰⁰ a Commerce program that omits ingredients 6 (disclosure of opposing evidence) and 8 (determination on the record). The "responsibly connected" debarment determination has for a long time been made by the Chief of the Regulatory Branch of the Fruit and Vegetable Division, USDA, without any established procedural regulations. Nonetheless, in the

ans, 9 C.F.R. § 161.2 (1976). Approved facilities are inspected periodically by the accredited veterinarians who, when they find deficiencies, explain them to the livestock managers or facility owners and offer an opportunity to correct them. Ninety-five per cent of the inspection violations are corrected in this low cost, nonadversary fashion. USDA estimates each of these inspections costs the government \$100 to \$150. The remaining violations are handled as follows: The facility is given a written notice of noncompliance, with the opportunity to comply or contest within thirty days. Assuming a factual contest over the inspector's report, the Deputy Administrator of APHIS provides a *Goldberg*-type hearing (minus ingredient 6). In the last five years, twenty-five complaints have been handled in this fashion, and ten withdrawals of approval have occurred, none of which resulted in judicial appeals. The inspection process remains the primary means of ensuring compliance with the Act.

⁹⁸ APHIS memorandum to author, Sept. 3, 1975.

⁹⁹ See 7 U.S.C. § 499h(b) (1970). Under PACA a "responsibly connected" person is defined as one "affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation." 7 U.S.C. § 499a(9) (1970). In addition, the USDA has recently been granted the authority to negotiate settlements with PACA licensees who admit to a violation of the Act. 7 U.S.C. § 499(b)(5) (1974) provides:

That any commission merchant, dealer or broker who has violated this subsection may, with the consent of the Secretary, admit the violation or violations and pay a monetary penalty not to exceed \$2000 in lieu of a formal proceeding for the suspension or revocation of license

The law contains no procedures for implementation. The Deputy Director, Fruit and Vegetable Division, USDA, who will administer this provision, expects that about twenty-five cases a year will arise under it. There are no procedures fixed by regulation, but the Deputy Director intends to engage in negotiations which will have procedures that include *Goldberg* ingredients 1 (notice—of settlement offer with suggested penalty amount), 2 (disclosure of evidence—of the violation), 7 (right to retain attorney during settlement negotiations), and 9 (a statement of reasons). The Deputy Director, since he is the instigator of and a party to the negotiations, does not consider himself an impartial decision maker. PACA memorandum to author (undated).

¹⁰⁰ See Offshore Shrimp Fisheries Act of 1975, 16 U.S.C. §§ 1100b to 1100b-7 (1975); 50 C.F.R. § 245.11 (1975). Under the Act the Secretary is authorized to issue up to 325 annual permits for United States-owned vessels to carry on shrimp fishing in the vicinity of Brazil (boundaries having been declared under a prior treaty agreement). 16 U.S.C. § 1100b-1(a) (1975). No denials, revocations, or suspensions of permits have yet occurred under this Act.

cases where the initial determination is questioned,¹⁰¹ the division provides the debarred employee with an informal hearing containing each of the *Goldberg* ingredients except confrontation and cross-examination.¹⁰² Recently, however, the division's procedures for determining who is a "responsible employee" have come under judicial scrutiny, and significant changes may be necessary in the future.¹⁰³

Four programs operated under procedures with seven of the *Goldberg* ingredients: removal of grain inspectors' licenses under the United States Grain Standards Act¹⁰⁴ (a USDA function); de-

¹⁰¹ The division estimates that fifty persons have questioned their status as responsibly connected employees in the last five years; on 50 percent of those occasions (twenty-five times) the questioning resulted in a changed ruling by the chief of the division favorable to the employee. In the remaining twenty-five cases, the eight-ingredient *Goldberg* hearing discussed in the text has been provided. There have been five judicial appeals from these twenty-five final rulings in the last five years. The most significant appeal from a procedural standpoint is discussed in note 103 *infra*.

¹⁰² The division claims that, although confrontation and cross-examination are not permitted, "to date no situation has arisen in which such a procedure has been necessary." PACA memorandum to author (undated).

¹⁰³ In *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), the court construed the section of the Act defining "responsibly connected employee," see note 99 *supra*, as not creating an irrebuttable presumption against an officer of a violating corporate licensee. The court emphasized that when evidence is offered on whether an officer is a responsibly connected employee, "the opportunity of proof must be accorded, and the issue must be resolved on the evidence." *Id.* at 756. While the court did not specifically enumerate the ingredients necessary in such a hearing, one can anticipate that the USDA's current policy denying confrontation and cross-examination in "responsibly connected" cases could be held an intrusion upon the individual's right to offer proof on the issue. However, the PACA division chief anticipates that no more than one challenge a year to the "officer" interpretation will get to the agency review stage. PACA memorandum to author (undated).

¹⁰⁴ 7 U.S.C. §§ 71-87h (1970); 7 C.F.R. § 26.101 (1976). Under the Act and regulations, all grain sold, offered for sale, or consigned for sale by grade in foreign commerce must be officially inspected as the grain is being loaded on the final carrier for transportation abroad. The Act also provides for the voluntary inspection and grading of grain to be sold in interstate commerce. The grain inspections are carried out by USDA-licensed private inspection agencies, and in some cases by state inspection agencies. Licensed grain inspectors are entitled to a hearing before their licenses can be suspended, revoked, or not renewed. 7 U.S.C. §§ 85-86 (1970). But the Act goes on to provide the licensee with the choice of an informal or formal (administrative law judge) hearing. 7 U.S.C. § 87e (1970), provides:

[P]roceedings under section 85 or 86 . . . shall not, unless requested by the respondent, be subject to the administrative procedure provisions in sections 554, 556 and 557 of Title 5.

This unique "procedural option," which was offered in theory by statute in 1968, did not become a reality until 1974 when the Agricultural Marketing Service (AMS) of USDA proposed and adopted informal procedural rules. See Rules of Practice, 7 C.F.R. §§ 26.2001-.2016 (1976). From 1968 to 1974 all licensing proceedings were formal APA hearings since no informal rules had been enacted. The informal rules were promulgated on July 8, 1974 after the Service engaged in informal rulemaking proceedings to determine the public's views. Since July 1974 four informal proceedings have commenced; three resulted in respondent default; and the fourth has not been completed. AMS memorandum to author, July 31, 1975.

barment of lender-builders, appraisers, and attorneys under the Federal Housing Administration¹⁰⁵ (HUD); issuance of permits under the Antiquity Act¹⁰⁶ (Interior); and grants and loans by the Bureau of Indian Affairs¹⁰⁷ (Interior). The first program fails to pro-

The informal proceeding is conducted by a hearing officer who makes written decisions that become final when approved by the Administrator of the Agricultural Marketing Service. This switch from an administrative law judge to a hearing officer was a main aspect of the Service's effort "to expedite the proceeding"; its experience in this regard deserves close watching. *See* 39 Fed. Reg. 25050 (1974) (comments of AMS). The denial of discovery and oral argument are two other attempts to expedite proceedings. Since the experience is so limited, it will take a while to evaluate the time and cost effectiveness of the informal alternative. AMS's current estimates of costs, however, are that they will not vary much from the costs of administrative law judge proceedings.

Licensed grain inspectors at the Port of New Orleans have become the subjects of criminal proceedings for alleged shortweighting and bribery. *See* The Washington Post, Nov. 28, 1975, § A, at 1, col. 1. Those proceedings are not included within this study, but they may in the long run have an impact on the USDA licensing process.

¹⁰⁵ HUD is authorized to debar lender/builders, appraisers, or attorneys from government lending programs if they have violated criminal statutes, the equal employment opportunity executive order, or the Civil Rights Act of 1964, or for other causes of a serious and compelling nature. The procedural regulations provide for an informal hearing before a hearing officer (an attorney from a six-member panel selected by HUD's General Counsel). 24 C.F.R. § 24.10 (1974). The disputant makes an oral presentation, and the hearing officer writes an opinion which becomes final unless revised or modified by the Assistant Secretary. A debarred individual may request reinstatement after six months. At this "rehearing" the same procedures apply except the first hearing officer is replaced by the program director. *See* 12 U.S.C. § 1731a (1970); 24 C.F.R. § 24.10(b)(4) (1974).

¹⁰⁶ 16 U.S.C. § 432 (1970); 43 C.F.R. § 3 (1975). The regulation prohibits the removal of "any object of antiquity" (a man-made object over 100 years old) from federal lands without a permit. The regulation also applies to examination of ruins and excavation of archeological sites (such as the search for Spanish galleons on the outer continental shelf). The permit process is administered by a departmental Ph.D. archeologist. Informal oral or written presentations are allowed, and applications for permits by qualified archeologists are rarely denied.

¹⁰⁷ *See* Indian Financing Act of 1974, 25 U.S.C. §§ 1451-543 (1974); 25 C.F.R. §§ 80, 91, 93 (1974). The Division of Financial Assistance of the Bureau of Indian Affairs (BIA) administers several grant and loan programs: the Indian Business Development program (nonreimbursable grants made to stimulate Indian entrepreneurship and employment), 25 C.F.R. § 80 (1975); the revolving loan fund program, 25 C.F.R. § 91 (1975); and the loan guaranty, insurance, and interest subsidy program, 25 C.F.R. § 93 (1975). These programs have resulted in awards to Indians of over \$325 million in the last five years. Since 1971 the Bureau has made 17,723 supervised loans, totaling \$42 million; 97,661 assisted commercial loans, totaling \$100 million; and 6,726 other assisted federal loans, totaling \$185 million.

Initially, the programs consist of notice, application, evaluation, determination, and explanation stages that are carried out by area BIA superintendents. Notice of program availability is a particularly crucial aspect of the initial procedures since it is the step that largely determines the quality of the applications. This is especially true for the Indian Business Development program. Currently notice is provided at the BIA administrative offices located on each reservation. While this notice may not automatically reach all of the potential applicants, BIA officials believe that such information travels with alacrity throughout the Indian community. Presumably this kind of tribal communication system is not present in other more geographically and politically diverse constituencies.

vide ingredients 3 (oral argument),¹⁰⁸ 6 (disclosure of opposing evidence), and 10 (impartial decision maker);¹⁰⁹ the second fails to provide 2 (confrontation), 5 (cross-examination), and 6 (disclosure of opposing evidence); the third also omits ingredients 2, 5, and 8; and the fourth omits ingredients 2, 4 (oral presentation of evidence), and 5.

One program has procedures with six *Goldberg* ingredients. Retailer disqualification under the food stamp program¹¹⁰ is a USDA function that omits ingredients 2 (confrontation), 4 (oral presentation of evidence), 5 (cross-examination), and 8 (determination on the record). Retailers may be disqualified under the Food Stamp Act for irregularities such as selling ineligible items or discounting stamps for cash. The disqualifications can be for up to three years.¹¹¹ It should be noted that the procedures for retailer disqualifications are considerably less formal than for disqualifications of food stamp recipients.¹¹² The decisions are made by a single official (the Chief, Retailer-Wholesaler Branch, Food Stamp Division) in an effort, according to USDA, to obtain uniformity of treatment for retailers throughout the nation. This official reviews case summaries from local officials who collect information, issue notices of charges, and allow the retailer and his counsel to make an oral and written explanation of the charge. The retailer is entitled to administrative review of any order of disqualification.¹¹³ Approximately 49 percent of the retailers seek this review, which represents the final agency

Disappointed applicants are entitled to internal review through the recently created Board of Indian Appeals, which provides the seven *Goldberg* ingredients noted in the text. In addition, the Board, if it feels the need to do so, can assign an administrative law judge to resolve matters involving genuine issues of material fact. See 43 C.F.R. § 4.415 (1975). The Board estimates that such discretionary fact hearings are ordered in less than 1 percent of the appeals that come before it. In *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), a denial of oral hearing was successfully attacked on due process grounds, and the Secretary was ordered to develop regulations providing for an oral hearing. BIA officials observe that most of the disappointed applicants either line up for grants and loans the following year or pursue their cases directly through congressional channels.

¹⁰⁸ Written comments are permitted, however.

¹⁰⁹ This is the agency's own characterization made apparently because of the belief that failure to provide an administrative law judge as the decision maker destroys impartiality. This study follows *Goldberg* in not requiring administrative law judges for impartiality. See note 45 *supra*.

¹¹⁰ 7 U.S.C. §§ 2020-22 (1973).

¹¹¹ 7 C.F.R. § 272.6(a) (1976). During the five year period 1970 to 1974, 1,904 determinations to disqualify were made, and 2,359 lesser actions (usually warning letters) were taken.

¹¹² See text and note at note 81 *supra*.

¹¹³ 7 C.F.R. § 273 (1976). These proceedings take place before the food stamp review officer in Washington. This review may include an oral appearance by the retailer or his representative; in addition, the retailer may request the review officer personally to inspect his store.

decision. In the last five years 182 retailers have sought judicial review.

One program had five *Goldberg* ingredients: leasing of oil, gas, and coal deposits.¹¹⁴ The program is in the Department of the Interior and has an informal procedure with ingredients 1, 6, 7, 9, and 10.

Over one-half of the forty-two programs studied (twenty-two) provided procedures with either four or three of the *Goldberg* ingredients. Of the nine programs with four ingredients, all but one¹¹⁵ had ingredients 1, 3, 9, and 10; of the thirteen programs with three ingredients, all had ingredients 1, 9, and 10. Thus the distinction between eight of the nine four-ingredient programs and the thirteen three-ingredient programs is the addition of oral argument (ingredient 3) to the minimal adversary informal procedures of notice, a statement of reasons, and an impartial decision maker.¹¹⁶ The eight four-ingredient programs are: loans by the Farmers Home Administration¹¹⁷ (USDA); public works grants,¹¹⁸ business development loans,¹¹⁹ and technical assistance grants¹²⁰ by the Economic Development Administration (Commerce); financial guarantees to

¹¹⁴ See 30 U.S.C. § 226(a) (1970) (oil and gas); 30 U.S.C. § 181 (1970) (coal).

¹¹⁵ The one exception is PACA negotiation procedures (ingredients 1, 2, 7, and 9), which is discussed at note 99 *supra*.

¹¹⁶ The fact that there is no oral argument (ingredient 3) does not mean that there is no right to submit written memoranda and arguments. Of the thirteen three-ingredient programs, four include a right to submit written comments. Thus they meet the informal adjudication minimum discussed earlier.

¹¹⁷ 7 U.S.C. § 1989 (1970); 7 C.F.R. §§ 1801.1-6 (1976). Certain Farmers Home Administration programs (rural housing loans) listed in 7 C.F.R. § 1822 (1976) are excluded from these informal procedures. However, agency personnel in charge state that "full explanation and informal review" are available even in those programs. Farmers Home Administration memorandum to author, July 3, 1975. From 1947 through 1974 the Farmers Home Administration made 1,989,120 direct, insured, and guaranteed farm operating loans in the total amount of \$6,135,494,170. In *Hilburn v. Butz*, 463 F.2d 1207 (5th Cir. 1972), the court held that despite *Goldberg*, no hearing was required prior to a reduction in Farmers Home Administration in program benefits. But in *Ponce v. Housing Authority*, 389 F. Supp. 635 (E.D. Cal. 1975), the court required certain informal procedures before permitting rent increases in low rent farm labor housing projects funded by the Farmers Home Administration. The court required several *Goldberg* ingredients (timely notice, review of written evidence, written comments, concise statement of reasons, and impartial decision maker), but excluded others (oral presentation of evidence, confrontation, and cross-examination). In these procedural choices, the court followed the decisions under HUD housing programs. See note 127 *infra*.

¹¹⁸ 42 U.S.C. §§ 3131-36 (1970). About \$200 million in public works grants were awarded in fiscal 1975. The awards are made within certain areas which are designated by EDA as "economic development districts."

¹¹⁹ 42 U.S.C. § 3142 (1974). About \$23 million in business development loans were awarded by EDA in fiscal 1975.

¹²⁰ 42 U.S.C. § 3151 (1970). About \$25 million in technical assistance grants were awarded by EDA in fiscal 1975.

developers of new communities¹²¹ (HUD); establishment of estuarine sanctuaries¹²² (Commerce); master planning for new parks¹²³ (Interior); and planning for outer continental shelf oil and gas leasing¹²⁴ (Interior). The thirteen three-ingredient programs include seven programs within the Department of Commerce;¹²⁵ three within the Department of the Interior;¹²⁶ and three within HUD.¹²⁷

¹²¹ 42 U.S.C. § 4514(a) (Supp. IV, 1974).

¹²² 16 U.S.C. § 1461 (1972); 15 C.F.R. § 921 (1976). Under this program the agency is to create natural field laboratories within the estuaries of the coastal zone. Notice of program availability follows the "advertised public hearing" requirement of NEPA. 15 C.F.R. § 921.11(d)(10)(i) (1976).

¹²³ 16 U.S.C. § 2 (1970). Master planning involves many people in the Park Service; they prepare a draft plan and a draft environmental impact statement and make them available for public comment. It is estimated that the Yosemite National Park Master Plan will cost \$500,000 before it is finished.

¹²⁴ See Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-43 (1970); 30 C.F.R. § 250 (1975).

¹²⁵ They are: (1) reimbursements under the Fishermen's Protective Act of 1967, 22 U.S.C. § 1971 (1970) (during 1969-76, \$3.5 million in claims have been paid); (2) loans to fishermen under section 4 of the Fish and Wildlife Act of 1956, 16 U.S.C. § 742 (1970) (1,282 loans have been awarded totalling \$32.3 million); (3) agreements for capital construction funds under the Merchant Marine Act of 1936, 46 U.S.C. § 1177 (1970) (over the program's life, 706 agreements have been issued totalling \$345 million); (4) guarantees under the fishing vessel guarantee program, 46 U.S.C. § 1271 (1970); 50 C.F.R. § 255 (1975) (322 guarantees totalling \$40.8 million through 1972); (5) grants for conservation research and development of fishing resources, under the Anadromous Fish Conservation Act, 16 U.S.C. § 757a (1970); 50 C.F.R. § 401 (1975) (in fiscal 1975, 40 grants for \$2 million), and the Commercial Fisheries Research and Development Act of 1964, 16 U.S.C. § 779 (1970); 50 C.F.R. § 253 (1975) (in 1975, 125 grants for \$3.8 million); (6) grants under the Coastal Zone Management Act of 1972, 16 U.S.C. § 1455 (1972); and (7) planning grants under the same act, 16 U.S.C. § 1454 (1972); 15 C.F.R. § 923 (1976).

¹²⁶ They are: (1) grants to individuals under the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1380 (1972); 40 Fed. Reg. 23281 (1975). (Most requests for research grants are handled at a preapplication stage.) (2) Permits issued under the Marine Mammal Act, 16 U.S.C. § 1374 (1972), and under the Endangered Species Act of 1973, 16 U.S.C. § 1539 (1973). 50 C.F.R. §§ 14-18 (1975). (The Acts allow the Director of the Fish and Wildlife Service to issue permits for scientific purposes, public display, or propagation of protected species. The permit process is in part conducted on the basis of negotiations and conferences. In the last five years 517 Endangered Species Act and 18 Marine Mammal Act permits have been issued, representing in each case favorable action on about 93 percent of the permit requests under each Act. The Service estimates that each application costs \$653 to administer. Of the 7 percent denials, only 1 percent seek internal review before the Director, and only one judicial action—which resulted in dismissal—has been recorded in the last five years.) (3) Permits issued by the Park Service for public use of the national parks, 16 U.S.C. § 1 (1970); 36 C.F.R. § 2.6 (1975). (The Park Service sets the "carrying capacity" for national park areas through the use of section 553 informal rulemaking. Notice of proposed capacity determinations is provided to a broad class of persons in several ways. Notice is typically given to interested groups like hiking clubs, as well as to the general public through official publications and general circulation newspapers and magazines.)

¹²⁷ They are: rent increases for tenants in subsidized housing, 42 U.S.C. § 1415 (1970); grants under the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 (1974); and comprehensive planning under the Housing Act of 1954, 40 U.S.C. § 461 (1970); 24 C.F.R.

The preponderance of these three- and four-ingredient programs is in the categories of grants and benefits or planning and policymaking.¹²⁸ Each of the four agencies studied has programs within these classifications, with Commerce the leader at eleven programs.

Three programs surveyed provided procedures with two of the *Goldberg* ingredients; in each case those ingredients are 1 (notice) and 10 (impartial decision maker). These programs are auditing of money grants for outdoor recreation¹²⁹ (Interior); voluntary inspection of fish products¹³⁰ (Commerce); and inspection for lead base paint and structural defects in public housing¹³¹ (HUD). Since each program involves inspections, it is not surprising that the adversary procedural ingredients are held to a minimum.¹³²

The two remaining programs have no designated procedures,

§ 600 (1975). Procedures for termination of block grants are formal APA proceedings. See 24 C.F.R. § 570.913 (1975). The HUD rent increase proceedings have been the subject of much litigation. See note 36 *supra*. HUD procedures require thirty days written notice of proposed increases placed "conspicuously" at the housing project; the tenants may submit written comments to the local housing authority (LHA); the LHA then submits a written request to HUD with the comments attached. HUD makes its determination and furnishes a statement to the LHA in writing with reasons, at which point the LHA posts this statement in the same conspicuous place for an additional thirty days. See 24 C.F.R. § 410 (1975).

¹²⁸ Nineteen of the twenty-two programs are within these two categories; three are within the licensing category.

¹²⁹ See Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460l-4 to 460l-11 (1970). The purpose of this program is to oversee the accounting practices of the federal and state agencies that implement the grants and financial assistance programs of the Bureau of Outdoor Recreation. The grants provide for 50 percent reimbursement of allowable costs. The states submit vouchers showing actual expenditures which the Bureau auditors review to ensure that the costs are reasonable and within the grant contract. There are ten auditors who review slightly over 2,000 contracts per year. The auditors cost \$270,000 per year, making each audit cost approximately \$135. About 5 percent of the audit conclusions are challenged, and these challenges are handled informally within the Bureau on the audit record.

¹³⁰ 16 U.S.C. § 742d (1970). The Department of Commerce administers a voluntary fish inspection program whereby processors of fish products can obtain an inspection and grading mark (much like USDA meat inspection marks) that certifies the cleanliness of the processing operation and the quality of the fish. Fish processors apply for an inspection of their facilities to an inspection field office. If the facility meets the stated requirements, an inspection certificate is issued. The applicant may appeal an initial denial of a certificate by asking for a reinspection by a different inspector. 50 C.F.R. § 260 (1975). No hearings have ever been held under this program.

¹³¹ HUD enforces regulations that prohibit the use of lead base paint in federally funded structures. 24 C.F.R. § 35 (1974). The local HUD staff or the project managing agent inspects the property by taking paint samples from selected dwelling units. Testing is designed to show that the lead in the paint does not exceed the allowable limit of 1 percent by weight. If the inspection reveals an excessive amount of lead, measures are taken immediately to remove the hazard. No hearing is provided on the issue, and no requests for review have been recorded by HUD.

¹³² See p. 753 *supra*.

and for the purposes of this study they are categorized as having none of the *Goldberg* ingredients.¹³³ Both these programs are in the Department of Agriculture: meat and poultry inspections and plant quarantine certifications.¹³⁴

B. Specific Procedural Observations

The survey also revealed a number of agency practices not limited to particular programs that significantly affect the quality of informal adjudication and warrant special mention. Two of these practices relate to recent reforms adopted by the Department of the Interior, and two apply specifically to control of access to programs in the grant and benefit category.

The first practice uncovered by the survey that should be noted concerns an internal procedural refinement in the Interior Department. As a result of the requirements of the National Environmental Policy Act of 1969,¹³⁵ environmental impact statements are required of proposed federal actions that may have a substantial effect on the environment. Frequently, however, agencies cannot tell at the outset whether the proposed action will or will not require an environmental impact statement. Interior, which has many functions that affect the environment in some way, has sought to develop internal procedures for predicting the environmental and social impact of all major programs. The Department has developed

¹³³ There are, in addition, some grant programs of the Farmers Home Administration that are without *Goldberg* ingredients, but these programs have been included within another program that includes certain *Goldberg* ingredients. See note 117 *supra*.

¹³⁴ See APHIS memorandum to author, Sept. 3, 1975. These programs are administered by the Animal and Plant Health Inspection Service (APHIS). The regulations contemplate procedures for the cancellation of certificates for noncompliance with quarantine orders and other prohibitory regulations. See, e.g., 7 C.F.R. §§ 301.38-4 to .38-5, 301.45-4 to .45-5 (1976) (promulgated under the Plant Quarantine Act and the Federal Plant Pest Act, 7 U.S.C. §§ 147a to 149 (1970)). But since no procedures for these cancellation proceedings have been established, this function is listed as having no *Goldberg* ingredients. Although the Director of APHIS has cancelled one or two permits in the last five years based upon written reports of field inspectors, he offers the assurance that "if a dispute arose with respect to a material fact, a due process hearing would be provided in accordance with published rules of practice applicable to other actions." APHIS memorandum to author, Sept. 3, 1975. The Director of APHIS takes a similar stance with respect to meat and poultry inspection programs under the Federal Meat Inspection Act, 21 U.S.C. §§ 620, 621, 623(b) (1970), the Poultry Products Inspection Act, 21 U.S.C. § 464(e) (1970), and the voluntary inspection service for meat, poultry, and other agricultural products, 7 U.S.C. § 1623 (1970). No proceedings have been commenced under these sections in the last five years. APHIS memorandum to author, Sept. 3, 1975. Since in both programs the choice of procedures remains within the sole discretion of the Director and no procedures have ever been implemented, these programs are tabulated as having none of the *Goldberg* ingredients for the purposes of this survey.

¹³⁵ 42 U.S.C. §§ 4321-47 (1970).

a program decision option document that is "designed to ensure timely and systematic consideration of all environmental programs, economic, social and other aspects of critical decisions."¹³⁶ The purpose of the document is to decide initially whether an environmental impact statement must be prepared. But the effect of the process is to provide a self-imposed procedural hard look at all aspects of important decisions. The option document has the potential to become a rigorous internal control on the arbitrariness of nonadversary decision making.¹³⁷ Seen in this light, the document is an additional procedural ingredient that might be used to offset the apparent lack of adversary procedures in many agency functions.¹³⁸ The reality of this observation depends, of course, on the extent to which the agency's various bureaus and offices are willing and required to respond to the careful examination contemplated by the option document and environmental impact statement process.¹³⁹

Another recent development in the Department of the Interior that deserves special mention is the Office of Hearings and Appeals, created in 1970. The Office, with operating appeals branches (e.g., Board of Land Appeals, Board of Indian Appeals, and Board of Contract Appeals), took over the internal review function from the Department Solicitor's office.¹⁴⁰ The boards are staffed by attorneys, designated administrative judges,¹⁴¹ who sit in panels of three and

¹³⁶ Department of the Interior, Department Manual, Part 301.1.1 (1972).

¹³⁷ No particular format for the option document is required, but suggestions advanced by the advocates of decision theory could facilitate its implementation. See text and notes at note 28 *supra* & note 222 *infra*. The *Department Manual* has this to say about the document's contents:

No standard format is prescribed as the nature of the issue addressed in each environmental impact statement will determine the content and form of the related decision option document—which may well be unique. Depending upon that issue, the supporting decision option document may have to address economic, political, or social values, implications for or alternatives to policy or political, economic, or social institutions, or implications for programs or budgets. Upon recommendation of such need . . . the Assistant Secretary-Program Policy will arrange for consultations to develop the approaches and responsibilities appropriate to the particular program decision.

¹³⁸ Since many of the HUD functions involve important environmental, social and economic issues, it is one of many agencies that would benefit from this kind of internal procedure.

¹³⁹ See generally *Kleppe v. Sierra Club*, 96 S. Ct. 2718 (1976).

¹⁴⁰ See 43 C.F.R. 4.1-.913 (1975). See generally Day, *Administrative Procedures in the Department of the Interior: The Role of the Office of Hearings and Appeals*, 17 ROCKY MT. MINERAL L. INST. 1 (1972). Despite the fact that the reform occurred in 1970, the year of the *Goldberg* decision, the inspiration for reform appears to have been not that case, but mounting congressional pressure to establish an independent agency responsible for all decisions concerning uses of and claims on public lands.

¹⁴¹ These are not to be confused with administrative law judges, who are reserved for formal APA decision making or for occasional discretionary fact hearings. See 5 U.S.C. § 556(b) (1970).

review initial decisions based on the record of the informal decisions below, supported by written briefs and memoranda.¹⁴² The decisions of the boards are final unless the Secretary exercises supervisory jurisdiction,¹⁴³ which has rarely been invoked. This informal review process is the product of the Department's desire to create a more impartial and thorough review of initial informal action without sacrificing the efficiency of the former Solicitor review process.¹⁴⁴

A third practice revealed in the survey that warrants further discussion relates to the variable quality of the notice ingredient in grant and benefit programs. Notice of program availability is obviously of critical importance in the granting process, where notice is the way applications are generated. In some circumstances the scope of the grant, loan, or guarantee is limited to a class of beneficiaries who might be expected to be generally aware of the program's existence. Thus specific notice of program availability is said to travel fast in the Indian community.¹⁴⁵ Farmers¹⁴⁶ and to some extent fishermen¹⁴⁷ might be expected to fall within a similar class of aware grant and loan beneficiaries, as might specific groups like scholars.¹⁴⁸ Similarly, grants and loans to states could reasonably presuppose beneficiaries who are attuned to program availability.¹⁴⁹

¹⁴² On occasion oral argument is permitted by the board as well. Frequently the initial panel circulates important cases to the seven or eight members of the board for their comments on the decision. This amounts to a kind of informal en banc process that allows important policy decisions to be ventilated within the board. See generally text and notes at notes 203-06 *infra*.

¹⁴³ 43 C.F.R. § 4.5 (1975).

¹⁴⁴ The avowed purpose of the 1970 Interior reorganization was to eliminate the "fusion of functions" that resulted from the Solicitor performing investigating, prosecuting, and review roles. The Solicitor, in a memorandum letter on reorganization to the Secretary observed: "We agree that a procedural system should be isolated from and insulated against institutional bias and influence. For this reason the Board of Contract Appeals was recently removed from the Solicitor's office to the Secretary's office, and the same reasoning should apply to all hearing examiners and appellate boards." Memorandum from Mitchell Melich, Solicitor to Walter J. Hickel, Secretary, Feb. 4, 1970.

¹⁴⁵ See note 107 *supra*.

¹⁴⁶ Farmers Home Administration loans are clearly of such long standing that their availability is something farmers have learned to expect.

¹⁴⁷ Fishermen eligible for the older Commerce Department programs, see note 125 *supra*, like farmers, may be aware of their availability; in newer programs, under the Coastal Zone Management Act, for example, knowledge of such availability probably should not be presumed.

¹⁴⁸ Research grants administered by such institutions as the National Science Foundation and the National Institute of Health are directed at a select and highly aware scholarly community. One would think that any academician who did not take care to discover the availability of grant funds is not worthy of his professional status; "grantsmanship" is common parlance in the academic community.

¹⁴⁹ Public works grants and grants under the Coastal Zone Management Act are princi-

When it comes to generally available grants and benefits to a nonselect, ill-defined, and potentially national constituency, however, the quality of the notice ingredient becomes a crucial aspect of substantive and procedural goals. The danger is that a grant program with broad social purposes will be frustrated if the notice of its availability is so limited as effectively to limit the beneficiaries to a few Washington-connected cognoscenti. If this occurs, the program itself can be unintentionally transformed from broad social benefit legislation into narrow special interest legislation. There is some suggestion of this in the policy of the Economic Development Administration (EDA) in its administration of public works grants, business loans and technical assistance grants. The EDA has a conscious policy of "low profiling" the availability of its grants to reduce the number of disappointed applicants and to expedite the granting process.¹⁵⁰ Currently the EDA's notice of availability consists of pamphlets handed out by regional and state Economic Development Representatives (EDRs), but it is largely up to the public to make the initial contacts with the EDRs.¹⁵¹

The second notable practice employed by the examined agencies in grant and benefit programs is the use of a preapplication stage, whereby the agency representatives confer with interested applicants to sharpen, direct, or discourage the forthcoming applications. This conference technique reduces the number of meritless applications and the level of frustration attendant upon otherwise impersonal and uninformative denials.¹⁵² In the case of the EDA, however, the preapplication stage, while it reduces the number of

pally awarded to state or other public bodies whose access to the granting process is generally assured by their continuing relationship with federal granting institutions. Undoubtedly, the states are or should be sophisticated enough to obtain assistance in processing grants.

¹⁵⁰ These reasons were stated by the EDA in a letter to the author, Aug. 5, 1975. The Raleigh EDR indicated his office was as "quiet as we can be." The low profile policy was confirmed in interviews with the Atlanta EDR regional office. Interviews with Raleigh state representative, July 29, 1975, and Atlanta regional office, Aug. 5, 1975. The first reason for low profiling was explained by the desire not to generate too many "good proposals" for the limited grant and loan funds that are available in any year. Certainly more good applications would make choices between applicants harder, but the hard choices would probably produce a better utilization of program funds. To some extent the second reason, expedition, is based on the need to expend all available funds within a given fiscal year. This pressure may be somewhat reduced after fiscal 1976 if, as expected, EDA gains granting approval for a three-year period.

¹⁵¹ The EDR relies principally on political contacts within the state to generate grant and loan guarantee proposals. Interviews with Raleigh state representative, July 29, 1975, and Atlanta regional office, Aug. 5, 1975.

¹⁵² HUD's administrator of guarantees for developers of new communities estimates that about 200 inquiries are received per year, that between 20 to 60 go through the preapplication stage and that 6 to 10 become final applications for guarantee assistance.

formal applications¹⁵³ and thereby the number of ultimate denials, also serves further to limit the availability of grants under the programs. As the program administrators admit, former practice yielded applications for up to ten times the number of fundable projects. Full explanation at threshold meetings discourages applications in several ways. For one thing, a display of government "red tape" in the application process will discourage many. For another, this stage occasionally allows promising applications to be selectively deferred to subsequent years if they cannot be awarded right away.¹⁵⁴ While this latter tendency is understandable and undoubtedly efficient in some ways, it also has the effect of stacking up applications and thereby reducing the need for new applications in the future. To the extent that this occurs in the EDA grant process, it serves to reinforce the EDA's general policy of "low profiling" program availability and raises more questions about the efficacy of that practice.

C. Data Summaries and Cross-Tabulations

There are several other ways of looking at the collected data to facilitate further analysis. Looking at the procedures and programs studied across the four agencies offers some interesting institutional contrasts. The Department of Agriculture, one of the least visible agencies from a judicial review standpoint,¹⁵⁵ had, on the one hand, programs that utilized the most elaborate, and, on the other hand, programs that utilized the least demanding, procedural ingredients. Of the fourteen USDA programs studied, ten had procedures with six or more ingredients, two had four, and two, none.¹⁵⁶ Part of the reason for this unevenness in procedures is undoubtedly the failure of USDA to promulgate procedural regulations¹⁵⁷ in several cases.

¹⁵³ The Commerce Department Office of Business Development estimates that there were 855 preapplication conferences in the fiscal year periods 1970 to 1974, of which 285 became formal applications; of these formal applications, 38 were ultimately denied. Thus 87 percent of all applications were granted during the last five years. The public works program does not keep total grant application figures, but officials estimate that 250 grants are issued per year.

¹⁵⁴ Conferences with the Raleigh EDR and the Atlanta EDR regional office revealed that this practice was being employed on occasion. Interviews with Raleigh state representative, July 29, 1975, and Atlanta regional office, Aug. 5, 1975.

¹⁵⁵ During the five years since *Goldberg* (the period of this survey), there have been at least three decisions in the federal courts involving USDA informal procedures. See notes 103, 117 *supra*.

¹⁵⁶ Each of the seven programs with ten and nine procedural ingredients is within USDA; in addition, USDA has single programs with eight, seven, and six ingredients, and two with four.

¹⁵⁷ See note 134 *supra*.

Nonetheless, of the four agencies studied, USDA's informal adjudication procedures are the most "formal" in the *Goldberg* sense. The Department of Commerce had perhaps the most evenly distributed informal adjudication ingredients. Of the thirteen Commerce programs studied, eleven had procedures with the standard three or four ingredients.¹⁵⁸ This procedural consistency is notable since the Office of General Counsel in Commerce, unlike that in Agriculture, lacks central control over each of the Department's divisions and offices.¹⁵⁹ The Department of the Interior is clearly the most innovative of the four agencies when it comes to designing new procedures for informal adjudication. The nine Interior programs studied offered procedures with a wide variety of *Goldberg* ingredients,¹⁶⁰ but there were additional elements of informal decision making, such as a revised informal review mechanism and a program decision option document, that tended to regularize the formal adjudication process in other ways. The fact that Interior has a Solicitor's office with central control over procedural decisions within the various operating bureaus may have contributed to the recent innovations.¹⁶¹ The fourth agency studied, the Department of Housing and Urban Development, appeared to be lacking most in central control by the General Counsel's office. As a result, the procedures surrounding its six programs were difficult to locate and their effect was difficult to comprehend.¹⁶² Since HUD is an agency with highly visible programs, it may be that the agency is as an initial matter leaving some of the formulation of informal procedures to the courts.¹⁶³

¹⁵⁸ Each of these eleven programs involved grants or benefits (eight) or planning and policy making (three). In addition Commerce had one program with eight ingredients and one with two.

¹⁵⁹ In addition to an Office of General Counsel in the Department of Commerce, the two operating divisions with informal programs studied here, EDA and the National Oceanic and Atmospheric Administration (NOAA), have their own chief counsels.

¹⁶⁰ The Interior programs ranged from having procedures with seven ingredients (two programs), down to those with five (one program), four (two programs), three (three programs), and two (one program).

¹⁶¹ The Solicitor's office was instrumental in revising the internal review procedures by establishing the Office of Hearings and Appeals. The Department's program policy office was instrumental in setting up the program decision option document procedures, but to a large extent these procedures are implemented at the operating level by attorneys from the Solicitor's office.

¹⁶² The author had difficulty obtaining information about HUD's informal procedures from its General Counsel's office. Part of the difficulty was attributable to the many volumes of procedures contained in the Department's manuals that apparently have never been fully analyzed and indexed by the General Counsel's office, let alone published in comprehensible form for the public.

¹⁶³ As of January 1976, at least twenty-one cases (seven at the district court level and fourteen at the court of appeals level) had applied *Goldberg* to HUD's informal procedures.

Informal procedure summaries based on categories of programs reveal that of the seventeen grants and benefits and six planning and policy-making programs (categories one and four), nineteen employed procedures with four or three ingredients. The other two categories demonstrate a variety of procedural ingredients. Category two, licensing, has twelve programs, most of which provide numerous procedural ingredients.¹⁶⁴ Given the high value placed on licensing from the traditional right-privilege perspective,¹⁶⁵ this result is not surprising. What is surprising is that two of the licensing programs provide three ingredients.¹⁶⁶ Category three, inspections, is predictably short on procedural ingredients. Of the five programs studied, none has more than two ingredients,¹⁶⁷ which suggests that the inspection process is in fact the least adversary of the informal programs studied.

These empirical compilations provide some objective answers to the questions concerning the relevance and impact of *Goldberg* upon informal adjudications raised at the outset of this study.¹⁶⁸ It would seem from the objective evidence here presented that *Goldberg* has been manifestly irrelevant to the selection of procedural ingredients in informal adjudications. But the survey also included a subjective component that suggests *Goldberg* has had some impact upon agency thinking about procedures. The various agency personnel contacted initially were requested in a follow-up inquiry to describe the role *Goldberg* and its progeny actually had

All involved treatment of tenants in subsidized housing (evictions, rent increases, lease renewals, and tenant complaints). The rent increase cases discussed earlier offer a variety of procedural formulations, one of which HUD has enacted into its procedural regulations. See note 36 *supra*. The judicial activity involving HUD during the period studied can be contrasted to the situation of Commerce, where no cases questioning the Department's informal procedures were discovered, and Interior, where only one such case was discovered. See *Janis v. Wilson*, 385 F. Supp. 1143 (D.S.D. 1974), *remanded on other grounds*, 521 F.2d 724 (8th Cir. 1975) (posttermination hearing for employees of tribal governments held adequate under *Goldberg*). See also *Morton v. Ruiz*, 415 U.S. 199 (1974) (eligibility for BIA general assistance benefits must be clarified in procedural regulations) (discussed in text at notes 212-16 *infra*). It should be remembered that no survey of NEPA cases involving these agencies was undertaken during this period; the focus was entirely on *Goldberg* kinds of informal adjudication procedures.

¹⁶⁴ Two of the programs provide nine ingredients, two provide eight, three provide seven, one provides six, and one provides five.

¹⁶⁵ See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

¹⁶⁶ The two Interior programs are permits under the Marine Mammal and Endangered Species Acts and Park Service public use permits. A partial explanation for these spare procedures may lie in the fact that much of the decision making is done in negotiation and preapplication stages, and very few applications are ultimately denied. See note 126 *supra*.

¹⁶⁷ Three had two, and two, none.

¹⁶⁸ See p. 740 *supra*.

in the drafting of informal procedures. Since most of the informal procedural regulations studied were enacted subsequent to the *Goldberg* decision,¹⁶⁹ some relationship between them was suggested. Responses indicated that while the agency personnel were certainly not unaware of the *Goldberg* movement, procedures were not enacted precisely with the *Goldberg* ingredients in mind.¹⁷⁰ Rather the survey indicated a general level of awareness of the new judicial focus on procedural due process that was occasionally translated into specific procedural regulations. These conclusions would not seem dependent upon the precise programs explored here for theoretical support. The particular agency programs surveyed are not unique or unrepresentative of informal procedures found in government agencies generally. Studies of licensing decisions by the federal banking agencies reveal comparable procedural informality,¹⁷¹ as do other diverse functions like New York Stock Exchange disciplinary proceedings¹⁷² and Clemency Board pardon and discharge proceedings.¹⁷³ Once outside the structures of formal adjudi-

¹⁶⁹ Of the forty-two functions studied, thirty-two had procedural regulations that were promulgated subsequent to March 1970, when *Goldberg* was decided. It is possible, however, that many of those regulations repromulgated procedures similar to those contained in earlier regulations.

¹⁷⁰ The reaction of most of the agency personnel to the inquiry was that *Goldberg* and its progeny have generally led to an increased awareness of the need to provide due process hearings. *E.g.*, NOAA memorandum to author, Nov. 10, 1975. This sensitivity to procedural due process is reflected by personnel at USDA who indicated that, while there are no procedural regulations in force, "due process hearings" would be provided if requested. *See* note 134 *supra*.

¹⁷¹ The banking agencies (Comptroller of the Currency, Federal Home Loan Bank Board, Federal Reserve Board, Federal Deposit Ins. Corp., Federal Savings & Loan Ins. Corp.) have various licensing functions related to approval of branches and charters, and other matters. The usual procedures are quite sparse, involving notice to the applicant, an impartial decision maker (ingredients 1 and 10), and some internal review, but rarely any other hearing ingredients. *See, e.g.*, 12 U.S.C. § 1816 (1970) (Comptroller of the Currency). Professor Scott in his study for the Administrative Conference recommended, however, that "[a]t this stage . . . the pressing need is for the articulation of policy rather than for trial-type hearings." *See* Scott, *In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies*, 42 U. CHI. L. REV. 235, 290 (1975). *But see* Murphy, *What Reason for the Quest?: A Response to Professor Scott*, 42 U. CHI. L. REV. 299 (1975).

¹⁷² The NYSE has established procedures in its constitution for disciplinary actions against members and nonmembers. These procedures (which lack ingredients 6, 7, and 8) were inspired by *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), rather than *Goldberg*. *See* note 2 *supra*. In addition, in 1975 amendments, the SEC, which until then had no jurisdiction over NYSE disciplinary proceedings, was given explicit authority to review these decisions. 15 U.S.C.A. § 78f(d)(3) (Supp. 1976). Presumably, the SEC will now be able to evaluate the Exchange's procedures as well.

¹⁷³ *See* 39 Fed. Reg. 41351 (1974), as amended, 40 Fed. Reg. 12763 (1975). Applications to the Board are initially submitted to an "action attorney," who prepares a case summary in writing, subject to additional written comments (of up to three pages) from the applicant.

cation under the APA, government agencies appear to have taken advantage of the ability to decide matters informally.

III. AN ASSESSMENT OF INFORMAL ADJUDICATION PROCEDURES

The foregoing sections develop the study of informal adjudication procedures deductively and inductively. It is the task of this section to convert these theoretical and empirical predicates into overall hypotheses about procedures for informal adjudication. The evidence heretofore adduced tends to cluster around certain core concepts that deserve further emphasis. These include the use of a scale ranging from minimum to maximum informal procedures to measure adversariness incrementally, as well as a dichotomous measure that places procedures into adversary and inquisitorial molds. The notions behind the balancing and valuing of interests and procedures are also central here, and analogues can be drawn to related ideas, such as the zone of interests test and the jurisdictional amount requirement, in an effort to calibrate the balancing process. A sharpening of fundamental procedural ingredients will also be undertaken through a closer look at the impartiality, notice, and statement of reasons requirements. Finally, emphasis will be placed upon implementation of these concepts through the device of procedural rulemaking.

A. Minimum and Maximum Procedures

First of all, the survey clearly reveals that the ten procedural ingredients mandated by *Goldberg* have not been generalized throughout the system of informal adjudication. Of the forty-two programs studied, only two contained all ten *Goldberg* ingredients, and most contained far fewer than ten. Moreover, in the grant and benefit category, which implicates *Goldberg* directly, the usual procedural formulation contains only three or four ingredients. But these empirical results do not necessarily mean that the programs

The Board reviews and acts upon each case summary and will grant an oral appearance if need for it is shown in a written statement by the applicant. Presidential Clemency Board Administrative Procedures and Substantive Standards § 101.9(c), 40 Fed. Reg. 12765 (1975). At this appearance, the applicant may be represented by counsel. Thus the Board's procedures appear to contemplate the minimum three (or four) procedural ingredients referred to throughout the study. As an advisory executive agency, the Board considers itself not bound by the APA, but it goes on to state:

Nonetheless within the time and resource constraints governing it, the Board wishes to adhere as closely as possible to the principles of procedural due process. The administrative procedures established in these regulations reflect this decision.

40 Fed. Reg. at 12763.

studied are inconsistent with sound procedure or due process. *Goldberg* itself contained the seeds of an interest balancing theory for evaluating informal procedures, an approach that has grown considerably in the last six years. The balancing approach is clearly reflected in the Supreme Court and circuit court opinions that have cited *Goldberg* during this period, which suggest that the case has largely been limited to its factual context (*i.e.*, termination of welfare-type benefits).¹⁷⁴ The empirical survey of agency practice is consistent with the judicial trend. Full *Goldberg* ingredients are required in the one grant and benefit program, the food stamp program, that most closely resembles the program reviewed by *Goldberg*,¹⁷⁵ and substantial ingredients are required in the other grant and benefit program, loans and grants to Indians, that raises *Goldberg* concerns.¹⁷⁶ This kind of parallelism between judicial dictates and agency practice suggests that the agencies surveyed, while not generally requiring the full measure of *Goldberg* ingredients, have not ignored the *Goldberg* criteria for assessing informal procedures.¹⁷⁷

Just as the survey tends to confirm certain accepted limits on the use of maximum *Goldberg* ingredients, it also suggests limits on the appropriate minimum number of procedural ingredients. It will be recalled that support for a three-ingredient procedural minimum for informal adjudication was drawn from an analogy to the existing framework for informal rulemaking: notice, comment, and reasons.¹⁷⁸ These three ingredients might become four in a particular case if oral comment is added to written—an option left to the

¹⁷⁴ The one Supreme Court opinion which required full *Goldberg* ingredients was the companion case of *Wheeler v. Montgomery*, 397 U.S. 280 (1970) (old age benefits). Two circuit court opinions have required full *Goldberg* ingredients. *Mothers' & Children's Rights Organization v. Sterrett*, 467 F.2d 797 (7th Cir. 1972) (welfare benefits); *Williams v. Weinberger*, 494 F.2d 1191 (5th Cir. 1974) (Social Security disability benefits). The case survey concluded with volumes 95 of the Supreme Court Reporter and 508 of the Federal Reporter (2d Series).

¹⁷⁵ See note 83 *supra*. It should be noted that the other ten-ingredient program, determination of crop quotas for support payments by USDA, cannot be easily explained by analogy to *Goldberg*. One would not think of farmers' subsidies as having the same value as welfare payments on the "brutal need" scale. Perhaps the explanation for this "excessive" formality lies in the fact that the impartiality of the local review committees is somewhat questionable. See text and notes at notes 84-87 *supra*.

¹⁷⁶ The BIA-administered grant and loan programs offer Indians benefits akin to those provided by welfare programs. On the value of interest scale, these programs are presumably worth more to Indians than grants are worth to farmers or fishermen.

¹⁷⁷ Some reservation on this score may be warranted with respect to HUD's rent increase procedures, which provide sparse procedural ingredients for presumably important interests. But the cases themselves manifest some difficulty in striking the proper procedural balance for this function. See notes 36, 127, 163 *supra*.

¹⁷⁸ See text and notes at notes 35-36 *supra*.

discretion of the decision maker under section 553(c) of the APA.¹⁷⁹ The survey shows these three (or four) ingredients to be the predominant informal procedural motif in the programs studied, especially those in the category of grants and benefits. This is an impressive empirical confirmation of a theoretical postulate. The importance of discovering a procedural minimum for informal adjudication is that this limits the scope of debate over the kinds of procedural ingredients necessary to satisfy due process. Unless a case can be made for inquisitorial-type informal procedures, the choice of procedures in the particular case falls within a range from those employed in the usual informal adjudication (the minimum) to those employed by *Goldberg* itself (the maximum). Choices can be made within this spectrum by employing the benefit-cost analysis described earlier and the kind of judicial scrutiny now utilized to determine when additional procedures are required in informal rule-making.¹⁸⁰

B. Inquisitorial and Adversary Solutions

The empirical study is useful in determining when nonadversary or inquisitorial procedural solutions might be acceptable. Five programs had less than the three-ingredient adversary minimum. Their procedures can be defended by the analysis suggested here only on the basis that they need not adhere to the adversary model at all. Since these programs fall within the inspection, grading, and auditing category, that defense can be made.¹⁸¹ Inspections and audits are conducted by government personnel or private licensees under established and accepted standards. Erroneous determinations resulting from initial inspections or audits are generally attacked not by adversary hearings but by reinspections or reaudits

¹⁷⁹ Judge Friendly would require the addition of the oral comment ingredient if written comments are an unrealistic option for the particular affected individual. See note 44 *supra*. Presumably, failure of the decision maker to make the oral comment option available in these circumstances would constitute an abuse of discretion. See *Chemical Leaman Tank Lines, Inc. v. United States*, 368 F. Supp. 925, 946 (D. Del. 1973).

¹⁸⁰ For a discussion of the utility of additional procedures in the informal rulemaking context, which could be extended by analogy to informal adjudication, see Williams, "Hybrid Rulemaking" *Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975).

¹⁸¹ The five programs are fish inspections and grading, lead base paint inspections, and auditing of outdoor recreation grants with two ingredients and meat and poultry inspections and grading and plant quarantine inspections with none. See notes 129-31 *supra*. While meat and poultry and plant quarantine inspections are currently without prescribed procedures, see note 134 *supra*, they are functionally similar to the other inspections and can be judged along with them for purposes of prescribing appropriate procedures.

by different personnel. In the programs studied, this alternative to adversary hearings appears both satisfactory, in that judicial appeals from reinspections are rarely sought,¹⁸² and efficient, in that the cost to the government per transaction is minimal.¹⁸³ This experience would seem to support the Thibaut-Walker proposition that agreed-upon standards, time pressure, and correspondent interests are likely to produce inquisitorial solutions that are fair and satisfactory to the participants.

C. Balancing and Valuing Interests

1. *The Balancing Process.* The theoretical discussion in Part I suggested several ways in which the balance between individual and governmental interests should be struck in differing procedural contexts. These theoretical postulates received significant confirmation from the empirical survey. For example, the most adversarial category studied turned out to be licensing, authorizing, and accrediting. This result would tend to support the high value Judge Friendly placed upon the individual interest at stake in the revocation of professional licenses.¹⁸⁴ Moreover, the Thibaut-Walker satisfaction-fairness criteria would also call for adversary procedures here since the government's relationship to the individual licensee is characterized by a high degree of conflict. This is in part because the purpose of licensing and accrediting is not only to create a class of qualified specialists but also to police the conduct of the members of this class. For example, the debarring of responsibly connected employees of PACA licensee violators is a government program with an admittedly punitive purpose.¹⁸⁵ In these circumstances, one would expect to find more adversary procedural ingredients present.

On the other hand, the empirical survey does not fully support the theoretical assumption that procedures for administering grant and benefit programs should be available in inverse proportion to the ability of the program to meet available demand.¹⁸⁶ Where, for

¹⁸² See notes 129-31 *supra*. It should be noted that USDA provides informal adversary appeals from veterinary inspections. See text at note 134 *supra*.

¹⁸³ The agency costs for veterinarian inspections and outdoor recreation audits are estimated at between \$100 and \$150 per transaction. See notes 129, 134 *supra*. The lowest estimated agency cost for individual adversary hearings recorded in the survey was \$500 for USDA quota reviews, and this total assumes the existence of volunteer decision makers who are compensated at a markedly lower rate than full-time government employees. See note 87 *supra*.

¹⁸⁴ See p. 747 *supra*.

¹⁸⁵ See note 103 *supra*.

¹⁸⁶ There were several programs that appear to satisfy the theoretical model. For exam-

example, the grant or benefit was part of a limited amount adequate to serve only a few of the potential beneficiaries, the situation was expected to involve a high degree of conflict and thus to be a natural setting for adversary procedures. Where, on the other hand, the grants and benefits were designed to serve an entire designated class, the interests of the applicant and the decision maker could be viewed as more congruent, suggesting an appropriate setting for inquisitorial decision making. The data show that in some circumstances where the benefits are quite limited compared with the potential beneficiaries, the procedures are often minimal or even inquisitorial; this is especially the case with the various EDA grant and loan programs and to some extent with the HUD programs as well. Conversely, in the circumstances where there appear to be adequate funds to satisfy an entire class of beneficiaries, elaborate adversary procedures are often employed; this is the case with the various USDA farmers' loan and subsidy programs and the welfare-type programs such as the food stamp program. Of course, this was the situation in *Goldberg* itself.

However, there may be ways to reconcile the above deviations with the theoretical postulates.¹⁸⁷ First, it may be that long-standing cultural presumptions in favor of the adversary system have simply skewed procedures in that direction even though adversary procedures might not fit well in a particular substantive setting. There is some sense of this tendency in *Goldberg*, where the Court is partially concerned with providing welfare recipients with the "badges" of new property, one of which is the traditional adversary system.¹⁸⁸ Moreover, there may be a concern in the welfare cases that the theoretical correspondence between the goals of the welfare system and the needs of qualified recipients is not fully reflected in the

ple, the BIA grant and loan programs fall into the limited-pie, adversary procedures category; and the Commerce loan and guarantee programs for fishermen fall into the unlimited-pie, inquisitorial category.

¹⁸⁷ The procedures of some of the programs might be explained on grounds such as the universal acceptability of scientific standards justifying inquisitorial procedures. See text and note at note 66 *supra*. Grants to individuals under the Marine Mammal Act, for example, have few procedural ingredients, see note 126 *supra*, but the awards are usually made by a government scientist to members of the scientific community.

¹⁸⁸ The source of inspiration for the *Goldberg* Court here was Professor Charles Reich, who had advocated the use of "full adjudicative procedures" to protect the individual's interest in welfare benefits. See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1253 (1965). This approach had the effect of converting the procedures surrounding the right to welfare into an aspect of the right itself, thus subordinating questions about what would be a better procedural solution from a system perspective. See Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 851-56 (1975).

attitude of the decision makers. The fear that deciders, especially at the state level, are insensitive or even antagonistic to their clients' needs could well cause a heightened concern about the need for adversary procedures.¹⁸⁹

When it comes to grant and benefit programs that demonstrate a notable lack of adversary procedures, different explanations must be sought. One explanation is suggested by the "low profile" policy of the Economic Development Administration. Congress has frequently established broad social programs funded at a fixed level for limited periods, and has delegated the task of fixing the beneficiary universe to the agency charged with the program's administration. The EDA, for example, is told by Congress to administer economic development programs in underdeveloped areas where there is a sudden rise in unemployment.¹⁹⁰ To limit the class of eligibles, the EDA engages in a policy of "low profiling" the availability of its grant and benefit programs. This policy, which was discussed earlier,¹⁹¹ artificially reduces available demand for the program's benefits and conceals potential conflicts that could generate a need for adversary procedures. Thus the "low profile" approach may be seen as distorting an environment otherwise appropriate for adversary procedures and thereby frustrating system goals in the long run.

¹⁸⁹ See generally Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818 (1971). The problem of determining whether administrators of the welfare system, or any other government program, *should* be sympathetic to the goals of the program is a difficult one. See V. THOMPSON, *WITHOUT SYMPATHY OR ENTHUSIASM: THE PROBLEM OF ADMINISTRATIVE COMPASSION* (1975). When it becomes clear that the administrators are unsympathetic to program goals, the best way to check potentially discriminatory administration is to invoke the adversary system and wrest control of the process from the decision maker. But where the administrators are sympathetic with program goals, as in the Veterans Administration benefit programs, something less than adversary procedures may be desirable. Indeed, Congress has even seen fit to deny judicial review of Veterans Administration decisions, 38 U.S.C. § 211(a) (1970), apparently out of confidence that the program is properly (and generously) administered at the agency level. See *Johnson v. Robison*, 415 U.S. 361 (1974). But see *Plato v. Roudebush*, 397 F. Supp. 1295 (D. Md. 1975) (termination of V.A. pension requires *Goldberg* hearing). Professor Popkin's study for the Administrative Conference, goes into this matter in considerable detail and statistically confirms the relative generosity of V.A. program administration as compared to welfare program administration. He also concludes, "The nonadversary system assumes that the agency will not be hostile to the claimant and procedural protections will therefore depend upon how favorably or unfavorably the agency views applications." Popkin, *supra* note 40. If one of the conditions of the use of nonadversary procedures is finding impartial decision makers, the irony may be that in order to get those who are more "impartial," decision makers should be selected from among the program beneficiaries, as in the USDA farm subsidy programs. See text and note at note 207 *infra*.

¹⁹⁰ See 42 U.S.C. § 3161 (Supp. IV, 1974).

¹⁹¹ See text and notes at notes 150-51 *supra*.

2. *The Zone of Interests Analogy.* The empirical survey also revealed certain informal procedural practices that could be used in an innovative fashion to refine the theory of allocating procedures by a valuation of interests.¹⁹² For example, the food stamp program provides full *Goldberg* procedural ingredients for termination of benefits, but only partial ingredients for disqualifying food retailers who are authorized to receive stamps.¹⁹³ From an interest valuation standpoint, this distinction is most sensible. The true beneficiaries of the government program are the individual recipients; the retailers are at most incidental beneficiaries. Moreover, the interest of the recipient is far more significant than that of the retailer, who, although disqualified from selling to one segment of the consumer market, can in most cases continue to serve the majority of the market. The distinction is suggestive of a familiar one in the law of standing. Since the purpose of the food stamp legislation is not to benefit retailers, they are arguably not within the "zone of interests" sought to be protected by the statute.¹⁹⁴ If the plaintiff seeking judicial review can be denied access to the courts because he is not intended to be directly affected, it does not seem unreasonable to allocate the level of procedural protections in a similar fashion.¹⁹⁵ Of course, there are limits on using the zone of interests analogy to determine appropriate informal procedures. Once the Government acts, even incidentally, to benefit a particular class, it must do so in a nonarbitrary fashion. This suggests the need for the three-ingredient model as a due process minimum. To decide when to go above this minimum, resort to the zone of interests concept may prove to be a helpful analogue to the valuation of interest theory already proposed. Certainly not all government programs will offer as wide a variety of affected beneficiaries as the food stamp program. But there may be programs, such as health or disability programs, that involve cooperation from third parties in the private

¹⁹² See p. 747 *supra*.

¹⁹³ See text and notes at notes 81, 110-13 *supra*.

¹⁹⁴ See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); cf. *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886 (1961).

¹⁹⁵ Professor Kenneth Scott has made a valuable analysis of standing in functional and allocational terms. One point he makes that bears on the procedural allocation analogy is the notion of a direct injury "setting in motion spreading circles of repercussions." When this occurs, "usually the magnitude of consequences is diminished as one moves further and further away from the point of initial impact, so that second-order effects are less than first-order effects, and so on." Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 679 (1973). Under this analysis, food stamp recipients might be viewed as subject to first-order effects, and retailers as subject to second-order effects.

sector (doctors, insurance companies) who become, perforce, incidental beneficiaries of the government program. Procedures designed for these individuals in the manner suggested by the standing analogy are unlikely to be wide of the mark for due process purposes.

3. *The Jurisdictional Amount Analogy.* Another procedural innovation that could be useful in allocating procedural ingredients above the due process minimum is that employed in PACA reparations proceedings. The PACA reparations procedures are in two forms: a *Goldberg*-type oral hearing and a shortened procedure permitting only written responses.¹⁹⁶ If the claim is below \$3,000, the shortened procedure must be chosen; otherwise either procedure is optional. This jurisdictional amount requirement for additional procedural ingredients is a unique application of benefit-cost analysis to the allocation of administrative procedures and could represent a conceptual breakthrough for allocating informal adjudication procedures generally. It is reminiscent of the \$10,000 amount in controversy requirement for federal question and diversity jurisdiction in the United States district courts,¹⁹⁷ a requirement which also has an allocational purpose—namely to reduce congestion in the federal courts.¹⁹⁸ The obvious difference between the two requirements is that in most cases the federal limitation affects only access to a particular forum¹⁹⁹ and not the formality of the procedures available in the particular case.²⁰⁰ But this distinction need not prevent the PACA shortened procedure alternative from being more generally adopted. So long as the due process issue is posed in efficiency and

¹⁹⁶ See note 91 *supra*.

¹⁹⁷ 28 U.S.C. §§ 1331-32 (1970). There are also isolated examples of benefit-cost allocation of appellate court review. See 11 U.S.C. § 47 (1970) (appeals in bankruptcy cases are discretionary if they involve less than \$500); *cf.* 28 U.S.C. § 1335 (1970) (\$500 amount for interpleader).

¹⁹⁸ See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 (1972); SEN. REP. NO. 1830, 85th Cong., 2d Sess. (1958).

¹⁹⁹ See *Testa v. Katt*, 330 U.S. 386 (1947). There is considerable debate about the efficacy of the jurisdictional amount requirement, which, especially as it applies to federal question jurisdiction, has many "loopholes." See, e.g., 28 U.S.C. § 1337 (1970); P. BATOR, D. SHAPIRO, P. MISHKIN & H. WESCHLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1141-43 (2d ed. 1973); Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 268, 293-94 (1969). This debate is beyond the scope of this study, but its central concern appears to be the unfairness of relegating certain plaintiffs to less satisfactory state forums, and of occasionally denying plaintiffs a forum altogether (e.g., when it comes to enjoining federal officials). See W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 148-49 (6th ed. 1974). The consequences to parties confronted with the procedural ingredient jurisdictional amount are not nearly so severe.

²⁰⁰ But even where the state forum is available, it may not provide equivalent procedural ingredients. Discovery (*Goldberg* ingredient 6) may be more limited, and the judges may be less impartial (ingredient 10) due to lack of life tenure and protected salaries.

allocational terms,²⁰¹ it should be permissible and even preferable to make those judgments in the first instance at the agency level, for instance, in a rulemaking proceeding convened for that purpose.

D. Fundamental Procedural Ingredients

1. *The Impartiality Ingredient.* The empirical survey also sheds light on important differences in the treatment of particular *Goldberg* ingredients among the programs studied. The variation in the treatment of individual ingredients is illustrated by the differing approaches to impartiality, an element highlighted by Judge Friendly as a fundamental procedural ingredient.²⁰² The Department of the Interior's recently formed Office of Hearings and Appeals appears to be an example of an internal agency reform that has substantially increased the impartiality of informal decision making at a low cost to the system.²⁰³ For instance, two-thirds of the Bureau of Land Appeals business is generated by initial informal adjudications, the bulk of which are applications for benefits and permits.²⁰⁴ The impression of attorneys formerly in the Solicitor's office who have been separated functionally and physically from that office and redesignated administrative judges is that resulting decisions on informal appeals are less institutionally oriented, more objective and ultimately more fair.²⁰⁵ Moreover, this new appeals process is more streamlined in that it replaces a two-step Interior appeals process that sent initial decisions first to the appropriate Assistant Secretary's office for review and then to the Solicitor's office for separate review on behalf of the Secretary. The new review procedure is thought to cut the internal agency review time in half, which should serve to increase efficiency and client satisfaction with the process. While there are undoubtedly still serious problems to be resolved with this appeals process,²⁰⁶ it remains a significant

²⁰¹ For example, *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), clearly support a benefit-cost approach to the allocation of procedural ingredients.

²⁰² See note 44 & text at note 45 *supra*.

²⁰³ See text and notes at notes 140-44 *supra*. There have been no departmental studies of the costs associated with the new appeal function, but informal estimates suggest that there is little additional cost involved. This is because about the same number of lawyers, some of whom had served in the Department's Solicitor's office, have been transferred to new roles as administrative judges, and their staff support has not changed. Interviews with OH&A, Oct. 31 and Dec. 9, 1975.

²⁰⁴ The benefits are mostly mineral leases; the permits are for rights of ways, ditches, and canals.

²⁰⁵ Interviews with OH&A, Oct. 31 and Dec. 9, 1975.

²⁰⁶ The appeals process has been criticized for its bifurcation of policy-making responsi-

means of increasing impartiality in informal decision making which should be instructive to other agencies.

On the other hand, the study looked at a program with one of the least impartial tribunals. In the USDA support payment program, local quota review committees are composed of farmers (appointed by the Secretary of Agriculture) who sit in judgment upon the quota awards made to other farmers. These decision makers are not even USDA employees, let alone government employees who have been insulated from other branches of USDA in a manner similar to Interior's Office of Hearings and Appeals. Nevertheless, these private "judges" do not necessarily violate the performance criteria discussed herein for at least two reasons. First, they do not stand directly to gain or lose from any particular decision vis-a-vis their farmer colleagues.²⁰⁷ This is partly because their jurisdiction is over quotas that are fixed independently of their own quota opportunities; the pie of subsidies available from USDA is not limited in a way that would compromise fair decision making. Second, the procedures employed before the review committee are elaborate enough by *Goldberg* standards to minimize partiality in judgment and to expose it if it were to occur. This indicates what may be the converse to Judge Friendly's impartiality principle (which suggests that the more impartial the decision maker, the less the need for other procedural ingredients). If, in fact, the other ingredients *are* provided, an ostensibly less impartial decision maker may satisfy fairness, efficiency, and satisfaction criteria.²⁰⁸ This conclusion sug-

bility between the Office of Hearings and Appeals and the Solicitor's office, and for the lack of oral argument in the formal review process. See Strauss, *Rules, Adjudication, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1254-60 (1974); 3 RECOMMENDATIONS AND REPORTS OF ACUS 43, 451 (1974) (Recommendation 74-3). From the perspective of this study, the procedural reform is significant despite these criticisms because it further supports the theoretical postulates of good procedures advocated here. In particular, it should be recalled that a high value is placed not only on impartiality but upon the availability of fast and efficient internal review as well. See note 38 *supra*.

²⁰⁷ This distinguishes *Gibson v. Berryhill*, 411 U.S. 564 (1973), where the optometry licensing board consisted of members who sought to discipline (and disadvantage) their competitors. In some circumstances, however, USDA makes use of industry selected review committees in a manner that comes closer to *Gibson* concerns. See *Walter Holm & Co. v. Hardin*, 449 F.2d 1009 (D.C. Cir. 1971) (Florida Tomato Committee charged with discrimination against Mexican producers).

²⁰⁸ It is difficult to tell whether these criteria are satisfied in the support payment program. The insignificant number of appeals to the committees, the lack of judicial appeals from the committees' decisions, and a reversal rate of 36 percent by the committees, can all be seen as relevant to the fairness and satisfaction criteria. The efficiency criterion is more clearly demonstrated by the minimal cost to the government (\$500) of conducting the appeals. See notes 85-87 *supra*.

gests that "volunteer" or part-time decision makers may be useful in other high volume decision agencies that administer grant and benefit programs.²⁰⁹

2. *The Notice Ingredient.* The survey also underscores how the notice ingredient, if it is to have meaning, must be designed effectively to reach those within a presumed class of potential beneficiaries. The EDA's policy of "low profiling," discussed above,²¹⁰ is probably the most conspicuous instance of inadequate notice encountered. Judge Friendly lists notice among his fundamental procedural ingredients when he discusses notice of adverse government action.²¹¹ But the notice requirement is certainly not without meaning in the grant and benefit process, even though the concern is with notice of program availability rather than notice of termination in the *Goldberg* sense.

In *Morton v. Ruiz*,²¹² the Court recently considered the notice obligations of an agency charged with the task of allocating limited Bureau of Indian Affairs (BIA) general assistance funds among a large class of beneficiaries. The BIA, acting under the authority of legislation that theoretically extended eligibility for benefits to Indians living on or near a reservation, limited those eligible to Indians on the reservation, and excluded plaintiffs who lived near the reservation. The Court found that the BIA could limit its coverage only by developing rational "eligibility standards" when the limitation "might leave some of the class otherwise encompassed by the appropriation without benefits."²¹³ These standards were to be established by rulemaking or policy making, and they would be "ineffective" if merely contained in department manuals or developed in unpublished ad hoc determinations.²¹⁴ The Court's concern with the latter forms of policy making is that they are contained in internal documents not designed to reach the public. Whether or not an agency must decide all eligibility questions through informal rulemaking,²¹⁵

²⁰⁹ Such a course of action would undoubtedly be controversial in the welfare area; but it should be remembered that one of the current problems in this area is the lack of sufficient administrative law judges to handle the caseload at both the state and federal levels. See generally STAFF OF HOUSE COMM. ON WAYS AND MEANS, 93D CONG., 2D SESS., REPORT ON DISABILITY INSURANCE PROGRAM (Comm. Print 1974).

²¹⁰ See text and notes at notes 150-51 *supra*.

²¹¹ See Friendly, *supra* note 29, at 1280-81.

²¹² 415 U.S. 199 (1974).

²¹³ *Id.* at 231.

²¹⁴ *Id.* at 232.

²¹⁵ Professor Davis questions the Court's opinion on this score, since it seems clear from other cases that the choice of rulemaking or adjudication remains within an agency's sole discretion. See Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM. L. REV. 823, 825-31 (1975).

it is clear that more is required than internal policy formulation designed *not* to give notice to the public. The EDA's "low profile" policy, the admitted purpose of which is to reduce the number of applications from eligible beneficiaries, is an "agency policy" designed to frustrate the notice requirement itself. As such it must be considered questionable in light of the *Ruiz* case and the theories behind the notice ingredient expressed herein. Since there are ways of making notice of program availability more effective,²¹⁶ efforts in this direction may be required as a matter of procedural due process.

3. *The Statement of Reasons Ingredient.* Another insight generated by the survey regarding the treatment of specific ingredients relates to a modification of the statement of reasons requirement that might facilitate judicial review. A statement of reasons for a decision has long been an essential predicate to judicial review and a concern of due process.²¹⁷ Failure by an agency to provide some contemporary statement of reasons for informal decision making places the reviewing court in an unseemly dilemma. The court must either exercise weak review over the informal process and affirm even when in doubt about the basis for the decision, or engage in strict review that can involve an unwarranted intrusion into the decision maker's mental processes.²¹⁸ When this deficiency occurs in the context of informal rulemaking, the court can remand to the agency with some confidence that a closer examination of the informal rulemaking "record" will yield a more precise statement of reasons.²¹⁹ But in the informal adjudication context there may not be an informal record for the agency to examine, and the agency may be forced to create one on remand.²²⁰ This is a lamentable deficiency of informal adjudication.²²¹ The survey provides a possible reform here, however. Interior's program decision option

²¹⁶ See, e.g., note 126 *supra* (discussion of the notice practice of the Park Service). The EDA could, of course, engage in rulemaking to identify the class of beneficiaries more precisely and in this way increase the general level of program awareness. In other agency programs the beneficiaries may be sufficiently apprised of program availability from other sources. See text and notes at notes 145-49 *supra*.

²¹⁷ See Friendly, *supra* note 29, at 1292.

²¹⁸ See generally Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721 (1975).

²¹⁹ Recently courts have refined this process by requiring additional agency procedures on reexamination. See Williams, *supra* note 180, at 425-36.

²²⁰ In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), it took the agency on remand four months to find and produce an informal adjudication "record." See Nathanson, *supra* note 218, at 722-23 n.16.

²²¹ See also K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 104-05 (1969).

document has the potential to become a regularized decision record for even routine informal adjudications. The purpose of the document is to have the responsible administrator consider decision options in a clear and systematic way. Once prepared, this document becomes the ideal record on which to focus judicial review since it reflects contemporaneous consideration of the issues under appeal. If an important option is ignored, or ill-considered in relation to others, the reviewing court can order a remand directed precisely to that particular deficiency. On the other hand, if all an appellant can do is argue generally about arbitrary decision making, clear thinking expressed in the option document should give reviewing courts confidence in affirming informal decisions.

As currently conceived, the program decision option document is limited to major planning and policy decisions affecting the environment; in this posture it has only marginal relevance to the kinds of informal adjudications involved in this study. But the goals of decision theory expressed in the option document are not at all irrelevant to informal adjudication. The basic goal, to replace guesswork and "muddling through" with systematic thinking about public decisions,²²² is applicable to government decision making generally, including informal adjudications. It is true, of course, that the time spent on preparing option documents for each decision will vary with the importance of that decision. Less significant informal adjudications are worthy of less time-consuming decision making.²²³ When the Department of the Interior is preparing the master plan for Yosemite National Park, it is making a \$500,000 decision, and when the Department's Bureau of Outdoor Recreation conducts an audit, it is making a \$135 decision.²²⁴ The option document would undoubtedly reflect this difference in value. But even for small decisions the goal of decision theory should be to reduce the tendency of decision makers to act solely by intuition or snap judgments.²²⁵

Moreover, decision theory is a sound way to encourage the use of the inquisitorial model in the circumstances where the courts are

²²² See A. RIVLIN, *SYSTEMATIC THINKING FOR SOCIAL ACTION* (1971); Lindblom, *The Science of Muddling Through*, 19 PUB. AD. REV. 79 (1959). Professor Rivlin finds "two major messages" in decision theory: "(1) It is better to have some idea where you are going than to fly blind; and (2) It is better to be orderly than haphazard about decisionmaking." A. RIVLIN, *supra* at 2. Certainly these messages are relevant to informal adjudication as well.

²²³ This is much like the kind of benefit-cost analysis that is undertaken when the question is how many and what procedural ingredients are necessary to a particular informal adjudication.

²²⁴ See notes 123, 129 *supra*.

²²⁵ See Vaupel, *Muddling Through Analytically*, in *IMPROVING THE QUALITY OF URBAN MANAGEMENT* 187, 188-89 (W. Hawley & D. Rogers eds. 1974).

unwilling to impose adversary procedures upon informal adjudication. In *Dunlop v. Bachowski*,²²⁶ for example, the Court required the Secretary of Labor to provide a statement of reasons before deciding not to file suit to set aside a union election, but specifically negated the possibility that the Secretary's statement could be challenged in a hearing before the agency or on review. This decision has raised the fear that the scope of review might be too narrow to be effective.²²⁷ An agency's use of decision theory which can legitimate the process of informal adjudication and yet keep it free from judicially imposed constraints derived from the adversary model may serve to overcome this fear.

E. Procedural Rulemaking

Many of the ideas for improved informal procedures suggested by the empirical survey could be addressed by an agency rulemaking proceeding convened for that purpose.²²⁸ For example, to implement the "jurisdictional" amount procedures utilized in the PACA reparations program, an agency might request information on what dollar amount would be appropriate to permit the invocation of more elaborate procedures.²²⁹ Another consideration to be explored in this type of rulemaking would be the value of the particular benefit or interest to the individual. Judge Friendly's hierarchy is a

²²⁶ 421 U.S. 560 (1975).

²²⁷ Schwartz, *Administrative Law Cases During 1975*, 28 Ad. L. Rev. 131, 144 (1976).

²²⁸ This is a crucial aspect of the entire process since participation in a rulemaking proceeding by those who will ultimately be subjected to the procedures should maximize the satisfaction criterion suggested at the outset as a basic measure of agency performance. While rulemaking about procedure is not the usual approach to procedural reform, there were some notable (and commendable) examples of its utilization revealed in the empirical study. See text and note at note 104 *supra*. For instance, the Grain Standards Act provides a "procedural option" of informal or formal adjudication; unfortunately, since the choice of procedures is left to the affected individual, it does not go far enough to ensure that allocational goals are reflected in the choice that is made.

²²⁹ Presumably the choice would be between shortened procedures that meet the adversary minimum and procedures approaching the full *Goldberg* adversary maximum. The PACA procedures conform to these minima and maxima. (The shortened procedure has four ingredients and the elaborate one, nine. See notes 90-91 *supra*.) In order to rise above the minimum level, the jurisdictional amount should reflect the cost of providing the more elaborate procedures. Estimates of cost per transaction could be provided by the agency itself, subject to contradiction from interested witnesses. There is a danger, of course, that this could deteriorate into a kind of public utility-type hearing dealing at length with questions about joint cost allocation and other imponderables. It will be up to the courts on judicial review of the rulemaking to prevent this from occurring just as they now must deal with the detail required in such calculations under NEPA. Moreover, if more agencies engage in this kind of procedural rulemaking, comparable cost figures will probably emerge, and unrealized procedural options will be discovered. Interagency procedural cost comparisons would, in this manner, serve to enhance the efficiency criterion on a system-wide basis.

helpful beginning, but it could be refined by comments specifically directed to the matter from the affected individuals. For example, rent increase or benefit reduction cases might be assigned a lesser value (and fewer procedures) than eviction or benefit termination cases. A rule might even fix a cutoff point for the use of the more summary procedures (e.g., a 20 percent rent increase or benefit reduction) tied both to the cost of procedures and the seriousness of the interest. Additionally, the rulemaking process might examine the possibility of employing inquisitorial procedural alternatives to the informal adversary model that may be superior by the measuring criteria. For instance, if conference and inspection techniques can be employed on a regular basis, the need for informal adversary procedures (whether minima or maxima) will be reduced. In addition, a rulemaking proceeding could address the need for sharpened notice procedures discussed earlier. In all of these inquiries the agencies will be advantaged if they can inform the rulemaking proceedings with the results of social science experimentation.²³⁰

IV. RECOMMENDATIONS AND CONCLUSIONS

Little systematic study has been made of the way the federal government in fact adjudicates informally.²³¹ The foregoing empirical survey is designed partially to fill this research gap and to elucidate standards of general applicability for evaluating informal procedures. While much work, both empirical and theoretical, remains to be done, some conclusions can be drawn at this stage.

It seems clear from this survey that while *Goldberg* is a benchmark for beginning the analysis of informal adjudication procedures, it is not by any means the last word. This is not because *Goldberg* might be perishable as a precedent, as *Arnett v. Kennedy* and *Mathews v. Eldridge* can be read to suggest, but rather because,

²³⁰ The need for measurement in terms of fairness, efficiency, and satisfaction presupposes a role for the social scientist. Agencies willing to experiment with different informal procedural solutions before setting upon a particular procedural regulation will undoubtedly be better informed and less dogmatic when the final choice is made. And there are accepted methods for engaging in this kind of quasi-scientific research that can readily be applied to the informal procedure context. See D. CAMPBELL & J. STANLEY, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* (1966); Campbell, *Reforms as Experiments*, 24 AM. PSYCHOLOGIST 409 (1969). The latter paper considers among other things techniques for utilizing welfare recipients' judgments in evaluating changes in welfare delivery systems.

²³¹ The Administrative Conference of the United States has commissioned some thirty-seven individual studies of the informal process over the last three years, but these studies tend to be concerned with particular agency functions only and in many cases have not been made generally available. See R. Hamilton, ACUS Memorandum, March 14, 1975 (summarizing the thirty-seven studies).

as the survey indicates, *Goldberg* has not been applied with full force to much of the federal government's informal adjudication business. But the informal procedural schemes that depart significantly from *Goldberg* should not be read invariably to reflect procedural failures in the due process sense. In fact it would seem that many of the Government's informal adjudication procedures can be defended on theories reconcilable with *Goldberg* itself. To take but one example, the procedures surrounding the inspection process are in most cases notably shy of *Goldberg* ingredients, yet this process appears generally sound from a due process perspective. A goal of this article has been to illuminate and assess informal adjudications that offer procedural alternatives to *Goldberg* and yet do no violence to the procedural due process reforms that case supports.

Although *Goldberg* in its full procedural trappings may with some degree of confidence be limited to its particular factual context, it is difficult to make further "due process" generalizations about informal adjudication procedures. While many of the programs studied appear to work well with fewer than the ten *Goldberg* procedural ingredients, more investigation is needed to make a firm general statement about what and how many ingredients are appropriate to every program the government administers. The data base and theoretical underpinnings of the foregoing study are inadequate for such overall conclusions. As a result, this article cannot with any confidence recommend a code of informal procedures or offer a polished theory for predicting appropriate procedures in the future. The Informal Administrative Procedure Act, which Warner Gardner once drafted to stimulate discussion, remains a distant goal.²³²

The study does, however, provide a framework for analysis that can be utilized to build generalizations about informal adjudication procedures. If, for example, each agency were to identify its informal programs, measure their procedural ingredients against the *Goldberg* maximum and the minimum formula here proposed, and reconcile any variations in terms of the standards and criteria introduced here, much more would be learned about the informal adjudication process, perhaps even enough to construct that procrustean code of informal adjudication procedures that remain an elusive ideal. While such an undertaking might take several years, the rewards to the agencies, courts, and Congress are not difficult to see. By all indications, the need for efficient, fair, and satisfactory informal decision making will continue to grow in the twentieth

²³² See generally Gardner, *supra* note 12.

century administrative state until it reaches crisis proportions; attempts made now to deal systematically and definitively with the relationships between the individual and the Government cannot help but reduce the potential for crisis.

Despite this need for further study, there are some conclusions about aspects of the informal process that can be translated into recommendations without delay. The obligation to publish and make available procedural rules is clearly mandated by the Administrative Procedure Act,²³³ yet it continues to go unheeded. The survey data show that several agencies, notably HUD, Agriculture, and Commerce's Economic Development Administration, fail substantially to publish their informal procedures in the Federal Register or otherwise to make their policies publicly available as required by section 552 of the APA.²³⁴ This conclusion confirms the earlier analysis of the informal action studies prepared by the Administrative Conference that revealed "a consistent pattern of failure to comply with the requirements of [section] 552."²³⁵ Certainly there need be no reluctance to urge upon the agencies studied here immediate compliance with the APA.

The study also suggests that notice of program availability, which is an ingredient mandated by *Goldberg*, can be improved considerably. In the case of the EDA, notice of program availability requires a policy shift from a low to a high profile posture.²³⁶ Improved potential beneficiaries' awareness of grant and benefit availability, while often difficult to realize on a limited public relations budget, should be a desired policy goal of all granting agencies. Improved notice is especially necessary in an agency like the EDA where regional and local program administrators have grown accustomed to dealing with an intentionally limited clientele.

There are other aspects of this study that must be characterized as suggestions rather than recommendations. In particular, the idea of improving internal review mechanisms by maximizing the impartiality of agency deciders bears further investigation. Given the Supreme Court's interest in balancing the need for informal proce-

²³³ Section 552(a)(1) of the APA requires publication in the Federal Register of all agency formal and informal procedures; section 552(a)(2) requires that statements of policy, opinions, and staff manuals that affect the public be made available for public inspection.

²³⁴ See text and notes at notes 133-34, 151-54, 162 *supra*.

²³⁵ Hamilton, *supra* note 231. There is also a need to publish indices to procedural regulations, especially on the part of agencies like HUD that have shelves of currently unpublished procedural manuals that even their attorneys have difficulty utilizing.

²³⁶ See text and notes at notes 150-51 *supra*.

dures at the outset with the availability of internal review,²³⁷ the approach recently implemented by the Department of Interior is an invitation to reform that should be considered by all agencies. In this and other situations, one senses that an agency's willingness to explore and experiment with procedural alternatives in the informal adjudication context will be respected by the Court.

Despite indications of procedural rigidity in *Goldberg*, the Court seems more likely to be guided by the flexible approach to procedural due process advocated in subsequent cases.²³⁸ The challenge to the administrative agencies is to ensure that the concept of flexible due process involves a serious inquiry into appropriate procedural solutions and not merely an acquiescence in second class procedures for the resolution of informal adjudications. There is of course a danger that such a devaluation will take place if cases like *Arnett* and *Eldridge* are expanded upon indiscriminately. But to return to the status quo ante *Goldberg* would plant seeds of frustration in many government programs that would grow into formidable barriers to program effectiveness.

By following the analysis suggested here agencies should be able to legitimate their informal procedures in terms of *Goldberg* without being overwhelmed by rampant proceduralization. Indeed, it is just as probable that agencies will discover ways of streamlining their informal process by reducing the number of procedural ingredients attached to a given program, as it is that they will encumber the decision process by adding ingredients. But the ability to get the right fit between program and procedure lies primarily with the agencies, since the courts are institutionally incapable of making the procedural evaluations and assessments. Fundamental reforms in the choice of procedures for informal adjudication can occur, but it is up to the agencies to lead the way.

²³⁷ See *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Fusari v. Steinberg*, 419 U.S. 379 (1974); note 38 *supra*.

²³⁸ See text and notes at notes 8-9 *supra*.