

OPEN AND CLOSED JUDICIAL REVIEW OF AGENCY ACTION: THE CONFLICTING US AND ISRAELI APPROACHES

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A central issue in judicial review of administrative agency action is the determination of what materials a reviewing court is allowed to consider. Can the court consider *evidence* that the agency¹ did not consider? Can it consider *reasons* for the agency action that the agency did not assert when it took the action in question? Can it consider *arguments* that the private party failed to make during administrative consideration of the matter?

We can imagine a spectrum between completely closed and completely open judicial review. At the closed end of the spectrum, the court would consider no evidence that the agency had not considered (“closed record”), no reasons that the agency failed to assert when it made the decision (“closed reasons”), and no arguments except those made during agency consideration of the matter (“closed arguments”). At the open end of the spectrum, the court would ignore everything that occurred at the agency level; all of the evidence and argument would be new and the court would be indifferent to the reasons the agency gave for its decision.

This paper considers the US and Israeli practice on this issue. The US falls close to the *closed* end of the spectrum. Israel originally followed the British model of closed review but changed its practice and now falls closer to the *open* end of the spectrum. We seek to explain why these countries have followed different paths and speculate about the relationship between openness of the judicial review process and other doctrines of judicial review.² By focusing on the conflicting review practices of the US and Israel, we hope to shed light on a fundamental but understudied problem of administrative law. We believe that the issue of whether judicial review should be open or closed is not merely a technical or procedural question. Rather, it reflects important policy choices and is closely related to central administrative law doctrines.

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¹ We use the term “agency” in the sense that it is used in US law, meaning a governmental unit (other than a court or a legislature) having delegated power to implement government policy. The term includes governmental units with various titles used throughout the world including ministries and departments. It includes both units situated within the executive branch of government and those that are independent of the executive branch. This article considers US federal administrative law, not state or local practice.

² In another article, we considered the implications of the choice between open and closed review on the role of government attorneys who represent agencies on judicial review. See Michael Asimow & Yoav Dotan, *Hired Guns and Ministers of Justice: The Role Of Government Attorneys in the US and Israel*, __ ISR. L. REV. – (2015) (forthcoming).

Part I of the paper discusses closed judicial review practice in the US while Part II addresses open judicial review in Israel. Part III speculates on why the judicial review practices of the US and Israel diverge so sharply.

I. US PRACTICE: CLOSED JUDICIAL REVIEW

In general, the US practices closed judicial review regardless of the *type of agency action* that is subject to review. In other words, it does not matter whether the action in question is formal or informal adjudication, rulemaking, or government policy-implementation decisions that are neither adjudication nor rulemaking. However, because US courts recognize a number of exceptions to closed review practice, the US falls near the closed end of the open/closed spectrum but does not quite reach it.

In understanding the US practice, it is helpful to consider the *type of agency action* that is subject to judicial review.

A. Formal and informal adjudication

We define adjudication as agency action of *specific applicability*.³ The norm in US practice is *formal adjudication*, meaning that the agency conducts an *evidentiary hearing* to resolve a dispute between the government and a private party (or occasionally between two private parties). Evidentiary hearings (which usually resemble adversarial judicial trials) are often required by the due process clause of the federal constitution⁴ as well as by the Administrative Procedure Act⁵ (hereinafter referred to as the APA), by statutes applicable to particular administrative schemes, or by procedural regulations. However, formal adjudication by no means fills the administrative adjudicatory space. There are many schemes of adjudication with respect to which no provision of the Constitution, or of a statute, executive order, or procedural regulation, requires an evidentiary hearing or, indeed, any procedure at all. We refer to these cases as *informal adjudication*.

The term “formal adjudication” is often used to describe the types of hearings described by the APA. The initial decisionmaker in APA formal adjudication is an agency official called an Administrative Law Judge (ALJ) who works for the agency in question but has substantial de jure and de facto decisional independence. However, we use the term “formal adjudication” more broadly to include evidentiary hearings required by due process or by statutes other than the APA or by other sources of law such as executive orders or procedural regulations. For example, disputes about deportation are resolved by formal trial-type hearings required by

³ This definition is not the same as that provided by the federal Administrative Procedure Act (APA) which does not properly distinguish adjudication and rulemaking. 5 U.S.C. §551. Sometimes the term “quasi-judicial” is used to describe adjudicatory action. In many countries, agency adjudicatory decisions are referred to as “administrative acts.” Israeli practice distinguishes between quasi-judicial, quasi-legislative, and administrative action. See text near note 74, *infra*.

⁴ US Const. Arts. V (relating to the federal government), XIV (related to state or local government).

⁵ 5 U.S.C. §§551, 554, 556-57 (cited herein without the prefatory 5 U.S.C.)

specific statutes (and in many situations by due process); however, the federal APA is inapplicable to immigration cases,⁶ meaning that the initial decisionmaker is not an ALJ.

In formal adjudication, the decisionmaker must be impartial and cannot have any adversarial involvement in the case (such as having served as an investigator or advocate on the agency's behalf). The decisionmaker cannot consider any evidentiary inputs except those introduced at the hearing (the "exclusive record" rule). US judicial practice calls for closed review of agency adjudicatory decisions in both formal and informal adjudication. As we will observe, however,⁷ the case for closed review is much stronger for formal than for informal adjudication.

1. Closed record

The closed record is deeply rooted in US legal culture. In ordinary litigation, an appellate court is confined to the record made before the trial court.⁸ Because of separation of powers, the closed record approach seems even more natural in the world of administrative adjudication,⁹ since the court is reviewing action taken by a coordinate branch of government rather than by a lower court. Indeed, the APA judicial review provision (applicable to review of all types of agency action) requires that a court "shall review the whole record..." which at least implies a closed record.¹⁰

The closed record requirement reflects important efficiency concerns. In the case of formal adjudication, the hearing generated an organized and complete "record" for judicial review consisting of the transcript of testimony and argument and documents submitted into evidence. It would be costly and cause significant delays for the reviewing court to make a new "record" by taking evidence that the agency had not considered.¹¹ Moreover, judicial review of formal adjudication often takes place at the appellate-court rather than the trial-court level; appellate courts are not equipped (and not accustomed) to conduct trials.

In addition, US judicial review is constrained by *deference* doctrines that would be undermined if a reviewing court could consider new evidence. Judicial review of agency fact finding is limited by the "substantial evidence" test, meaning that the reviewing court must sustain "reasonable" agency fact findings even if the court disagrees with them.¹² If the reviewing court could consider new evidence, the court would become the fact-finder and the

⁶ See *Marcello v. Bonds*, 349 U.S. 302 (1955).

⁷ See text at notes 22-24, *infra*.

⁸ See Jeffrey C. Dobbins, *New Evidence on Appeal*, 90 MINN. L. REV. 2016 (2012).

⁹ For history of the closed record rule in federal administrative adjudication, see Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929, 933-36 (1993).

¹⁰ APA §706 (final paragraph): "In making the foregoing determinations [regarding the legality of the administrative action], the court shall review *the whole record* or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." (emphasis added). The "whole record" language in the APA means that a court must consider the evidence in the record that detracts from the agency's conclusion as well as the evidence that justifies it. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

¹¹ See Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. OF COMP. LAW -- (forthcoming 2015).

¹² APA §706(2)(E).

“substantial evidence” test would be negated. Moreover, if the court could consider new evidence, the private party would have a perverse incentive to hold back its best evidence until the judicial review phase, in order to deny the agency a chance to consider (and perhaps discredit) it. We refer to this practice as “sandbagging.”

2. Closed reasons

In US administrative law, agencies must state the reasons for their actions in order for reviewing courts to evaluate the rationality of those actions.¹³ The reasons must be stated contemporaneously with the agency decision, not advanced for the first time at the judicial review level. The source of the US “closed reasons” rule is the first *Chenery* case.¹⁴ The two *Chenery* cases involved decisions by the Securities & Exchange Commission (SEC) requiring officers of a utility company to relinquish a large profit earned by acquiring preferred stock while administering the company’s reorganization, then converting it to common stock. The rationale for the SEC’s decision was that the insiders violated equitable fiduciary duty doctrines. The Supreme Court reversed, holding that equity rules did not support the SEC’s decision. The SEC argued that its decision could be justified by a different reason, namely its experience in administering public utility reorganizations. However, the Supreme Court refused to consider this reason because it was a “post hoc” rationalization offered for the first time on judicial review.¹⁵

The closed reasons rule is justified by considerations derived from the separation of powers.¹⁶ The SEC is responsible for administering the securities law and it must make the initial decision about whether that law justified the sanction it imposed.¹⁷ Consideration by the courts of post-hoc rationalizations for agency decisions would be inconsistent with the SEC’s statutory responsibility and would make the court rather than the agency the instrument of policy articulation.

The *Chenery* rule also makes good pragmatic sense. It promotes rigorous reasoning by agency staff professionals and agency heads, because it induces them to settle on a rationale as part of the

¹³ For discussion of the centrality of the reason-giving requirement in US administrative law, see Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1817-23 (2012); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L. J. 387. For a comparative account of reason-giving, see Peter Cane, *Records, Reasons and Rationality in the Control of Administrative Power: England, the US, and Australia*, -- ISR. L. REV. – (forthcoming 2015).

¹⁴ SEC v. *Chenery Corp.*, 318 U.S. 80 (1942) (hereinafter referred to as *Chenery I*).

¹⁵ See *id.* “We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.” The SEC then re-decided the case, this time justifying the decision by its administrative experience. The Supreme Court upheld the SEC’s decision. SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*).

¹⁶ See Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2007) (grounding *Chenery* in delegation doctrine and arguing that a condition of delegation is that agencies identify their reasons for acting); Richard Murphy, *Chenery Unmasked: Reasonable Limits on the Duty to Give Reasons*, 80 U. CINN. L. REV. 817 (2012) (criticizing rigid application of *Chenery* doctrine).

¹⁷ *Chenery I*, note 14 at 88.

decisionmaking process. It helps to assure that the reasons will be supported by the written record. It means that the agency's reasons are determined by the agency professionals (such as scientists and experienced staffers) and by politically responsible agency heads, rather than by government lawyers on judicial review.¹⁸ Moreover, a policy of requiring agency decisionmakers to furnish contemporaneous explanations enables parties to decide whether they have grounds for an appeal.¹⁹

In addition, the *Chenery* rule is justified by considerations relating to agency accountability. It forces agency heads to articulate their positions in overt ways that facilitate political oversight of those positions. Otherwise, the agency could avoid disclosure of its reasoning (and thus forestall a political backlash) if no party sought review or the case was settled rather than decided by an appellate court. In all of these ways, *Chenery* contributes to the integrity of discretionary decisionmaking.

3. *Closed arguments*

The “closed arguments” rule (also known as “issue exhaustion”) requires a private party to raise at the agency level every argument that the party wishes to raise at the judicial review level.²⁰ Any argument not made at the agency level is considered to be waived. Again, this rule serves interests arising out of separation of powers, deference, and efficiency. The agency should have an opportunity to remedy a procedural defect or to apply its expertise to a policy objection before a court considers those issues. Moreover, the *Chevron* doctrine requires a court to uphold any reasonable agency interpretation of an ambiguous statute.²¹ If the court could entertain arguments about statutory interpretation that the agency never considered, *Chevron* would be undermined.

4. *Closed review of informal adjudication*

The same closed review rules apply to judicial review of decisions reached by informal adjudication.²² However, the circumstances of formal and informal adjudication are quite different. In informal adjudication, an agency may never have conducted an evidentiary hearing (or any kind of hearing) and is not limited by the exclusive record requirement. Often, the

¹⁸ See Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1043 (2011).

¹⁹ See *T Mobile South v. City of Roswell*, 134 S.Ct. 2361 (2014) (local government decisionmaker must furnish a reason statement contemporaneously with land use decision in order to permit private parties to decide whether to appeal within the short statutory limitations period).

²⁰ See, e.g., *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946). In *Aragon*, the Court said: “A reviewing court usurps the agency function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.” The closed argument rule originated in the context of formal adjudication but is now applied to review of all forms of agency action.

²¹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). A related doctrine requires a reviewing court to uphold an agency's interpretation of its own regulation unless plainly erroneous or inconsistent with the regulation. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 412, 414 (1945).

²² As discussed above, informal adjudication means adjudication that is not conducted according to a legally required evidentiary hearing. See text following note 5, *supra*.

agency makes its decision by considering economic or environmental studies and informally consulting the parties. Nevertheless, the Supreme Court ruled that judicial review of informal adjudication decisions must be on the basis of a closed record, consisting of all materials considered by responsible agency staff members.²³ These materials may consist of a large number of documents contained in many paper or electronic files. Assembling such a “record” poses serious practical difficulties. In addition, the closed reasons rule applies, even though the agency might not have been legally required to state reasons, and the closed arguments rule applies even though there was never an organized procedure by which the private parties could make arguments. Because of the differences between formal and informal adjudication, the case for closed review of decisions reached by informal adjudication is tenuous.²⁴

B. Rulemaking

“Rulemaking” is the process for adoption of “rules,” meaning agency action of general applicability.²⁵ The APA prescribes public notice and opportunity for comment before a rule is adopted.²⁶ As developed by post-1946 case law and practice, the notice and comment system generates a “record” consisting of the documents prepared by the agency staff in formulating the rule, public comments, transcripts of public meetings, material such as scientific studies that the agency considers, required agency analyses (such as environmental impact statements), and a thorough statement of reasons. The statement of reasons must explain why the agency disagreed with material public comments.

Judicial review of rules is closed, meaning that at the judicial review level neither side²⁷ can introduce new evidence, the private party cannot make arguments that were never raised by anyone during the comment period,²⁸ and the agency cannot bring forth new reasons.²⁹ The

²³ *Camp v. 411 U.S. 138, 142 (1973)* (involving review of agency’s rejection of an application to open a bank); *Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)* (reviewing agency rejection of a petition to modify a nuclear reactor license). If the reviewing court is unable to decide the case based on the administrative record or on the agency’s contemporaneous statement of reasons, it should remand the case to the agency for further consideration.

²⁴ See David S. Black & Gregory R. Hallmark, *Procedural Approaches to Filling Gaps in the Administrative Record in Bid Protests Before the U.S. Court of Federal Claims*, 43 PUB. CONT. L.J. 213 (2014) (problems of closed review of judicial review of government contract litigation); Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L. J. 57, 89-97 (2009) (problems of closed record review of IRS collection due process decisions).

²⁵ In American practice, the terms “rule” and “regulation” mean the same thing and the words are used interchangeably in this article. This definition is not the same as that provided in the federal APA which fails to adequately distinguish rulemaking from adjudication. APA §551(4).

²⁶ APA §553. The APA also provides for “formal rulemaking” which involves a trial-type process, but this procedure is virtually never used. An enormous body of law implements the APA’s deceptively simple informal rulemaking provisions. See generally Jeffrey S. Lubbers, *A GUIDE TO FEDERAL AGENCY RULEMAKING* (5th ed. 2012).

²⁷ It is unclear whether the agency can include material in the rulemaking record that was considered by the agency heads but was added after the close of the comment period, so that outsiders never had an opportunity to challenge it. See Lubbers, *supra* note 26 at 293-99.

²⁸ *Advocates for Highway and Auto Safety v. Fed. Motor Carrier Saf. Adm’n*, 429 F.3d 1136, 1148-50 (D.C. Cir. 2005) (arguments not raised during rulemaking process are waived because not the kind of

closure doctrines fit well with the APA rulemaking procedure, because the process generates a complete and organized record and a complete reasons statement. As in the case of adjudication, the rationale for closed record review of rules arises out of concern with efficiency, separation of powers, and deference to agency expertise. In addition, judicial review of rules usually occurs in appellate courts before the rule is ever enforced; as a result, no evidence about how the rule operates in practice is available.³⁰ The parties who seek pre-enforcement review are typically the same ones that were involved in the rulemaking process, so they have no new evidence or arguments to offer at the judicial review stage (unless they have strategically held them back by “sandbagging,” which obviously should be discouraged).

However, there are practical and theoretical arguments against closed record judicial review of rules that do not arise in connection with formal adjudication. The rulemaking record includes all materials “considered” by the agency staff and agency head during the rulemaking process, whether these materials are helpful to the agency or whether they are helpful to opponents of the rule. There may be an immense amount of such material. Moreover, there are numerous conceptual and practical problems of deciding what should be included and excluded from the “record.”³¹

clear points that agency must raise on its own). See Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?* (Consultant’s Report to Administrative Conference, 2015). Lubbers’ report is available on www.acus.gov. As of mid-2015, ACUS has not acted on this report, but an ACUS recommendation is under consideration.

²⁹ See *Motor Vehicle Mfgs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 49-50 (1983) (rejecting government attempt to supply post-hoc reasons for agency’s rejection of airbags).

³⁰ Pre-enforcement review of rules has become the norm because the Supreme Court has ruled that such challenges are generally ripe for review. See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

³¹ See William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975). The Administrative Conference of the United States (hereinafter ACUS) recently adopted a recommendation concerning the record for judicial review of rules. Under ACUS Rec. 2013-4, all materials “considered” by the agency should be included in the administrative record that is certified to the reviewing court. The term “considered” means that the document was reviewed “by an individual with substantive responsibilities in connection with the rulemaking,” even if the reviewer disagreed with the document (unless the individual determined that it was not germane to the subject matter of the rulemaking). This recommendation is available on www.acus.gov. Since an agency normally has a proposed rule under consideration for a lengthy period before it is proposed for public comment, and for a lengthy period after the comment period closes, and since numerous staffers have “substantive responsibilities in connection with the rulemaking,” a potentially enormous number of documents must be certified to the reviewing court. Even so, it is unclear whether certain kinds of documents must be included. For example, what about memoranda summarizing telephone conversations or documenting discussions with outsiders or with representatives of other agencies or the White House staff or the Office of Management and Budget? What about material the agency staff derived from internet searches, rejected drafts, and the like? See generally, Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking*, Consultant’s Report to ACUS (2013) (available on www.acus.gov); Leland E. Beck, *Judicial Review of Final Rules and the Administrative Record Problem*, 40 ADMIN. & REG. LAW NEWS (Fall, 2014, p. 11). What about material contained in pre-decisional staff memoranda (which is exempt from disclosure under the Freedom of information Act)? See Lubbers, *supra* note 26 at 295-97.

The agency must anticipate that its rule will be challenged in court, so it must contemporaneously assemble and organize all this material in preparation for judicial review. Because of the closed reasons requirement, an agency's statement of reasons for the rule must anticipate every possible objection that challengers to the rule might raise. The closed argument rule requires challengers to raise every conceivable argument against the rule (without knowing what form the final rule will take), requiring them to submit voluminous comments. The closed review requirements thus generate massive rulemaking records, including a statement of reasons that may run to hundreds of pages. All this is a major contributor to what US commentators call "rulemaking ossification."³² And the agency must do all this for every rule it adopts (whether or not through notice and comment), even though many rules are never reviewed at all.

Although many rules are reviewed before they go into effect, others are not reviewed until they are enforced or otherwise applied. This may occur years or decades after the rule is adopted. While the case law allows the enforcement target to challenge the legality of the rule, even if statutory time limits on challenges to the rule have expired,³³ the closed review requirements apply to such challenges. The challenger is allowed to introduce new evidence to establish that the rule does not apply to the challenger, or that the challenger did not violate the rule. However, the challenger is not permitted to bring forth new evidence or arguments that the rule is contrary to the governing statute or unreasonable.³⁴ Application of closed review doctrines in this situation gives rise to serious concerns that do not arise in connection with pre-enforcement review. Often, a person against whom the rule is enforced did not know about or chose not to participate in the notice and comment process or never imagined that the rule could be applied to it.

C. Judicial review of policy implementation

The universe of policy implementation decisions is enormous.³⁵ Policy implementation includes agency decisions such as designing highway routes, priority setting, maintaining databases, allocating budgeted funds between programs, approving state Medicaid rate adjustments,³⁶ administering grant-in-aid programs managed by states,³⁷ managing public

³² See Jerry Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 L. & CONTEMP. PROB. 185 (1994); Thomas O. McGarrity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

³³ See Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2223-35 (2011).

³⁴ See *RSR Corp. v. EPA*, 102 F.3d 1266 (D.C. Cir. 1997). In *RSR*, a statute permitted a challenge to the rule within 90 days after it was adopted and precluded challenges thereafter. *RSR* challenged the rule three years after adoption when the rule was applied to it. *RSR* was barred from introducing evidence of a new scientific study that it claimed would undermine the rule. However, *RSR* was allowed to introduce evidence challenging the agency's determination that the rule applied to it. *Id.* at 1271.

³⁵ See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1840-41 (arguing for a constitutional duty to supervise agencies that carry out policy-implementation functions); Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L.J. 95, 125-26 (2003) (contending that the APA is deficient by failing to structure policy implementation decisions).

³⁶ See Brietta R. Clark, *APA Deference After Independent Living Center: Why Informal Adjudicatory Action Needs a Hard Look*, 102 KY. L. J. 211 (2014).

institutions such as hospitals or prisons, environmental impact assessment, architectural design competitions, decisions involving multiple uses of public lands, siting of airports or power plants, habitat protections of endangered species, and countless other examples. These types of governmental decisionmaking involve a mix of fact finding, legal interpretation, law application, policy-making, and policy-application, mixed up with concerns about political repercussions, public relations, federalism, budget constraints, and public administration. The APA suggests that agency action is either rulemaking or adjudication. But this dichotomous approach works poorly when it comes to policy implementation. Policy implementation decisions are neither adjudication (since they are not directed at specific private parties) nor rulemaking (since they do not establish general rules).³⁸ Most policy implementation is not judicially reviewable, but some of it is.

Judicial review of policy implementation decisions involves different considerations than review of adjudication or rulemaking. The case for closed record review of such decisions is uneasy³⁹ because the decisionmaking process does not generate a structured evidentiary record and assembling it is a laborious and deeply problematic process. The record should contain all of the materials that responsible staff members considered in making the decision. As a result, agency staff must scrutinize vast quantities of disorganized and widely dispersed files. Similarly, the process may not give rise to a thoughtful agency statement of reasons and may not furnish an opportunity for the private parties to make arguments.

The key decision about judicial review of policy implementation is *Overton Park*.⁴⁰ The federal Department of Transportation (DOT) decided to provide funds to construct an interstate highway through a park in Memphis, even though a statute prohibited building roads through a park unless there is no “feasible and prudent” alternative route.⁴¹ The agency did not explain how its decision to route the road through the park was consistent with the statute. The process of planning the highway route consumed many years, involved a costly and contentious decisionmaking process, and was based on a complex mix of planning, political and economic considerations as well as park protection. Although there were numerous public hearings about the highway route, there was no organized process by which the agency constructed a record

³⁷ See Karen M. Tani, *Administrative Equal Protection: Cooperative Federalism in the Shadow of the Fourteenth Amendment*, forthcoming 100 CORNELL L. REV. -- (2015).

³⁸ See *Weaver v. Federal Motor Carrier Safety Adm’n*, 744 F.3d 142, 147 (many agency actions cannot be classified as either adjudication or rulemaking).

³⁹ See generally Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park’s Requirement of Judicial Review “On the Record,”* 10 ADMIN. L. JOURNAL 179 (1996); Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333 (1984); James N. Saul, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVIR. L. 1301 (2008); Daniel J. Rohlf, *Avoiding the ‘Bare Record’: Safeguarding Meaningful Judicial Review of Federal Agency Action*, 35 OHIO N. L. REV. 575 (2009).

⁴⁰ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

⁴¹ For detailed treatment of the legislative background to this provision, see Peter L. Strauss, *Citizens to Preserve Overton Park v. Volpe—Of Politics and Law, Young Lawyers and the Highway Goliath*, in ADMINSTRATIVE LAW STORIES, Peter Strauss ed., ch. 8 (2006), at 268-78.

suitable for judicial review of the decision. Indeed, it was unclear whether the Department's heavily political decision was reviewable at all.

The Supreme Court held that the decision to route the highway through the park was reviewable; the statutory "feasible and prudent" provision provided a legal standard by which the agency decision could be reviewed.⁴² The Court held that DOT's discretionary decision on routing the highway should be reviewed under the APA's standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"⁴³ (hereinafter referred to as the "arbitrary and capricious" test). Although such review should be deferential, the court should engage in "thorough, probing, in-depth review."⁴⁴ This language gave birth to the now well-recognized federal practice of hard-look review of discretionary action.⁴⁵

The Supreme Court ruled that review of the highway routing decision was closed, and that review should be based on the record before the agency, rather than on a new record constructed at the judicial review stage.⁴⁶ This holding is questionable, because the APA explicitly recognizes the possibility of de novo judicial review when the agency decision resulted from a process that did not generate an exclusive record.⁴⁷ The Supreme Court distorted the legislative history of this provision and gave it a narrow construction that made it inapplicable to the *Overton Park* situation.⁴⁸

⁴² Because the statute provided a legal standard, the judicial review exception for action "committed to agency discretion" in APA §701(a)(2) was inapplicable.

⁴³ APA §706(2)(A).

⁴⁴ 401 U.S. at 415.

⁴⁵ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (hard look review of EPA's choice not to regulate carbon dioxide motor vehicle emissions); *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (hard look review of decision not to require automatic seat belts); *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (hard look review of SEC's economic analysis in support of a change in proxy rules).

⁴⁶ "That review is to be based on the full administrative record that was before the Secretary at the time he made the decision." *Overton Park*, 401 U.S. at 420.

⁴⁷ "A reviewing court shall—... hold unlawful and set aside agency action, findings, and conclusions found to be—...unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." APA §706(2)(F).

⁴⁸ At the time the APA was adopted, the general understanding was that courts would provide de novo review of any agency action that was not required by statute to be based on an exclusive record. The APA's legislative history confirms that Congress intended that this practice would continue. The House Committee wrote: "In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined on record somewhere and if Congress has not provided that an agency shall do so, then the record must be made in court." H.R. REP. No. 1980, 79th Congr. 2d Sess. 45-46. See Nathaniel L. 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, 755-56, 763-68 (1975); Stephen F. Williams, "Hybrid Rulemaking" Under the *Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 417-424 (1975).

According to *Overton Park*, DOT was not legally required to state the reasons for its choice of route. However, if it failed to provide a reasons statement, the reviewing court should determine those unstated reasons. If necessary, the court should require the officials who made the decision to testify concerning their reasoning process, but they could not come up with new reasons for their actions.⁴⁹ Thus *Overton Park* established that the closed reasons requirement of *Chenery* applied to policy-implementation decisions, even though no statute or other source of law required the agency to state its reasons for taking action. The consequence of this decision was a lengthy trial that attempted to reconstruct what Department of Transportation officials knew or should have known.⁵⁰ The judge determined that the Secretary had not seriously addressed the availability of a feasible and prudent alternative, so the matter was remanded to the Secretary for a new decision.⁵¹

Later cases overruled this aspect of the *Overton Park* decision. An inadequately explained discretionary decision is not to be reviewed through a trial that ascertains the reasons for the agency action. Instead, the reviewing court is limited to the materials considered by the decisionmaker (a closed record). If the decision cannot be reviewed on the basis of this record or the contemporaneous reasons given by the agency, the case must be remanded to the agency to reconsider the case and supply a new reasons statement.⁵²

D. Exceptions to closed review

In general, the US practices closed judicial review of all forms of agency action. Nevertheless, reviewing courts recognize a number of rather nebulous exceptions to the various closed review doctrines. In general, these exceptions (many of them questioned in academic writing and in the case law) apply only to “unusual circumstances justifying a departure from this general rule.”⁵³ Because most cases do not present “unusual circumstances,” reviewing courts reject most attempts to introduce new evidence, new reasons, or new arguments at the judicial review stage.

(observing that APA legislative history indicates that Congress intended a broad use of the provision for de novo trials).

⁴⁹ “But since the bare record may not disclose the factors that were considered or the Secretary’s construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary’s action was justifiable under the applicable standard.” 401 U.S. at 420.

⁵⁰ *Citizens to Preserve Overton Park v. Volpe*, 335 F. Supp. 873 (W.D. Tenn. 1972); Strauss, *supra* note 41 at 329.

⁵¹ The highway was never completed. *Id.* at 332.

⁵² See *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), discussed in text at note 23, *supra*.

⁵³ See, e.g., *Frontier Fishing Corp. v. Pritzker*, 770 F.2d 58, 63 (1st Cir. 2014) (ALJ did not abuse discretion in refusing to admit evidence in a remanded case that party had failed to introduce during the earlier hearing); *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (lower court did not abuse discretion in refusing to add to the record post-decisional letters to the agency that disagreed with agency’s conclusions).

1. *Closed record requirement.* Because new evidence is usually offered for the purpose of impeaching the agency decision, reviewing courts typically reject it.⁵⁴ Nevertheless, various more or less problematic exceptions to the closed record rule have emerged.

a. *Completion of the record.* Some cases involve attempts to complete the record because the challenger claims that the agency failed to include materials that should have been included. These might be documents that some member of the agency staff had considered during the decisionmaking process and that support the challenger's argument that the decision is arbitrary and capricious. Or the agency may have excluded from the record documents offered by a party that should have been considered. If the challenger establishes a prima facie case that the record is incomplete, it may be allowed to engage in discovery proceedings to determine what additional materials should be included.⁵⁵

b. *Procedural failures or bad faith.* It is possible to supplement the record to establish that the agency action is tainted by some form of bad faith or by violation of a procedural norm that cannot be established by the existing record.⁵⁶ This exception arises most frequently in the review of adjudicatory disputes. For example, a closed record would fail to disclose newly discovered evidence revealing that the decisionmaker was biased, received improper ex parte communications from outsiders or from adversarial staff members or was subjected to political pressure.

c. *National Environmental Policy Act (NEPA) cases.* NEPA⁵⁷ is the federal statute calling for an agency to consider environmental effects in its decisionmaking. If a project might have a major effect on the environment, the agency must prepare an environmental impact statement (EIS). Some cases suggest that an open record is appropriate in NEPA cases where the issue is the adequacy of the environmental impact statement (EIS).⁵⁸ The purpose of the EIS is to inform the public and the agency of all of the major environmental effects of a particular decision. On review, a challenger might assert that the agency failed in its investigative function by not taking account of certain negative environmental impacts, even though these impacts had not been raised by public comments in the record or discussed by the agency. According to some cases, a reviewing court must be allowed to resort to non-record evidence to determine "whether an EIS has neglected to mention a serious environmental consequence, or otherwise swept

⁵⁴ See generally Beck, ACUS study, *supra* note 31 at 67; Saul, *supra* note 39; Rohlf, *supra* note 39; Richard McMillan, Jr. & Todd D. Peterson, *The Permissible Scope of Hearings, Discovery and Additional Fact Finding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333.

⁵⁵ McMillan & Peterson, *supra* note 54, at 340-50, 367-73; Exxon Corp. v. Dep't of Energy, 91 F.R.D. 26, 33-37 (N.D. Tex. 1981) (discovery authorized to obtain all evidence considered by agency where record was obviously incomplete); Envir. Def. Fund, Inc. v. Blum, 458 F. Supp. 650, 660-61 (D.D.C. 1978) (agency cannot skew record in its favor by excluding information in its own files that pertinent to proceeding in question).

⁵⁶ *Overton Park*, 401 U.S. at 420 ("there must be a strong showing of bad faith or improper behavior before such inquiry may be made"); *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (exception limited to "gross procedural deficiencies"). See Saul, *supra* note 39 at 1308 (noting that every circuit has recognized this exception); Beck, *supra* note 31 at 72.

⁵⁷ 42 U.S.C. §4321-4347.

⁵⁸ See French, note 9, *supra*.

stubborn problems or serious criticism under the rug...”⁵⁹ Other cases disagree with this analysis and enforce a uniform closed record in NEPA cases.⁶⁰ Similarly, some cases have employed open records to show that an agency has committed itself to a project before preparing its EIS (so-called “predetermination”).⁶¹

d. *Failure to consider relevant factors.* Some cases allow a challenger to introduce evidence to establish that the agency failed to consider relevant factors in making a discretionary decision (or that it took into account factors it should not have considered, but without actually mentioning them).⁶²

e. *Technically difficult cases.* Some cases have allowed a reviewing court to receive evidence to help it understand difficult technical issues.⁶³

f. *Predictive information:* Some cases allow material that postdates agency consideration in order to determine whether agency predictions turned out to be correct.⁶⁴

⁵⁹ *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1384-85 (2d Cir. 1977) (citations and internal quotation marks omitted). However, some courts indicate that the challenger should first seek to supplement the record at the agency level before attempting to introduce the new material in court. *Lands Council v. Powell*, 395 F.3d 1019, 1029 n. 10 (9th Cir. 2005).

⁶⁰ *Cronin v. Dep’t of Agriculture*, 919 F.2d 439, 443-45 (7th Cir. 1990) (precluding use of new evidence in NEPA case because agency should have first opportunity to pass on such evidence).

⁶¹ *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 716-17 (10th Cir. 2010); Jesse Garfinkle, *Scope of Reviewable Evidence in NEPA Predetermination Cases: Why Going off the Record Puts Courts on Target*, 39 BOST. C. ENVIR. AFF. L. REV. 161 (2012).

⁶² “It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not.” *ASARCO, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). Similarly, see *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1987); *McMillan & Peterson*, *supra* note 54 at 356-59. But see *Young*, *supra* note 39 at 229-42 (criticizing the use of extra-record evidence to demonstrate irrationality of the decision).

⁶³ “The district court’s admission of explanatory evidence served to help the court understand the complex nature of petroleum geology. It also served the related and equally important purpose of educating the court as to the kinds of scientific, technical, and economic data that are relevant to a legally correct determination.” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602-04 (9th Cir. 2014) (upholding use of court-appointed experts to assist court in understanding complex biological issues but not additional experts hired by both sides whose function was to open the record and debate the merits of the agency action); *Arkla Expl. Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984). See *McMillan & Peterson*, *supra* note 54 at 359-60; *Beck*, *supra* note 31 at 70; *Young*, *supra* note 39 at 232-33, 242-45.

⁶⁴ *American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976) (accepting post-promulgation evidence to establish that agency’s predictions were correct and thus not vulnerable to challenge); *Beck*, *supra* note 31 at 71. In *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 516-17 (2002), the Supreme Court relied on post-promulgation data provided by litigants to establish the reasonableness of FCC regulations.

2. Closed reasons

Numerous cases allow exceptions to the closed reasons requirement.⁶⁵ Some cases allow an agency to furnish additional material illuminating the previously stated reasons for its action, as opposed to providing a new rationalization for that decision.⁶⁶ Still others refuse to apply *Chenery* when it seems nonsensical to do so.⁶⁷

3. Closed arguments.

The courts apply the closed argument rule in a somewhat flexible manner.⁶⁸ This is unsurprising, given that the closed argument rule (often described as “issue exhaustion”) is a branch of the doctrine of exhaustion of remedies, a set of rules that is subject to numerous exceptions.⁶⁹ Thus the Supreme Court allowed a Social Security applicant to raise on appeal issues that he had not raised in an unsuccessful attempt to obtain review of an ALJ decision from

⁶⁵ See Murphy, *supra* note 16 at 858-74, arguing that courts often ignore the closed reasons rule when it is convenient to do so. A court can also deploy a harmless error analysis when it wishes to avoid the rule against consideration of new reasons. In addition, the common practice of remanding without vacating the agency decision has the effect of negating the closed reasons requirement. Remand without vacation allows the agency action to go into effect while the agency corrects the *Chenery* problem by stating acceptable reasons.

⁶⁶ Yale-New Haven Hosp. v. Leavitt, 470 F.3d 71, 81-82 (2d Cir. 2006) (rejecting agency explanation; since the original decision was unexplained, any explanation would be a new rationalization); Black & Hallmark, *supra* note 24 at 234-243 (agencies permitted to supplement the record with explanations contained in affidavits and by materials prepared during bid protests to the Government Accountability Office).

⁶⁷ See, e.g., Bagdonas v. Dep’t of Treas., 93 F.3d 422 (7th Cir. 1996) (court accepts explanatory affidavit of an official who was responsible for an earlier unexplained decision); Saratoga Dev. Corp. v. United States, 21 F.3d 445 (D.C. Cir. 1994) (staff report written before directors voted provided sufficient explanation of reasons for decision—strong dissent by Wald, J.); Population Inst. v. McPherson, 797 F.2d 1062 (D.C. Cir. 1986) (after court indicated disagreement with agency’s original rationale, administrator issued revised rationale that court sustained).

⁶⁸ See Lubbers, *Fail to Comment at Your Own Risk*, *supra* note 28 (listing numerous exceptions to the application of issue exhaustion in rulemaking and expressing concern about aggressive use of issue exhaustion to block judicial review of rules); Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1307-12 (1997) (discussing numerous exceptions to the closed argument rule in adjudication). Most of the exceptions parallel the exceptions to the exhaustion of remedies requirement. One such exception applies if “manifest injustice would result from the court’s refusal to entertain the unpreserved issue on judicial review.” *Id.* at 1309-10. Arguments not raised before an agency might be considered by the court in “exceptional circumstances,” such as “in cases involving uncertainty in the law; novel, important, and recurring questions of federal law; intervening change in the law; and extraordinary situations with the potential for miscarriages of justice.” Flynn v. Commissioner, 269 F.3d 1064, 1069 (D.C. Cir. 2001). New arguments may be considered in cases in which an agency has a duty to examine key assumptions even if nobody objected during the comment period. Oklahoma Dep’t of Envir. Qual. v. EPA, 740 F.3d 185 (D.C. Cir. 2014). Since agencies lack power to decide on-the-face constitutional arguments, these need not be raised during the rulemaking process. Noel Canning v. NLRB, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff’d*, 134 S. Ct. 2550 (2014).

⁶⁹ Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE §15.2 (5th ed. 2010).

the Social Security Appeals Council.⁷⁰ The Court recognized that parties seeking disability benefits are often unrepresented by lawyers and may be quite unsophisticated; moreover, the proceedings are inquisitorial in nature and the Appeal Council has primary responsibility for identifying the issues.

II. ISRAELI PRACTICE: OPEN JUDICIAL REVIEW

In contrast to the US, Israeli case law contains relatively little discussion of the question of open or closed judicial review. Nevertheless, Israeli practice has moved away from the British practice of closed review to a position located closer to the open end of the spectrum.⁷¹ Despite the lack of developed doctrines, the Israeli practice of open review influences many aspects of administrative law and interrelates with major judicial review issues.

Unlike the US, Israel has yet to adopt a comprehensive statute that regulates administrative procedures.⁷² The principles governing administrative procedure are largely the product of case law developed by the High Court of Justice (referred to herein as HCJ). The HCJ is the Israeli Supreme Court sitting in its capacity as the superior administrative court. Judicial review in Israel is carried out either by the HCJ, which functions as a court of first and last instance in many of the most important administrative cases, or by the administrative courts (which are district courts sitting in administrative cases and hear the bulk of the less important administrative cases). In the latter situation, the decisions of the administrative courts are subject to appeal before the HCJ.⁷³

⁷⁰ *Sims v. Apfel*, 530 U.S. 103 (2000).

⁷¹ See text at notes 91-92, *infra*. Peter Cane contends that UK practice has not always followed the closed record rule. See Cane, note 13, *supra*.

⁷² Recently the Ministry of Justice proposed a bill providing for general administrative procedure. See White Paper: Administrative Procedure (Agency Procedure and Rights of Citizens Addressing Administrative Agencies) (2014) (on file with authors)

⁷³ When a civil or criminal dispute arises in Israel, it normally makes its way to a county court. County court decisions are appealed to the district court. Only a handful of such cases reach the Supreme Court which considers only questions of law raised by the case, a function referred to as “cassation.” The Supreme Court also sits as an appellate court for cases involving certain serious criminal offenses or significant civil disputes. Such cases are tried by the District Court and then heard on appeal by the Supreme Court. This procedure also applies to decisions of administrative tribunals. See The Administrative Affairs Courts Law, 5760-2000 (2000) (Isr.). Prior to 2000, all cases involving public agencies exercising their legal powers (other than decisions of tribunals) were brought directly before the Supreme Court (sitting as the HCJ) and resolved by the HCJ with no further appeal. A law passed in 2000 routed less important administrative cases to the District Courts (referred to as administrative courts for purposes of this function). Therefore, the Supreme Court in Israel serves three different functions: as a court of cassation, as a court of appeal, and as a court of first (and last) instance for the more important administrative law judicial review cases. The Supreme Court has fifteen judges who normally sit in panels of three (except in unusually important cases).

A. Types of Administrative Procedures

Israeli administrative law does not contain mandatory procedures for “rulemaking” and “adjudication.” Instead, and following in the footsteps of UK administrative law, the case law distinguishes quasi-judicial and quasi-legislative actions.⁷⁴

Quasi-legislative functions include the formation of regulations and administrative policies or guidelines. No general statutory procedure regulates the formation of regulations, except for the minimal requirement for publication in the official register.⁷⁵ However, many specific statutes contain additional requirements of consultation or approval by a Knesset committee.⁷⁶ In addition, under guidelines adopted by the Attorney General, government authorities that adopt regulations must coordinate policies with other governmental units and consult experts and interested groups.⁷⁷ Israeli law does not include notice and comment procedures and excludes quasi-legislative procedures from the requirements of natural justice.

Nevertheless, the Supreme Court has imposed some important procedural requirements on agencies engaged in quasi-legislative decisionmaking. For example, it ruled that agencies must provide reasons for policy decisions in some cases.⁷⁸ In addition, Supreme Court decisions require agencies that create policies to conduct a rational process of decision-making. Such requirements include systematic data collection, data processing, consultation with experts, review of professional reports, formation of general policies, assessments of alternatives and (in some cases) generation of reasoned decisions.⁷⁹ These decisions do not amount to requiring

⁷⁴ A third category is known as administrative action, to which the principles of natural justice (i.e. fair hearing and the requirement of neutrality) do not apply. However, the definition of “administrative action” is relatively narrow and the definition of “quasi-judicial” is wide. Quasi-judicial action includes almost any administrative action that may prejudice a private interest. See H CJ 3/58 Berman v. Minister of the Interior [1958] IsrSC 12(2) 1493, 1504 ; H CJ 76-77/63, 79/63 Trudler v. Election Officer [1963] IsrSC 17 2503, 2515. Administrative action is not further discussed in this article.

⁷⁵ See The Interpretation Ordinance §17; CrimA 213/56 A.G v. Alexandrovitz. [1957] IsrSC 11 695.

⁷⁶ For example, there is a general requirement for approval by a Knesset Committee in case of regulations that carry potential criminal sanctions. See § 2(b) of the Penal Code (General Section).

⁷⁷ A.G. Guideline no. 1.0001 (The Obligation to Consult Under the Law) and 1.0002 (Administrative Guidelines) (Published at <http://index.justice.gov.il/Units/YoezMespati/HanchayotNew/Seven/10004.pdf>). The A.G. Guidelines apply to any unit of the central government (including all government offices) and may carry some formal binding force according to rulings of the H CJ. See e.g. C.A. 3350/04 General Manager of the Ministry of Interior v. Shenan (2007) (not yet reported).

⁷⁸ H CJ 2159/97 Regional Council Hof Ashkelon v. Minister of the Interior, [1998] IsrSC 52(1) 75, 88-89. And see the discussion of the requirement to provide reasons and the Law of Reasoning in text after note 115, *infra*.

⁷⁹ See H CJ 297/82 Berger v. Minister of the Interior [1983] IsrSC 37(3) 29 (per Justice Shamgar); H CJ 987/94 Euronet v. Minister of Communication [1994] IsrSC 48(5) 412. It is unclear to what extent these requirements apply to the formation of regulations. In any event, there is no duty to give a statement of reasons for regulations. The law regarding policy-making (not performed by regulations) is less clear, see note 78, *supra*.

agencies to create a record; as a result, discussion of the “record” in the context of judicial review of quasi-legislative actions is virtually non-existent.

Quasi-judicial actions include individualized decisions such as licensing and state benefits. Such decisions are subject to the requirements of natural justice, meaning a neutral decisionmaker and a hearing at which the private party has an opportunity to tell its side of the story. Agencies are required to provide reasons for quasi-judicial decisions.⁸⁰ However, natural justice does not require agencies to utilize adversarial procedures.⁸¹

B. The Three Stages of Adjudicatory Proceedings

There are typically three procedural stages for adjudicative proceedings.⁸² The first is the initial administrative decision. In Israel, the initial decision is usually investigatory in nature and can be written by the investigator. Such proceedings are subject to the principles of natural justice. The decision-maker is required to give reasons.⁸³

The second (or reconsideration) stage is often an appeal to an administrative tribunal which conducts a de novo merits review of the initial decision. Israel has no unified system of administrative tribunals, like those in the UK or Australia.⁸⁴ The statute that regulates a specific field may provide for an appeal to a tribunal and define the powers and procedures of the tribunal. The Administrative Tribunals Act of 1992 provides the procedural framework for administrative tribunals and ensures their independence *vis-à-vis* the agencies,⁸⁵ but it only applies to those tribunals that are specified in the addendum to the statute. Therefore, most administrative tribunals are not subject to its general requirements, and are governed exclusively by the provisions of the specific statute at issue.⁸⁶ The Tribunals Act itself refers to the administrative record of agencies only indirectly in the context of the right of the appellant to have access to “documents in the possession of the authority relating to the decision,” and does not confine the parties or the tribunal to such documents.⁸⁷

⁸⁰ See text at note 83, *infra*.

⁸¹ See H.C. 9,3/58 Berman, note 74 *supra*; H.CJ 531/79 Siat Halikud v. City Council of Petach Tikva, [1980] 34(2) 566.

⁸² See Asimow, *supra* note 11.

⁸³ Under the Administrative Procedure Amendment (Statement of Reasons) Law 1958 (hereinafter referred to as the Law of Reasoning). For English version see I. Zamir and A. Zysblat (eds.), PUBLIC LAW IN ISRAEL 196-210 (1996) (hereinafter referred to as Zamir & Zysblat).

⁸⁴ In Australia, the Administrative Appeals Tribunal provides for reconsideration of the initial decisions of nearly all federal agencies. Similarly, in the UK, the First Tier Tribunal provides for reconsideration of the initial decisions of most government agencies. See Asimow, *supra* note 11 at 28.

⁸⁵ Administrative Tribunals Act, §3.

⁸⁶ See Moshe Landau, “The Administrative Tribunal Law: An Introductory Note” in Zamir & Zysblat, *supra* note 83 at 189.

⁸⁷ Administrative Tribunals Act, §30(a).

The third stage (or the second stage if there is no tribunal or other form of administrative reconsideration) is judicial review conducted by either the administrative court or the HCJ.⁸⁸ At this stage the reviewing court holds the power to grant any remedy should it find the decision illegal. The judicial review stage is governed by the principle of deference to the original decision of the agency, meaning that the court should not replace the administrative policies with its own policy preferences. The court should interfere only on the basis of some illegality such as *ultra vires*, illegal purposes, or unreasonableness. Correspondingly, the court is not supposed to second-guess the process of fact finding by the agency unless the administrative decision was not based upon “reasonable” evidence.⁸⁹ As we discuss later, however, Israeli courts apply the reasonableness test more broadly than in the UK, the US and many other countries.⁹⁰

C. Closed and Open Judicial Review in Israel

1. The record on judicial review

During the first two decades after Establishment, Israeli administrative law followed in the footsteps of English law with respect to the administrative record. Under English law, courts could overturn administrative decisions only if the action was *ultra vires* (which was the main ground for judicial review) or if there was error on the face of the record (i.e. in the text of the decision).⁹¹ Consequently, English courts had no need to consider issues relating to the administrative record, meaning the evidence presented to the agency.⁹² Early decisions by the Israeli Supreme Court demonstrated loyalty to English doctrine, although even at that period the meaning of the term “record” (for purposes of applying the rule that courts could consider only errors appearing “on the face of the record”) remained rather vague.⁹³

During the 1960s, however, the HCJ openly diverged from the English rule that confined the reviewing court to consideration of the terms of the decision rather than to the record of what occurred before the agency.⁹⁴ In the leading case of *Trudler v. Election Officer*,⁹⁵ the

⁸⁸ See Administrative Affairs Courts Law, *supra* note 73. See also note 73, *supra*, for explanation of the distribution of judicial review cases between the administrative courts and the HCJ.

⁸⁹ HCJ 442/71 Lanski v. Minister of the Interior [1972] IsrSC 26(2) 337; HCJ 987/94 Euronet v. Minister of Communication [1994] IsrSC 48(5) 412; HCJ 10907/04 Soldoch v. Mayor of Rehovot (2010) (not yet reported)(sec. 30-35). In applying the reasonableness standard, the court does not differentiate between review of tribunal and non-tribunal decisions.

⁹⁰ See text at notes 136-40, *infra*.

⁹¹ See J.M. Evans, DE SMITH’S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 109-10 (4th ed. 1980).

⁹² See Cane, *supra* note 13.

⁹³ See *e.g.* HC 69/55 Boulos v. Minister of Development [1956] IsrSC 10 673, 680; HCJ 20/59 Kinsley v. Registrar of Communal Corp. [1960] IsrSC 14 2297, 2307 (per Justice Zilberg). It is worth noting that further developments in English law also tied the question of the administrative record to the scope of the duty of agencies to provide reasons for their decisions, See *e.g.* H.W.R. Wade & C.F. Forsyth, ADMINISTRATIVE LAW 228, 793 (10th ed., 2009).

⁹⁴ It is worth mentioning that in civil (commercial) law, the courts of appeal are limited to the record developed at the original trial. See Civil Procedural Regulations (1984) § 453. The regulations also acknowledge exceptions (see § 457) that were interpreted quite liberally by the Supreme Court. See C.A. 105/05 Dahan v. Kason (2005) (not yet reported). This rule also applies to civil litigation to which a

respondents argued that petitioners' attack on the Officer's decision was not directed to an error on the face of the record. Hence, it was argued that the court was precluded from discussing any evidence or arguments not on the record. Justice Bernzon pointed to the fact that even the House of Lords of England at the time showed a tendency to expand this narrow approach and then said the following:

I can see no reason why the court would not be able to see all the materials that were presented before the administrative agency....and under the special circumstances of the current case, it seems to me that we should make a step forward and admit all the evidence brought by the petitioners which were not presented before the Officer. The petitioners were no party to the original proceedings and therefore cannot be limited to the evidence that the original parties brought or did not bring [before the Officer]. This court should deal with the issue at stake on the basis of all the pertinent evidence including those materials presented by petitioners.⁹⁶

In *Trudler* the court opened the gate for the reviewing court to consider new evidence offered by third parties who were not parties to the original proceedings.⁹⁷ However, this decision had a much broader effect, because it was interpreted to permit a reviewing court to consider new evidence presented by parties who did participate in the original proceeding.⁹⁸ Nevertheless, the exact scope of the *Trudler* doctrine is far from clear; the case law remains eclectic and devoid of systematic development. The following sections consider in greater detail the various implications of opening review to factual evidence, arguments and reasons not considered by the agency.

1. Open record

Under Israeli administrative law, agencies are required to gather data, establish the facts, and base their conclusions upon the basis of "reasonable" evidence.⁹⁹ In the absence of formal proceedings at the initial decision level, in many cases the first stage at which a "record" is created is at the appeal to a tribunal or at the judicial review stage. Accordingly, to the extent that the HCJ in judicial review refers to constraints related to the "record," it is difficult to distinguish between references to the administrative record created at the initial decision level by the agency

public agency is a party. See *e.g.* C.A. 546/04 Jerusalem Municipality v. Kupat Holim Klalit (2009) (not yet reported) (sec. 17-23).

⁹⁵ HCJ 76-77/63, 79/63 *Trudler v. Election Officer* [1963] IsrSC 17 2503.

⁹⁶ *Id.* at 2516.

⁹⁷ The decision in *Trudler* was tied to the Court's ruling that petitioners had standing to attack the decision despite not being parties to the original administrative proceedings. See *id.* at 2510-12. For a more detailed discussion of the relationship between the concept of open record and the standing doctrine, see the discussion in text after note 126, *infra*.

⁹⁸ See text at notes 103-05, *infra*.

⁹⁹ See text accompanying notes 136-140, *infra*. This rule applies to all kind of decisions including those that are quasi-legislative.

and to the record established by the judicial echelons below the HCJ (i.e. the tribunal or the Administrative Court).¹⁰⁰

In any event, the law regarding the possibility of introducing new evidence at the judicial review stage remains unclear. The general practice of both the HCJ and the administrative courts is to reject new evidence, since admitting such evidence would undermine the required deference to the factual conclusions of the authorized agency.¹⁰¹ For that reason, courts often reject attempts by the parties to present new evidence at the judicial review stage.¹⁰² However, the enforcement of this norm is inconsistent. In some cases, courts open the door for such new evidence,¹⁰³ particularly in cases of petitions that involve issues of fundamental human rights and in immigration cases.¹⁰⁴ There seems to be no distinction in this respect between cases in which the administrative “record” was established during the initial administrative decision and cases in which there was an appeal to an administrative tribunal prior to the judicial review stage.¹⁰⁵

Some fundamental doctrines relating to judicial review support the general rule against the presentation of new evidence. First, judicial review is based on affidavits prepared by the parties. Oral testimony and cross-examination require special permission by the reviewing court, which is rarely given.¹⁰⁶ Logically, this restriction to affidavits would not preclude the parties

¹⁰⁰ Petitions disposed of by the Administrative Courts are subject to appeal before the HCJ, see note 73, *supra*.

¹⁰¹ See text at note 111, *infra*.

¹⁰² See, e.g. Adm. App. 1217/08 Hermelin v. Manager of Property Tax (2010) (not yet reported); AdminPet 09-2513 Magar v. City of Tel Aviv (2013) (not yet reported).

¹⁰³ See *Trudler*, *supra* note 95; HCJ 620/85 Miari v. Chairperson of the Knesset [1987] IsrSC 41(1) 169, 278; OM 6436/07 Carmeli v. Israeli Land Authority (2012) (not yet reported); AdminA 5674/04 City of Tel Aviv v. Friedman Hachshori Ltd (2008) (not yet reported) (enabling petitioners to bring new arguments and evidence that were not included in their response to the original petition); AdminPet 1920-02-12 Kakal v. Nazarat Municipality (allowing the presentation of new evidence that supports arguments raised in the original petition); AdminA 8256/12 Zoning Board of Rishon Letzion v. Neot Mizrahi (2014) (not yet reported) (considering new evidence presented by the petitioner while rejecting its position and allowing the Board’s appeal). See also Itzhak Zamir, *Evidence in the High Court of Justice*. 1 MISHPAT UMIMSHAL (LAW & GOVERNMENT) 295, 320-21 (1993).

¹⁰⁴ AdminA 12282/11 Brahana v. Ministry of Interior (2011) (not yet reported); HCJ 9429/09 Ploni v. Minister of Justice (2010) (not yet reported) (sec. 21-23) (allowing petitioner to bring new evidence regarding the dangers he would be exposed to if extradited to Ukraine); AdminPet 40886-07-11 Amenapo v. Immigration Authority (2013).

¹⁰⁵ AdminA 4875/12 Grumer v. Appellate Zoning Board of Tel Aviv (2013) (not yet reported). In *Grumer*, an appellate board quashed the original decision of a zoning board on factual grounds. The Administrative Court reversed and re-established the original decision by the zoning board. In the Supreme Court the justices could not agree on which of the two zoning boards enjoys better capability to evaluate the facts and what should be the standard of judicial review in such a case. The majority decided to dismiss the appeal while emphasizing the better ability of the original board to review the factual basis for the zoning decision).

¹⁰⁶ According to High Court of Justice Procedure Regulations (1984), § 18, oral testimony and cross examination require the approval of the Court. In practice cross-examination in the HCJ is extremely rare. See Zamir, *supra* note 103 at 312. The procedures before the administrative courts regarding oral

from using affidavits to introduce new evidence at the judicial review stage. However, the historical development of the affidavit rule before the Administrative Courts suggests that the default rule for Israeli judicial review is closed record. As mentioned above, until 2000 the HCJ served as the exclusive court for judicial review of all administrative cases. The HCJ was overwhelmed with administrative cases and was too busy to hear oral testimony.¹⁰⁷ In 2000, the Knesset passed a law that moved most administrative petitions to the Administrative Courts (in which a single judge of the District Court performs the task of judicial review).¹⁰⁸ Although the new statute also limited evidence to affidavits, it enabled the administrative judge to grant permission for oral testimony and cross-examination.¹⁰⁹ Since, unlike the HCJ, the administrative courts were not expected to suffer from the problem of overwhelming caseload, some commentators argued that these courts should be more willing to accept oral evidence rather than affidavits. The Supreme Court, however, was quick to negate this assumption. In *Sorchi v. Interior Office* the Court explained:

By accepting the new statute the legislature aimed “to keep the substantive and procedural distinctiveness of administrative law as developed by the High Court of Justice”...Indeed, in some cases the Administrative Court may be called for independent evaluation of the facts...but in this case petitioners did not establish a cause to divert from the general rule under which in administrative proceedings the court does not hear testimonies or establish facts...Even if petitioners seek to bring new testimonies, the place to do this is before the respondent [agency] not before the administrative court.¹¹⁰

The *Sorchi* decision demonstrates that while Israeli courts do not espouse a clear and consistent doctrine of closed record, they are not willing to adopt a general rule of open record either.

Another rule that connects well to this (partly) closed record approach is the rule regarding *deference* to the agency’s factual conclusions, particularly with regard to the agency’s resolution of conflicting expert opinions. In civil litigation, the general rule is that each party presents expert testimony and opinion and the court decides which expert opinion to prefer. In judicial review of agency action, however, the court is not expected to delve into the disagreements among experts. Instead, it should respect any factual conclusion by the agency

testimony and cross-examination are somewhat more lenient than those of the HCJ, but the court must give permission which is rarely granted. See Courts for Administrative Affairs Regulations (Procedure) (2000) Sec. 15.

¹⁰⁷ See Zamir, *supra* note 103 at 312-14.

¹⁰⁸ Administrative Affairs Courts Law, 2000 (2000). See note 73, *supra*.

¹⁰⁹ See Administrative Affairs Courts Regulations (Procedure) 2000, § 15.

¹¹⁰ AdminA 10811/04 *Sorchi v. Interior Office* (2004) (not yet reported) (sec. 10-11, per J. Barak); AdminA 9018/04 *Mona v. Ministry of Interior* (2005) (not yet reported). In *Mona*, the Judge Adiel wrote: ‘The Administrative Court is not supposed to put itself in the place of the authorized agency...and this rationale applies to the mission of establishing the facts...the Court is not supposed, as a general rule, to conduct the agency’s job of establishing the facts.’ *Id.* at 13.

based on expert opinion, unless such opinion is fundamentally flawed or flatly unreasonable.¹¹¹ This rule of deference towards an agency's factual findings and its resolution of conflicting expert opinions corroborates the basic concept that the factual basis for the administrative decision is to be established at the agency level — not in the courtroom.

2. New arguments at the judicial review stage

There is no clear-cut rule in Israeli law that limits the parties to the legal and policy arguments they raised before the administrative agency or before a tribunal. Nevertheless, the path for raising new argument is not wide open. Rather, courts often denounce attempts by the parties to raise arguments not raised before the agency as a forbidden “change of front.”¹¹² In such cases the courts may dismiss the new arguments without considering them on the merits, or give a short and unwilling look into the merits before dismissing them.¹¹³ Here, again, the doctrine does not seem to differentiate between arguments not raised before the agency at the initial decision stage, arguments not raised before a lower court or tribunal, or arguments that either party failed to raise in their original affidavits at the judicial review level.¹¹⁴

3. New reasons at the judicial review stage

Israeli statutory administrative law contains no provisions concerning evidence and arguments in administrative proceedings. However, the Law of Reasoning requires agencies to provide reasons for their decisions.¹¹⁵ While the statutory language refers primarily to *quasi-judicial* decisions, case law has expanded the duty to give reasons to some quasi-legislative and policy decisions.¹¹⁶ The obligation to provide reasons requires an agency to state the factual basis for the decision as well as the legal and policy grounds on which it is based.¹¹⁷

¹¹¹ HCJ 13/80 ‘Nun’ Tin Industry v. Ministry of Health [1980] 34(2) 693; HCJ 3186/03 State of Israel v. Ein Dor (2004) (not yet reported); HCJ 8109/01 Reshtnik v. Minister of Transport (2003) (not yet reported).

¹¹² *E.g.* Admin.Ap. 13-04-29028 Hativ v. Ein Kenia Local Council (2013) (not yet reported). See also CA 546/04 Jerusalem Municipality v. Kupat Holim Klalit (2009) (not yet reported) *supra* note 94.

¹¹³ *E.g.* AdminAp 33481-07-12 Zalk v. Zoning Board of Central District (2012); AdminPet 35244-07-13 Frenier v. Municipality of Lower Galili (2013) (not yet reported) (§ 29.); see also AdminPet 12466-01-12 Pardes Ltd. v. Tel Aviv District Appeals Committee for Planning and Construction (§ 49) (2013); AdminPet 32826-09-13 Sheleg Lavan Ltd. v. The Company of Business and Finance of Local Government Ltd. (§ 56).

¹¹⁴ *Cf.* AdminAp 13-04-29028 *Hativ*, *supra* note 112, vis-à-vis AdminAp 12 07 33481; *Zalk*, note 113, *supra*. See text at notes 99-100, *supra*.

¹¹⁵ See note 83, *supra*.

¹¹⁶ See Administrative Procedure Amendment (Statement of Reasons) Law 1958 §§ 2(a) and 2A; HCJ 153/77 Sasson Faraj v. Municipality of Petach Tikva [1977] IsrSC 31(3) 427, 434; CA 10419/03 Dor v. Ramat Hadar (2005) (not yet reported); HCJ 2159/97 Regional Council Hof Ashkelon, note 78 *supra*; HCJ 4733/94 Naot v. Mayor of Haifa [1996] IsrSC 49(5) 111.

¹¹⁷ CA 30/56 Ben Harosh v. Benefits Officer [1956] IsrSC 7 931, 933; CA 142/70 Shapira v. District Branch of the Israeli Bar Assoc. [1971] IsrSC 25(1) 325, 335 (per J. Kister); HCJ 518/78 Avrami v. Minister of Transport [1978] IsrSC 32(3) 675, 678.

This comprehensive duty to state the reasons for the decision at the agency level would seem to preclude an agency from stating new reasons for its actions at the judicial review stage. However, the HCJ's decisions on this point are less decisive and more flexible than their American counterparts.¹¹⁸ In the leading case of *Hilron v. Fruit Council*,¹¹⁹ the HCJ responded to the argument that the agency is banned from providing reasons in court that are different from those provided in its original statement by the following words:

It is certainly inconceivable that when the agency's original reasons were wrongful and it chooses to drop them in court, the court would be compelled to decide for the petitioner, even when other reasons are revealed which preclude a decision in his favor, such as reasons based on express statutory language. If it is revealed that the agency advances new reasons in order to support a decision that was erroneous as given, the court may get the impression that the new reasons are disingenuous and aimed to serve as a lip service to justify a baseless decision. And if the new reason requires additional factual findings, the court may remand the decision to the agency in order to conduct such factual investigation...but, despite the judicial suspicion which such post-hoc reasons receive in court...we found no support for the view that the court should disregard them just because they were raised [only in court].¹²⁰

Under the rule in *Hilron*, agencies are allowed to raise post-hoc rationalizations for their actions even if those differ from the reasons provided by the agency in its original statement of reasons (or if the agency failed to provide reasons at all).¹²¹ Sometimes, the judicial suspicion towards post-hoc rationalizations causes the court to ignore those reasons, or remand the case back to the agency.¹²² In most cases, however, the courts consider such reasons, despite

¹¹⁸ See discussion of the *Chenery* principle in text accompanying notes 13-15, *supra*.

¹¹⁹ HCJ 75/76 *Hilron Ltd. V. The Fruit Committee* [1976] IsrSC 30(3) 645.

¹²⁰ *Id.* at 649.

¹²¹ See *e.g.* HCJ 8437/99 *Habad Kindergarten v. Minister of Education* [2000] IsrSC 54(3) 69, 94-96; AdminA 823/12 *Kalisa v. Ministry of Housing* (2013) (not yet reported) (sec. 29 per J. Barak-Erez); CA 456/92 *Agaberia Bros. Ltd. v. VAT Manager* (1997) (not yet reported); CA 4027/10 *Yadid Eliyahu v. VAT Manager* (2012) (not yet reported). Failure to provide reasons does not normally amount to a ground for judicial annulment of the decision. Rather the court may allow the agency to provide reasons at the judicial review stage or remand the case to the agency to provide such reasons (see *The Law of Reasoning*, §. 6; Admin.Ap 34551-03-13 *Vanning v. Perminger* (2013) ; ALA 10629/04 *Azulai v. Soldiers' Benefits Officer* (2005) (not yet reported). In exceptional cases when the lack of reasons signify deep flaws in the decision the court may order annulment (*e.g.* HCJ 3/04 *Local Zoning Board of Tzefat v. Minister of the Interior* (2005) (not yet reported).

¹²² See *e.g.* HCJ 7177/95 *Eurogam v. Investments Council* [1996] IsrSC 50(2) 1, 8; HCJ 197/81 *Freidman v. Mayor of Eilat* [1983] IsrSC 36(2) 425, 430; HCJ 809/86 *Yankovitz v. Mayor of Ramat Hasharon* [1987] IsrSC 41(4) 309, 319.

expressing their discontent with post-hoc rationalizations, and usually do not quash the decision or even remand the case.¹²³

D. Open Judicial Review and General Israeli Doctrines of Judicial Review

The flexible attitude of the Israeli courts toward allowing new evidence, new arguments, and new reasons at the judicial review stage is tied to central doctrines of judicial review as developed by Israeli courts—each of which are strikingly inconsistent with American law and practice. Those doctrines could not function well under a regime of closed review. Indeed, rather than being a routine matter of judicial procedure, the question of open or closed review goes to the heart of any judicial review system.

1. Standing

In the past, Israeli law adhered to a narrow concept of standing (somewhat similar to the “injury in fact” approach currently used by US courts).¹²⁴ Under this doctrine the petitioner had to establish a *personal interest* in the state action that was *direct* and *substantial*.¹²⁵ This approach began to change during the 1970s,¹²⁶ and was completely abandoned during the 1980s when the HCJ developed an expansive doctrine of “public petitioner.”¹²⁷ This doctrine enables almost anyone to bring to court petitions against almost any administrative or executive action. Among other things, it enables citizens to challenge decisions relating to the appointment of senior executive officials, budgetary appropriations, or the provision of benefits, licenses or any other governmental goods to parties other than the petitioners themselves.¹²⁸

This expansive concept of standing is inconsistent with a strict concept of closed review. Most of these “third party” petitioners were not parties to the administrative decisions they challenge in court. In these kinds of proceedings (which are commonplace in Israeli public law),

¹²³ See reference at note 121 *supra* and see also C.A. 700/89 Israeli Electricity Co. v. Malibu Ltd. [1993] IsrSC 47(1) 667, 678. For a relatively rare exception where the court concluded that the agency’s post-hoc rationalization cannot be trusted and therefore ordered the provision of a business license to the petitioner, see HCJ 517/72 Snocrest (Israel) Ltd. v. Mayor of Bnei Brak [1973] IsrSC 27(1) 632.

¹²⁴ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

¹²⁵ HCJ 11/79 *Mirkin v. Minister of Interior* [1979] IsrSC 33(1) 502; HCJ 331/80 *Hatishbi v. Commander of Tel-Aviv Police Station* [1980] IsrSC 34(4) 113; HCJ 287/69 *Meiron v. Minister of Employment* [1970] IsrSC 24(1) 337; HCJ 348/70 *Kfir v. Religious Council of Ashkelon* [1971] IsrSC 25(1) 685; HCJ 26/76 *Bar Shalom v. Israel Land Administration* [1977] IsrSC 31(1) 796.

¹²⁶ The decision in *Trudler*, note 95, *supra*, marked the first signs of that development. Before reaching the question of the record, Justice Berenzon concluded that petitioners had standing to attack the respondent’s decision. See HCJ 76-77/63 *Trudler*, 2510-12.

¹²⁷ HCJ 910/86 *Ressler v. Minister of Defense* [1988] IsrSC 42(2) 441, 477, available in English at http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf, ¶ 36.

¹²⁸ See e.g. HCJ 4267/93 *Amitai- Citizens for Judicial Watch v. The Government of Israel* (1993) (not yet reported) (petition for dismissal of a minister on bribery allegation); HCJ 6770/10 *The Green Party v. The Government of Israel* (2011) (not yet reported) (attacking an appointment of the chief of staff); HCJ 287/91 *Kargal v. Investment Agency* [1992] IsrSC 46(2) 852 (attacking budgetary appropriation to a third party).

there is no “original” stage at the agency level designed to deal with petitioners’ evidence and arguments (save, perhaps, the pre-litigation letter or documentation they are required to send the relevant decision-maker before going to court).¹²⁹ Hence, the first time that the “record” for the litigation is shaped is at the judicial review stage.¹³⁰

2. Jurisdiction

A second important doctrine refers to the jurisdiction of the HCJ. Under the Basic Law: The Judiciary, the jurisdiction of the Supreme Court sitting as the HCJ is broadly defined.¹³¹ The Basic Law authorizes the HCJ to “hear matters in which it deems necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court or tribunal.” The HCJ defined this provision to enable it to “seize” jurisdiction from any court or tribunal when the HCJ deems its direct and immediate involvement necessary. As a result, the HCJ may decide to deal with an undecided case under the jurisdiction of another court or tribunal.¹³²

This extraordinary capacity of the HCJ is used rarely and has no obvious US counterpart. However, its existence suggests profound implications with respect to the whole system of judicial review,¹³³ including issues relating to the record. In order to seize control over a case under the jurisdiction of a lower court or a tribunal, the HCJ must be able to “construct” the record for its own purposes. If one adds to this exceptional rule of jurisdiction the considerable flexibility and informality of the procedure at the HCJ (and the administrative courts in general),¹³⁴ it seems that a strict, formalistic rule of closed review is foreign to the culture of administrative litigation in Israel.¹³⁵

3. Reasonableness

Since the early 1980s, the HCJ has developed an expansive doctrine of reasonableness, which serves as the principal pillar of judicial review and a major vehicle to advance its activist ideology. Under this concept, the reviewing court is called upon to examine the administrative

¹²⁹ See YOAV DOTAN, *LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL* (Cambridge Un. Press 2014) 172-187 (hereinafter Dotan 2014).

¹³⁰ See discussion of the *Trudler* case at note 95, *supra*.

¹³¹ Basic law: the Judiciary (1984) § 15. For an English version see http://knesset.gov.il/laws/special/eng/basic8_eng.htm. Israel has no formal constitution. Instead the Knesset has adopted Basic Laws that enjoy constitutional status. See A. Zysblat, *Introduction: The System of Government*, in I. Zamir and A. Zysblat, note 83 *supra*; Itzhak Zamir, *Rule of Law and Civil Liberties in Israel*, 7 C.J. Q. 64, 65 (1988).

¹³² See e.g. HCJ 6163/92 *Eisenberg v. The Minister of Building and Housing* [1993] IsrSC 47(2) 229, available in English at http://elyon1.court.gov.il/files_eng/92/630/061/Z01/92061630.z01.pdf. In *Eisenberg*, the HCJ decided to deal with a petition directed against the appointment of a senior government official who was involved in a public scandal, even though the case was under the jurisdiction of the labor tribunal; HCJ 2208/02 *Maha Salame v. Minister for the Interior* (2002) (not yet reported) (per C.J. Barak, par. 2).

¹³³ See Dotan 2014 at 44-45.

¹³⁴ See Dotan 2014 at 26-29.

¹³⁵ See Dotan *id.* at 26-29.

decision at stake and make sure that its result is not “extremely unreasonable.”¹³⁶ Accordingly, it calls for an independent judicial evaluation of the reasonableness of the decision and depends on a particular judge’s assessment of the meaning of this standard.¹³⁷

As examples of particularly intrusive exercises of judicial assessment of reasonableness, the HCJ ordered the Prime Minister to fire cabinet members¹³⁸ and ordered the government to rethink its policies on major national security matters.¹³⁹ Logically speaking, this activist concept of reasonableness does not require open review. Review could proceed on the basis of the record, reasons, and arguments as developed at the agency level or in lower courts. From an ideological point of view, however, such broad and independent assessment of the merits seems inconsistent with a strict, formalistic approach that would make the court dependent on the agency’s record. For example, when the HCJ ordered the government to change the location of the security barrier between Israel and the West Bank, the principal determination of the facts (regarding the security implication of each alternative locations for the Barrier) were made by the Court itself, and not by the government.¹⁴⁰

4. Selective enforcement

Another doctrine of judicial review that seems inconsistent with open record is selective enforcement. Since the early 1990s, the Israeli courts have developed an expansive doctrine of

¹³⁶ See H CJ 910/86 Ressler v. Minister of Defense [1988] IsrSC 42(2) 441, 477, available in English at http://elyon1.court.gov.il/files_eng/86/100/009/Z01/86009100.z01.pdf, H CJ 8379/06 Eduardo v. Minister of Defense (2007) (not yet reported); available in English at <http://versa.cardozo.yu.edu/opinions/wasser-v-minister-defense>. See also RUTH GAVISON, MORDECHAI KREM NITZER AND YOAV DOTAN, JUDICIAL ACTIVISM AT THE HIGH COURT OF JUSTICE 9-11 (2000). *Chevron* deference is not recognized by Israeli courts. Instead, agency interpretations merit no deference at all since the courts view themselves as the ultimate readers of the law, see *e.g.*, H CJ 3648/97 Stamka v. Minister for the Interior [1999] IsrSC 53(2) 728 (per J. Cheshin, sec. 8-11); H CJ 693/91 Efrat v. Minister for the Interior [1993] IsrSC 71(1) 749.

¹³⁷ It is worth noting that while the *terminology* used by the HCJ with regard to “reasonableness” is somewhat similar to that of the courts in England (see *Associated Picture Houses Ltd v. Wednesbury Corp.* [1948] 1 K.B. 223, 233-234) the doctrine developed in Israeli law is far more penetrative and expansive.

¹³⁸ See *e.g.* H CJ 3094/93 *The Movement for Quality in Government in Israel v. The State of Israel* [1993] IsrSC 47(5) 404, available in English at http://elyon1.court.gov.il/files_eng/93/940/030/Z01/93030940.z01.pdf; H CJ 4267/93; Amitai - Citizens for Judicial Watch v. The Prime Minister of Israel [1993] IsrSC 47(5) 441. See also Gavison *et al*, *supra* note 136 at 42-43.

¹³⁹ See *e.g.* H.C. 8379/06 *Eduardo*, note 136 *supra* (ordering government to build shelters at schools and kindergardens in southern Israel against rockets fired at these area from the Gaza Strip); H CJ 2056/04 *The Council of Beit Surik v. The Government of Israel* (2004) (not yet reported) (ordering government to change the location of the security barrier between Israel and the West Bank); Ronen Shamir, *The Politics of Reasonableness: Discretion as Judicial Power*, 5 THEORY AND CRITICISM 7 (1994).

¹⁴⁰ H CJ 2056/04 *The Council of Beit Surik v. The Government of Israel* (2004), note 139, *supra*.

selective enforcement. The US has no corresponding doctrine of selective enforcement.¹⁴¹ Accordingly, in Israel one can challenge a decision to enforce the law against herself (or to refrain from granting her a state benefit), without demonstrating the existence of a legal duty owed to her. Instead, it is sufficient to demonstrate that an exemption from the law or a benefit was given to others, even if contrary to official policy.¹⁴² Once again, the doctrine of selective enforcement, which focuses on what the agency did in cases other than the one at stake, seems incompatible with the concept of closed review.

III EXPLANATIONS FOR THE DIFFERENCE BETWEEN ISRAELI & US PRACTICE

The most likely explanation for the divergence between the US and Israel with respect to closed and open judicial review lies in some fundamental differences between the two systems of administrative adjudication (in addition to the striking differences between the two systems discussed in Part II. D. above). The administrative adjudication systems of different countries vary tremendously, but almost always include three phases—initial decision, administrative reconsideration, and judicial review. All countries want their administrative adjudication systems to operate efficiently and to generate accurate results through a process that is acceptable to the private parties enmeshed in disputes with government. However, each country tends to place its primary reliance on (and invest most of its resources in) only one of the three phases; the other two are less important.¹⁴³

The US system relies primarily on the *initial decision* to get things right.¹⁴⁴ As discussed earlier,¹⁴⁵ the initial agency decision normally consists of a trial-type adversarial proceeding. Adversarial initial decision proceedings are quite time consuming and costly for both the state (which has to pay its attorneys and the neutral arbiter) and private parties (who usually have to pay lawyers to conduct the lengthy trial-type proceeding). Later phases in the process (administrative reconsideration and judicial review) are less significant than the initial decision, and seldom overturn the fact-findings or the exercise of discretion that occurred as part of the initial decision.

The closed review rules in the US flow logically from the decision to invest most resources in the initial decision. That decision generates a written record of all of the testimony and other evidence offered at the hearing; the parties were in control of the proceedings and had the ability to introduce all relevant evidence and make all relevant arguments. The decisionmaker can consider only that evidence and those arguments. The initial decision creates a crystallized set of fact-findings and reasons that a reviewing court should respect by precluding the introduction of new evidence, arguments, or reasons at the review stage.

¹⁴¹ See *United States v. Armstrong*, 517 U.S. 456 (1996) (defendant cannot argue selective enforcement on the basis of race without showing that government declined to prosecute similarly situated suspects of other races).

¹⁴² H CJ 637/89 Huka Le' Medinat Israel v. Treasury Minister [1991] IsrSC 46(1) 191; H CJ 6396/96 Zakin v. Mayor of Beer Shiba [1999] IsrSC 53(3) 289.

¹⁴³ Asimow, *supra* note 11 at --.

¹⁴⁴ *Id.* at --.

¹⁴⁵ See text at note 3-5, *supra*.

Similarly, in the US, the rulemaking process is highly structured.¹⁴⁶ There must be notice to the general public and broad opportunity for public comment. The agency must disclose its methodology and critical data and it must respond to public comments by explaining why it did not follow the suggestions or alternative solutions contained in those comments. This process is very costly. As in the case of adjudication, the US system places primary responsibility for finding legislative facts and stating reasons at the level of the rulemaking agency. Reviewing courts should respect that process by a system of closed record, closed reasons, and closed argument.¹⁴⁷

Israel follows a quite different model of adjudicatory decisionmaking. Israel places primary reliance on the judicial review phase of administrative adjudication, rather than the initial decision or the agency reconsideration phases. The broad rules relating to standing, jurisdiction, reasonableness, and selective enforcement discussed in the previous section evidence Israel's commitment to judicial review and its willingness to rely on courts to produce a just and accurate decision. Similarly, Israel's striking and unusual rule that designates the Supreme Court in its role as the HCJ as the first and only judicial review stage in more significant cases evidences its commitment to judicial review as the most important level of administrative decisionmaking.

At the initial decision phase, Israel follows the rules of natural justice but the proceeding is inquisitorial rather than adversarial. The initial decision is considered to be a part of the agency's investigation and the private party has the opportunity to correct what it considers mistaken findings or an abuse of discretion by the investigators.¹⁴⁸ Under natural justice principles, the private party has a chance to make its arguments orally or in writing before an unbiased decisionmaker. However, that decisionmaker is often involved as an investigator in the case and can rely on his or her prior knowledge in finding the facts and exercising discretion.¹⁴⁹ There is usually no opportunity to cross examine adverse witnesses.¹⁵⁰ This inquisitorial proceeding is sharply different from the US commitment to trial-type adversarial proceedings at the initial decision level with an exclusive record and an uninvolved decisionmaker.

As a result, in Israeli practice, the record is not crystallized at the initial decision level. There may be no written record at all of the testimony offered at the initial decision level and the decisionmaker may rely on non-record evidence. In the light of these procedures, it is not surprising that the courts permit parties to the initial decision (as well as non-parties who become involved at the judicial review stage) to supplement the record by introducing affidavits from

¹⁴⁶ See text at note 26, *supra*.

¹⁴⁷ The case for closed review of informal adjudication and policy implementation decisions is much less persuasive. See text at notes 22-24 and 39, *supra*.

¹⁴⁸ See *e.g.* *Trudler*, *supra* note 95; *H CJ 1661/05 Aza Regional Council v. The Knesset* [2005] Isr.SC 59(2) 481, 606-07 and see also references at note 81 *supra*. See also DAPHNE BARAK-EREZ, *ADMINISTRATIVE LAW* (The Israeli Bar Publication House, 2010 Vol. I) 87-92.

¹⁴⁹ See text at note 81 *supra*.

¹⁵⁰ See *e.g.* *H CJ 78/71 Mizrachi v. Health Minister* [1971] IsrSC 25(2) 238, 244; *H CJ 646/93 Bracha v. Minister of Communications* [1994] IsrSC 48(3) 661.

additional witnesses or experts, and by allowing either party to advance new arguments, and by permitting the agency to state new reasons to support its decision.

It might seem that in cases involving an appeal from an agency to a tribunal, the record for judicial review would have crystallized at the tribunal phase in a way that would constrict the openness of the review at the judicial review level.¹⁵¹ In reality, however, the current status of tribunals in the Israeli system is not firm enough to substantiate the development of an exception to the judicial acceptance of open review principles.

Similarly, Israel provides no structured process for making quasi-legislative policy decisions such as rules.¹⁵² The agency no doubt consults with interested parties in the process of formulating the rules or other policies, but it is not required to inform the general public, solicit comments, conduct hearings, disclose its methodology, or to respond to public comments if there are any. Judicial review offers the first structured opportunity for adversely affected parties to challenge the legality and reasonableness of quasi-legislative policy judgments. Consequently, it is unsurprising that courts are willing to entertain new evidence and arguments as well as new agency reasons at the judicial review stage.

CONCLUSION

In this paper we compared closed and open judicial review of agency action. The US falls near the closed end of the spectrum while Israel falls closer to the open end. The question of the administrative record might seem like a procedural or technical issue. Our analysis demonstrates, however, that the concept of open or closed review is a central component of any system of judicial review. The decision about whether to employ closed or open review is crucial to the division of responsibilities between the administrative agencies and the courts.

In the US the policy of closed record means that the evidentiary record is set during the initial decision process in both adjudication and rulemaking as well as policy implementation decisions. In addition, the policies of closed reasons and arguments force private parties to make all their arguments and agencies to state all their reasons at that initial decision stage. In Israel, on the other hand, administrative procedures for making quasi-judicial and quasi-legislative determinations at the agency level are much less structured than in the US and the tribunal system of administrative appeals is undeveloped. The most crucial stage of decision-making is the judicial review process. The concept of open review reflects the Israeli choice to make judicial review the most important phase of the administrative process.

Our analysis also demonstrates that the question of open or closed review is intertwined with various other doctrines of review both on the procedural level (such as standing) and on the substantive level (including the standards of review such as reasonableness, proportionality, and selective enforcement). Accordingly, one cannot consider revisions in the policy regarding the administrative record, as well as those relating to new arguments or reasons, without bringing into consideration the implications of such a move on many other doctrines of judicial review.

¹⁵¹ See the discussion in text accompanying notes 84-87, *supra*.

¹⁵² See text at notes 75-79, *supra*.

