CHAPTER VI

ADMINISTRATIVE LAW

Administrative law is the study of the law governing administrative agencies and officials.[1] Included are the proper procedures for promulgating legislative rules and adjudicating disputes, legal issues raised by less formal actions of agencies, the problem of improper conduct of administrative officials, and the judicial remedies available in all these areas.[2]

This chapter will focus primarily on the law of federal administrative agencies and the requirements of the federal administrative Procedures Act (APA) and caselaw thereunder. One reason for focusing on federal agencies is their importance in their own right, but another is that much of state administrative law is modeled on the federal experience.[3]

PART I: Law and Procedures of Administrative Agencies

A. Types and Purposes of Administrative Agencies

Types of Agencies Broadly defined, virtually every non-military government organ other than the courts and the legislature is considered an "agency."[4] There are two general types of agencies: regulatory agencies and social welfare agencies. Regulatory agencies regulate conduct in private relations in various areas, from transportation to food and prescription drugs. An example is the federal Interstate Commerce Commission, the first administrative agency. Social welfare agencies dispense government assistance in the various programs of assistance for veterans, the aged, the disabled and others. An example is the federal Social Security Administration within the Department of Health and Human Services. Both types of agencies exist on both the state and federal level. Both have the power to make rules, to enforce them and to adjudicate disputes arising in matters under their jurisdiction.

Federal agencies are also distinguished by whether they are "executive branch" agencies or "independent" agencies. The former are responsible to a cabinet "Secretary," while independent agencies are headed by administrators, boards or commissions not formally subject to executive branch supervision. When it creates the agency, Congress determines whether the agency will be independent or executive.

Advantages and Disadvantages of Agencies There are essentially three reasons for having agencies. First, agencies bring expertise to bear on problems in a way that generalist executive officials, legislators and judges cannot. The highly technical fields of economic and market regulation require expert knowledge and flexibility to react

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1 The advent and expansion of administrative agencies is one of the major changes in the structure of government since 1789. *See* Chapter I, pp. 15-16.

2 For more on administrative law, *see* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, HORNBOOK ON ADMINISTRATIVE LAW, 2D ED. (West 2001); BERNARD SCHWARTZ, ADMINISTRATIVE LAW, 3D ED. (Aspen 1991); ROBERT J. PIERCE, SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS, 4TH ED. (Foundation 2004). *See also* A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW (ABA 2004). *See also* PETER STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES (Carolina Academic Press, Chapel Hill 1989) and Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 AM.J.COMP.L. 615 (2006), works written especially for the foreign lawyer. *See* Appendix, pp. A30-A31, for an outline of governmental structure with major federal agencies shown. Major federal and state laws on administrative agencies are collected in SELECTED FEDERAL AND STATE ADMINISTRATIVE AND REGULATORY LAWS (West 2004).

3 Also having strong influence on state practice is the Uniform Law Commissioners' Model State Administrative Procedure Act (1981), www.nccusl.org/Update/. *See* Chapter I, p. 34, note 154.

4 *See* 5 U.S.C.A. §551(1).

quickly to changes in conditions. In the social welfare area, programs are complex and the number of recipients is so great that it is only through specialized and expert administration that benefits can be properly distributed. The second reason for agencies is efficiency. Considerable efficiency results naturally from expertise in administration. But further efficiency gains come from the nature of agency structure. It combines legislative, executive and judicial functions "under one roof" rather than relying on the more traditional diffused governmental structure.[5] A third attraction of agencies is that their self-contained structure makes them more independent, insulating them from the "political winds that sweep Washington."[6] Thus, it is hoped, government policy and actions in a given area will be more consistent and more rational than those that would be produced by the political branches.

The disadvantages of agencies grow directly out of the three advantages just stated. Expertise can breed a narrow vision and arrogance. Undue concern for efficiency can trample individual rights. Insulation from political control can lead to a lack of accountability for actions and lawlessness. Much of administrative law struggles to enhance the positive side of agency expertise, efficiency and independence while controlling their more negative consequences.

The first half of the 20th century saw unrestrained growth in the size, number and variety of practices of federal agencies. A scathing report issued in 1937 complained that they had become "a headless 'fourth branch' of government, a haphazard collection of irresponsible agencies and uncoordinated powers."[7] Following a presidential commission investigation, steps were taken in 1946 to deal with such problems though passage of the Administrative Procedures Act (APA), a comprehensive statute regulating federal agency procedure for rule-making, adjudication and other activities.[8]

Agencies have two basic functions beyond their obvious executive mission: rule-making and adjudication. Statutory and constitutional aspects of these two functions will be outlined first.

B. Rule-Making Functions of Agencies

1. Legislative Rules and the Rule-Making Process

Legislative "rules" set substantive and procedural law that must be followed by both the agency and those subject to its jurisdiction. Under the APA, rule-making can be formal or informal, but by far the most common process is informal rule-making.

Informal Rule-Making For informal rule-making, the APA requires a "notice-and-comment" procedure.[9] A federal agency must first publish a notice of proposed rule-making in the Federal Register, a daily government publication, and invite public comments on its proposal. "[A]n agency's notice must 'provide sufficient detail and rationale for the rule to permit interested parties to comment meaningfully.'"[10] At the end of the notice and comment period, the agency promulgates and publishes the final version of the rule. In an introduction to the rule, the agency must take into account and discuss the public comments it has received and declare the basis for writing the

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5 The separation of powers problems inherent in such an arrangement are discussed *infra* pp. 215-220.

6 *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 835 (1986).

7 President's Commission on Administrative Management, Report with Special Studies (1937), quoted in AMAN & MAYTON, *supra* note 2, at 3.

8 *See* 5 U.S.C.A. §§551-559, 701-706, 1305, 3105, 3344, 5372, 7521.

9 5 U.S.C.A. §553. *See* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL RULE-MAKING, 4TH ED. (ABA 2006).

10 *Fertilizer Institute v. Environmental Protection Agency*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

final rule as it did in light of the comments it received. In the process, the agency must deal meaningfully with the public comments and cannot ignore any point of view.[11] It must respond specifically to significant negative comments either by modifying the proposed rule or explaining why it did not.[12] Overall, the agency must show that it has "genuinely engaged in reasoned decision-making."[13]

If the notice-and-comment procedures have been followed and the rule is an interpretation of statutory language or fills in gaps in the statute within the scope of the agency's delegated power, a reviewing court must defer to the agency's interpretation of the statute under the *Chevron* rule, discussed in Chapter II. This means that the reviewing court "may not substitute its own construction for a reasonable interpretation" by the agency.[14]

Formal Rule-Making Congress does not require that formal rule-making procedures be followed very often. For formal rule-making, testimony and other evidence must be taken "on the record" before final rules can be promulgated.[15] Formal rule-making is generally reserved for such matters as rate-making, in which an agency must make a general decision on what prices or rates to allow in an industry that it regulates. The Court has made it clear that rule-making procedures more formal than the notice-and-comment procedure may only be imposed by *Congress* and that courts do not have any power to impose more stringent procedures where Congress has not.[16]

The public has the right to petition for rule-making. However, there is no requirement that the agency respond with rule-making.[17]

Final federal agency rules are compiled yearly in Code of Federal Regulations (C.F.R.), where they are organized by subject matter. However, C.F.R. compilations are notoriously late in being published, so it is often necessary to find the final rule in the Federal Register.

Both state and federal administrative procedure acts contain "good cause" exceptions to the normal notice and comment procedure. Under the federal APA, "good cause" is said to exist when the notice and comment procedures would be "unnecessary, impracticable or contrary to the public interest." These are generally interpreted as requiring some sort of emergency need for the rule. The rules adopted pursuant to this exception are called "interim final" rules. The agency then goes

11 *See Kennecott Copper Corp. v. Environmental Protection Agency*, 462 F.2d 846 (D.C. Cir. 1972) (rule sent back to agency for reconsideration of why it reached a particular standard for air quality when tests showed a different standard was sufficient). In addition, Congress has required that all major agency action consider specific items. One is the requirement of an environmental impact statement. *See* 42 U.S.C.A. §4321, discussed in Chapter 15, p. 620.

12 *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977) (agency did not respond sufficiently to comments that current health standards were adequate and that new rule would make commercial marketing of whitefish unfeasible).

13 *Greater Boston Television Corp. v. Fed. Communications Comm'n*, 444 F.2d 841, 851 (D.C.Cir 1970) (decision on license renewal upheld). If a court vacates a rule, the agency can re-publishes the same rule and follow the proper procedures the second time, but it cannot make the rule retroactive. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988) (retroactive recoupment of Medicare payments already made to hospitals).

14 *See* Chapter II, p. 60, and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (EPA rule defining what a statutory term "stationary source" of air pollution upheld).

15 *See* 5 U.S.C.A. §557.

16 *Vermont Yankee Nuclear Power v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (reversing lower court order requiring agency to implement additional procedures, including suggestion of possible cross-examination of agency personnel who produced report on which agency relied).

17 5 U.S.C.A. §553(e). *See WWHT, Inc. v. Fed. Communications Comm'n*, 656 F.2d 807 (D.C.Cir. 1981) (by providing petition procedure, Congress did not mean to compel rule-making).

through the comment procedure before finalizing the rule, although interim rule may take effect upon its first publication.

2. Interpretive Rules and Statements of Policy

Agencies also issue "interpretive rules." As the name suggests, these rules interpret some existing legal standard. They often deal with the application of legislative rules to particular facts and are expected to apply to a general category of cases of that type. Interpretive rules are exempt from the procedural requirements for rulemaking applicable to legislative rules.[18] Interpretive rules may be promulgated in the same rule-style form as legislative rules or they may be in a less formal style, such as a question-and-answer format.[19] It is sometimes difficult to draw the line between an interpretive rule and a new legislative rule, but the basic principle is clear. An interpretive rule is improper if it sets out what is effectively a new requirement.[20]

"Statements of policy" are also issued. They need not follow any particular form. They relate principally to the future intentions of the agency, often with regard to what enforcement action it will take in particular situations. Interpretive rules or policy statements can be disputed as incorrect interpretations of existing law. If this can be shown, the agency has the duty to refrain from applying them to the complaining party and to change them for other similar cases.[21]

Agencies also give advice to the public on how to comply with their regulations. When that advice is correct, it is a great service to the public. When it is incorrect, agencies will seek to protect reliance interests to the extent possible. However, it is clear that in general there is no obligation to do so.[22]

C. Adjudicatory Functions of Agencies

Adjudication determines the rights and obligations of a particular party based on the application of some legal standard to particular facts. Understood in a broad sense, adjudication happens every time an agency takes action that is not in the form of a rule. However, in this section we will focus on *formal* adjudication, by which affected parties are afforded a trial-type hearing before the agency. Examples of formal adjudication by federal agencies are claims before the Social Security Administration for disability insurance benefits, unfair labor practice claims against an employer or union before the National Labor Relations Board or enforcement proceedings before the Securities and Exchange Commission to revoke the license of a securities broker. The formal adjudicatory functions of administrative agencies are an important part of their work.

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18 *See* 5 U.S.C.A. §553(d).

19 The Equal Employment Opportunity Commission issues both. *See Newport News Shipbuilding and Dry Dock v. Equal Employment Opportunity Comm.*, 462 U.S. 669 (1983), where examples of both forms of interpretive rules (on sex discrimination in medical disability insurance) are quoted.

20 *Compare Cabias v. Egger*, 690 F.2d 234 (D.C.Cir. 1982) (agency letter simply construed the language and intent of statute) *with Chamber of Commerce v. Occupational Safety & Health Admin.*, 636 F.2d 464 (D.C.Cir. 1980) (requirement announced in agency head's speech and later published as an interpretive rule enunciated a new requirement that must be promulgated as a rule). *See American Mining Congress v. Mine Safety & Health Admin.*, 995 F.3d 1106 (D.C.Cir. 1993) (setting out a widely cited definition).

21 Agencies may also waive their rules in individual cases where it appears the rule is not appropriate, a part of what has been called "administrative equity." *See* Jim Rossi, Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission, 47 ADMIN.L.REV. 255 (1995).

22 *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (incorrect advice caused plaintiff to lose 6 months of his pension; yet, equitable estoppel did not operate against the government).

Indeed, Congress has established several agencies whose sole responsibility is adjudication and who do not issue rules.[23]

Whether formal adjudication is called for is determined by examining the relevant statutes. Requirements can vary. For example, while all the proceedings mentioned in the last paragraph require formal adjudication, no such process applies to a decision of the Secretary of Transportation to order an automobile manufacturer to recall a particular car for safety defects. Although the primary focus here will be on formal adjudication, more informal agency action will be discussed later when judicial review is considered.[24]

1. Administrative Adjudication Procedure under the APA

Hearing Before the Administrative Law Judge The centerpiece of formal APA administrative adjudication is the hearing before an administrative law judge (ALJ) of the agency in question.[25] The ALJ is well versed in the intricacies of the subject matter of the agency and only decides cases from that agency. To assure a fair hearing, the APA mandates strict separation of ALJs from employees of the agency's investigatory and adjudicatory branches, including prohibitions on *ex parte* contacts and undue influence. In addition, it prohibits any "interested person outside the agency" from engaging in such activity.[26]

Nature of Agency Hearings The ALJ's decision must be made based solely on the "record" compiled by that ALJ.[27] The written decision will include findings of fact and conclusions of law much like the decision of a judge following a bench trial in court. In some agencies, the administrative hearing process resembles traditional courtroom proceedings, while in others it is more inquisitorial. An observer dropping in on a contested hearing before an ALJ from the National Labor Relations Board would probably see little to distinguish it from a bench trial in a courtroom. On the other hand, an observer of most administrative hearings involving Social Security benefits would witness ALJ interrogation of the claimant and other indices of judicial control that would be inappropriate in a courtroom. Indeed, it is said that the Social Security ALJ, as the only government representative present at the hearing, is supposed to "wear three hats": to represent the claimant's interests, to represent the agency and to decide the case.[28] Whatever procedure is afforded by the agency, the standard by which a

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23 Among them are the Occupational Safety and Health Review Commission, the Federal Mine Safety and Health Review Commission and the National Transportation Safety Board.

24 *See infra* pp. 210-210.

25 *See* 5 U.S.C.A. §§554, 556, 557. *See* MICHAEL ASIMOV, A GUIDE TO FEDERAL AGENCY ADJUDICATION (ABA 2002). The question of what kinds of agency decisions require these formal adjudication standards is one that is often disputed and is not entirely clear from the statute. ALJs are called referees or hearings examiners in some state systems.

26 5 U.S.C.A. §554(d), §557(d) and *infra* p. 220. *Ex parte* contact is contact between adjudicators and others without all the parties to the dispute being present. The prohibition applies to the President and White House staff, *Portland Audubon Society v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993), and to members of Congress, *Pillsbury Co. v. Fed. Trade Comm'n*, 354 F.2d 952 (5th Cir. 1966).

27 5 U.S.C.A. §556(e).

28 This is contrary to the basic adversary principles discussed in Chapter III and has been criticized on that ground. However, it has been upheld by the Supreme Court. *See Richardson v. Perales*, 402 U.S. 389, 410 (1971). *See* SCHWARTZ, *supra* note 2, §5.29. Nonetheless, the non-adversarial nature of Social Security hearings was one basis for the Court holding that failure of the claimant to raise an issue during administrative proceedings did not result in their forfeiting the right to raise it on judicial review. *See Sims v. Apfel*, 530 U.S. 103 (2000) (claimant failed to raise before the Appeals Council two errors of the ALJ).

decision must be made is the same standard as in civil cases in court: whether the factual contentions have been proven by a preponderance of the evidence.[29]

One difference between administrative hearings and court proceedings is that there is no absolute right to an oral hearing or cross examination of witnesses at the administrative hearing. The APA provides that the party "is entitled to present his case or defense by oral or documentary evidence" and "to conduct such cross-examination as may be required for a full and true disclosure of the facts."[30] Cross examination rights will be more likely to be afforded if the issues at the hearing are factual and depend on witness credibility.[31] However, there are many other issues that arise where cross examination would not be useful, such as expositions of technical data. Some courts have required that the necessity for cross examination "be established under specific circumstances by the party seeking it."[32] Pretrial procedures differ, however. In the administrative case, there usually has been a full investigation conducted by the enforcement division of the agency, so there are full statements of witnesses in the file for all parties to see and examine before the hearing.[33]

Rules of Evidence The Federal Rules of Evidence do not generally apply to agency hearings.[34] The APA provides that all oral or documentary evidence is admissible except irrelevant, immaterial or unduly repetitious evidence.[35] So hearsay evidence is fully admissible and a decision may be based solely on hearsay evidence if it is trustworthy.[36] Even when hearsay evidence is suspect, however, it will not be excluded, but will instead be admitted, evaluated and given such weight as appears appropriate.[37] But if hearsay is contradicted by other direct trustworthy testimony, it will not be deemed to be substantial evidence to support a decision.[38] When material evidence relevant to the issues in the case is excluded, reversal is appropriate.[39] Courts have also reversed agency decisions when the agency has not articulated on the record any reason why it did not find certain testimony credible.[40]

The Final Agency Decision The status of ALJ action varies from agency to agency. ALJs are considered the designees of the head of the agency appointed to gather the evidence, but beyond that practice varies. In some agencies the ALJ makes only a

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29 *See* Chapter III, p. 105 (standards of proof in civil and criminal cases). The burden of proof in administrative hearings is also on the claimant. *Schaffer v. Weast*, ___ U.S. ___, 128 S.Ct. 528 (2005) (burden of proof on student's parents in hearing on adequacy of school's placement of disabled student under federal Disabilities Education Act).

30 5 U.S.C.A. §556(d).

31 *See* SCHWARTZ, *supra* note 2, §7.7.

32 *Cellular Mobile Systems of Pa. v. Fed. Communications Comm'n.*, 782 F.2d 182, 198 (D.C.Cir. 1985). *Compare Giant Food Inc. v. Fed. Trade Comm'n.*, 322 F.2d 977 (D.C.Cir. 1963) (agencies cannot refuse or limit cross examination).

33 This makes less necessary the formal "discovery" process that is used in civil cases in court. *See* Chapter VII, pp. 232-236.

34 *But see* 29 U.S.C.A. §160(b) (proceedings before the National Labor Relations Board "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure.") *See* Chapter III, pp. 109-115 (evidence rules for courts).

35 5 U.S.C.A. §556(d).

36 *Richardson v. Perales*, 402 U.S. 389 (1971) (medical reports were properly relied on in disability hearing at least where claimant did not subpoena doctor for cross examination).

37 *See Calhoun v. Bailer*, 626 F.2d 145 (9th Cir. 1980) (8 factors to consider in evaluating hearsay).

38 *Hoska v. Dep't. of the Army*, 677 F.2d 131 (D.C.Cir. 1982).

39 *Catholic Medical Center v. Nat'l Labor Relations Board*, 589 F.2d 1166 (2d Cir. 1978) (evidence that employer did not refuse to bargain was improperly excluded).

40 *Tieniber v. Heckler*, 720 F.2d 1251 (11th Cir. 1983) (claimant's testimony as to his disability).

recommended decision that is then submitted to the agency head for acceptance, rejection or modification. In others, the ALJ decision is a final initial decision that may be subject to modification by higher authority in the agency. In yet others, the ALJ decision is the final agency action.[41]

By whatever means the decision of an ALJ becomes final, the final adjudicatory decision is deemed the decision of the head of the agency.[42] This does not mean that the head of the agency must personally participate in reviewing the ALJ decision. Instead, the agency is likely to have an "appeals council" or other body comprising persons at the policy-making level in the agency.

Agency Decisions as Precedents The practice citing and relying on prior administrative adjudications varies among agencies. Use of administrative decisions as precedent is hampered by the fact that agencies that set out agency policy primarily in rule-making often do not publish their decisions in a form that is easily accessible to the public or even to lawyers. However, if prior decisions can be found, the law of judicial review effectively requires that they be given precedential effect by the agency. This follows from a long-established common law and statutory basis for courts to reverse administrative action on the ground that it is "arbitrary and capricious."[43] If it can be shown that an agency has decided seemingly identical cases in two different ways without distinguishing the prior case, that is the very definition of arbitrary decision-making. However, the facts of prior agency decisions are often unique, thereby making it easy for the agency to distinguish any prior decisions that might be argued. Some types of decisions, such as individual disability adjudications, for example, are so unique that it may not be worth the effort to try to research them.

Case Adjudication As Lawmaking Despite what was just said, some administrative agencies give full *stare decisis* effect to their adjudicatory decisions and use those decisions to establish agency policy much in the way that courts make law. For example, the National Labor Relations Board (NLRB), makes policy almost exclusively through its administrative hearing decisions — despite pleas from several quarters that it do so by rule.[44] Administrative adjudication as a means of making agency policy raises all the problems that attend judicial lawmaking on a case-by-case basis, including the problem of retroactive lawmaking.[45] However, it has been upheld by the Supreme Court. This is so even when an agency decision clearly announces new principles.[46] As with judicial lawmaking, however, it is easy to overstate the problem. Even more so than in the judicial context, routine administrative adjudication affords even less opportunity for lawmaking than routine judicial adjudication, since the administrative legal standards applied are relatively more specific than other forms of law, thus providing less room for creativity on the part of the adjudicator.

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41 Consistent with the movement toward alternative dispute resolution (ADR) in the courts, *see* Chapter VII, pp.247-249, 1990 amendments to the APA require agencies to use ADR in all their functions.

42 *See* 42 U.S.C.A. §405(g) (referring to final social security on appeals taken to the hearing stage as decisions as the "the final decision of the Secretary [of the Department of Health and Human Services]."

43 5 U.S.C.A. §706(2)(A).

44 *See, e.g.*, Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 589-98 (1970). *See also Nat'l Labor Relations Bd. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (plurality, concurring and dissenting opinions addressing the legitimacy of NLRB practices). *But see American Hospital Ass'n. v. Nat'l Labor Relations Bd.*, 499 U.S. 606 (1991) (unsuccessful challenge to the first substantive rule issued by the NLRB since 1935).

45 *See* Chapter II, pp. 48-49.

46 *Nat'l Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947). *See generally* AMAN & MAYTON, *supra* note 2, §4.5.

2. Minimum Due Process Requirements for Agency Action

The APA requirements for hearings apply only to actions of federal agencies. State statutes on administrative procedure impose similar standards on some state agencies. Generally, these requirements provide for hearing rights that are well above the constitutional minimum. However, state statutes may not apply to some state and local administrative actions. And certain federal or state statutory hearing rights may not in some circumstances comport with due process. In these instances, the person affected will have to resort to the minimum procedural due process protections afforded by the due process clauses of the 5th and 14th Amendments to the Constitution as developed in court decisions.

The due process clause states that no person may be "deprived of . . . liberty, or property, without due process of law."[47] There are two steps in the procedural due process analysis. The first is to determine whether there is a "deprivation" of "liberty or property." If there is no such deprivation, the due process clause is inapplicable and no procedural safeguards are required. If there is a deprivation, then due process applies and a second question arises: what "process" is "due," *i.e.*, what procedural safeguards are required to accompany government attempts to bring about such a deprivation?

Defining "Liberty" or "Property" Interests By confining a person or taking away property owned by a person, the government clearly has "deprived" that person of liberty or property. But liberty and property for due process purposes include something less than a vested right to "pure" liberty (*i.e.*, freedom from confinement) or an ownership-type property interest. For example, due process applies to a welfare recipient's "right" to continue to receive welfare benefits. This is so even though the state is not required to have welfare programs for relief of poor people and could abolish them tomorrow if it chose. If the government *has* chosen to have welfare programs and a person is eligible to receive those benefits as long as certain factual conditions are met, then that recipient has a *legitimate claim of entitlement to continue* receiving those benefits. That is sufficient to constitute "property" that cannot be "deprived" without affording due process.[48]

Similarly, prisoners who are granted parole from prison on the condition that they follow certain rules have a liberty interest subject to due process protections. Properly convicted prisoners have already had their liberty seriously and validly restricted in compliance with the highest due process standards when they were convicted and sentenced to prison. While on parole, their liberty interests are clearly less than those of a free person on the street. However, their liberty interest qualifies for protection if they have a *legitimate claim of entitlement* to stay out of prison *unless* they violate the rules of their parole. If they do, as is generally the case with parolees, then they have a liberty interest that is subject to due process protections.[49] Even while in prison,

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47 The due process clause also protects "life." However, deprivations of life (and the most common form of "pure" liberty deprivations — conviction of a crime) may only be accomplished by way of the criminal process consistent with all the criminal due process safeguards specified in the Bill of Rights. *See* Chapter VIII, pp. 279-318, where constitutional criminal procedural rights are discussed.

48 *Goldberg v. Kelly*, 397 U.S. 254 (1970).

49 *Morrissey v. Brewer*, 408 U.S. 471 (1972). *Compare Connecticut v. Doe*, 538 U.S. 1 (2003) (sex offenders had no conditional liberty interest since all were required to register, even if not dangerous) and *Town of Castle Rock v. Gonzales*, ___ U.S. ___, 125 S.Ct. 2796 (2005) (no property interest in enforcement of restraining order because state law did not make enforcement mandatory).

inmates have a liberty interest in avoiding a further restraint that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[50]

Also treated as protected "deprivations" are revocation of a driver's license[51] and suspensions of school students for misbehavior.[52] On the other hand, a state university teacher who had a one-year contract was held not to have a legitimate claim of entitlement beyond that year.[53] Similarly, temporary public employees would generally have no legitimate expectation that they would be continued in their positions indefinitely. In the welfare assistance context, there are emergency assistance programs that provide funding for temporary housing and contemplate that that assistance is limited to one week. Termination at the end of that week would not deprive the recipient of any protected property interest (assuming the recipient has been advised of the one-week limit), but termination *before* the end of that week would be subject to some form of due process.[54]

Defining the Content of Procedural Safeguards Required Once it is determined that liberty or property interests have been deprived by administrative action, the next question in the procedural due process analysis is: what "process" is "due" for there to be "due process"? Obviously, there are many procedural protections that might be required. The proper process could range from an informal opportunity to state one's objections in writing to the full range of rights comparable to those enjoyed by a person facing a criminal charge in court — a full adversary hearing with rights to counsel, confrontation, proof beyond reasonable doubt, and so on.[55]

The standard "bundle" of due process rights that have been afforded when a very important property interest is at stake in the administrative context are those set out in the 1970 decision in *Goldberg v. Kelly*,[56] a case involving termination of welfare benefits based on financial need. According to *Goldberg*, a person facing such a loss is entitled to (1) notice of the action a reasonable time *before* it is scheduled to take effect, together with the reasons therefor, and (2) the opportunity for a trial-type hearing *before* the deprivation becomes effective.[57] The hearing must be (3) conducted by a neutral administrative official not connected with the original decision. At the hearing, the affected person has (4) the right to have a lawyer or other person present to assist him or her at the hearing, (5) the right to confront and cross-examine the witnesses against

50 *Sandin v. Conner*, 515 U.S. 472, 484 (1995) (finding 30-day punitive segregation involved no "dramatic departure from the basic conditions of [the inmate's] sentence"). *See also Meachum v. Fano*, 427 U.S. 215 (1976) (no liberty interest at stake in transfer from medium to maximum security prison). *Compare Wilkinson v. Austin*, ___ U.S. ___, 125 S.Ct. 2384 (2005) (prisoners facing indefinite assignment to "supermax" prison imposing solitary confinement had protected liberty interest). *See also Vitek v. Jones*, 445 U.S. 480 (1980) (transfer from prison to mental hospital affects liberty interest because of stigma and greater restrictions on activities).

51 *Bell v. Burson*, 402 U.S. 535 (1971). *See also Barry v. Barchi*, 443 U.S. 55 (1979) (jockey's license); *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1 (1978) (municipal utility service).

52 *Goss v. Lopez*, 419 U.S. 565 (1975).

53 *Roth v. Bd. of Regents*, 408 U.S. 564 (1972).

54 The issue has arisen as to whether a person who *applies* for a benefit or license is *denied* is entitled to a hearing. Hearings are routinely given, so the issue does not often arise whether there is any liberty or property interest that must be protected by due process. *But see American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999) (no protected interest arose until workers compensation insurance benefits began to be received).

55 *See generally* Chapter VIII, pp. 302-310.

56 397 U.S. 254 (1970).

57 Notice must be such as will actually inform the person. *See* Jones v. Flowers, ___ U.S. ___, 126 S.Ct. 1708 (2006) (sale of property for taxes after notice published in newspaper and two unclaimed letters, and without posting notice at address to which notice was sent violated due process).

him or her when credibility is at issue, (6) the right to a written decision based solely on the evidence produced at that hearing, and (7) the right to have a complete record of the hearing, including a record of the testimony and other evidence offered. By contrast, a secondary school student facing a short suspension from school for misconduct is only entitled to "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[58]

While *Goldberg* establishes the baseline due process standard, due process overall is a flexible standard. The test for determining the content of procedural safeguards required is that of *Mathews v. Eldridge*.[59] The *Eldridge* standard imposes a "cost effectiveness" test that balances three factors: (1) the seriousness of the deprivation, (2) the risk of erroneous deprivations and the likely effectiveness of the proposed additional protections in reducing that risk, and (3) the government's interest in avoiding additional procedural protections, including the cost and administrative burdens involved in providing them and considering the governmental function involved.

Balancing these three factors may involve adding to or subtracting from any of the baseline elements identified in *Goldberg v. Kelly*. An example of this is the fact situation of *Mathews v. Eldridge*. Mr. Eldridge was receiving benefits from the Social Security Administration's disability program and was terminated. Regulations entitled him to a hearing, but only a *post-deprivation* hearing. Although *Goldberg* had held that a *pre-deprivation* hearing was required for *need-based* welfare benefit terminations, the Supreme Court found an important distinction in the fact that Social Security disability benefits are government *insurance* benefits payable regardless of whether the disabled person is financially needy. Thus, the seriousness of the deprivation (factor (1) above) in Eldridge's case was less. The *Eldridge* opinion also relied on factor (2), pointing to the fact that the decision on disability was a medical one. Consequently, according to the Court, a face-to-face hearing before an ALJ would not improve greatly on the accuracy of the initial agency decision, which was made in consultation with medical experts. This was contrasted with situations like *Goldberg*, where factual questions involving credibility are central.[60]

The *Eldridge* factors also explain why the government may act in an emergency without first affording a hearing. The fact of an emergency gives overwhelming weight to factor (3), the government's interest in summary action. Summary action has been allowed to stop strip mining, to seize property for the war effort, to protect against a bank failure and to protect the public from misbranded drugs or contaminated food.[61]

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58 *Goss v. Lopez*, *supra* note 52. Expulsion from school or even suspension for a long period would require more process than *Goss* affords. But academic dismissals require less process than disciplinary ones. *Bd. of Curators v. Horowitz*, 435 U.S. 78 (1978) (dismissal from medical school, "like the decision of an individual professor as to the proper grade for a student in his course . . . requires expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making"). *See also Wilkinson v. Austin*, *supra* note 50 (process for determining that inmate should be in "supermax" prison satisfied due process, even though it provided only notice of summary of facts with opportunity for inmate to respond, but no right to call witnesses, given prison's interest in controlling gang activities in prison).

59 424 U.S. 319 (1976).

60 For other applications the *Eldridge* test, *see Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) (public employee); *Wilkinson v. Austin*, *supra* note 50 (inmate assignment to "supermax" prison); *Martinez-De Bojorquez v. Ashcroft*, 365 F.3d 800 (9th Cir. 2005) (deportation proceedings).

61 *See Hodel v. Virginia Surface Mining Ass'n.*, 452 U.S. 264, 300 (1981) (strip mining); *Phillips v. Comm'r. of Internal Revenue*, 283 U.S. 589 (1931) (tax collection); *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928) (bank failure); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (contaminated

However, the fact the government is conducting a war does not justify dispensing with due process protections.

In *Hamdi v. Rumsfeld*,[62] a U.S. citizen captured in the U.S. invasion of Afghanistan sued for release from detention. The Court acknowledged the President's power to capture and detain enemy combatants in wartime — even if they are U.S. citizens — but held that *Eldridge* nonetheless required that detainees be provided with hearings to determine whether they were in fact enemy combatants. The Court rated *Eldridge* factors (1) and (3) very high — (1) unqualified freedom from confinement balanced against (3) "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." Then, applying factor (2), it held that a detainee must receive notice of the factual basis for being considered an enemy combatant and a prompt and fair opportunity to rebut that basis before a neutral decisionmaker. The Court adverted to the "possibility" that the decisionmaker could be "an appropriately authorized and properly constituted military tribunal," and it would permit hearsay evidence and a presumption in favor of the military's initial designation as an enemy combatant. But the detainee would have to have a fair opportunity to present evidence to rebut the presumption. It left it to the lower courts to work out the details.[63]

Procedural Due Process and Judicial Proceedings The due process clause provides minimum standards for *all* adjudicatory actions of government — judicial as well as administrative. Consequently, the *Eldridge* test has relevance to civil and criminal cases in courts. For example, procedural due process has been held to require a prior judicial hearing before personal property can be seized by a creditor under an installment sales contract.[64] When "pure" liberty interests are at stake, the protections are even greater. Persons facing imprisonment for civil contempt of court may be entitled, not just to the opportunity to bring a lawyer at their own expense, but to the right to have a lawyer appointed and paid for by the state to act as their representative at the proceeding.[65] Conceptually, the due process continuum reaches all the way up to criminal cases. Criminal cases are generally governed, not by the procedural due process test of *Eldridge*, but by the specific guarantees of the Bill of Rights.[66] But one could well imagine that the *Eldridge* factors, if applied to criminal cases, could cause a court to apply many of the same strict safeguards found in the Bill of Rights as a matter of procedural due process.[67]

Criticism of the Eldridge Test The *Eldridge* test has been criticized for its attempt to "balance" completely dissimilar factors. How much weight one gives, for example, to the *individual interests* versus *governmental interests* implicates the most fundamen-

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food).

62 542 U.S. 507, 528-539 (2004) (plurality opinion).

63 For other cases on the Guantanamo detainees, *see* Chapter I, p. 14.

64 *Fuentes v. Shevin*, 407 U.S. 67 (1972) (secured creditor's seizure of debtor's kitchen stove pursuant to state law that did not provide for a pre-seizure hearing violated procedural due process).

65 *See Mead v. Batchlor*, 460 N.W.2d 493 (Mich. 1990). The contempt power is discussed in Chapter VII, p. 243. *But see Lassiter v. North Carolina Dep't. of Social Services*, 452 U.S. 18 (1981) (appointed counsel not *per se* required for parents facing termination of parental rights to their children).

66 *See* Chapter VIII, p. 279, where the sources of criminal due process rights are discussed. As noted there, the 5th and 14th Amendment due process clauses are also sources of procedural rights in criminal cases, but the Court has not applied the *Eldridge* test in criminal cases.

67 In actuality, the due process clause *does* result in the application of most Bill of Rights guarantees to state court criminal cases, but it is generally said instead that those right are "incorporated" against the states by the due process clause rather than being the product of a weighing due process factors. *See* Chapter VIII, p. 280.

tal of political attitudes and cannot be weighed according to any objective legal standard. One could well ask if the test is any better than a judge simply deciding whether a given procedure "sounds fair under the circumstances." Another criticism of the *Eldridge* test is that it is too cold and objective: as a "cost-effectiveness" test of procedural safeguards, it fails to include the intangible concepts of justice and respect for individual autonomy that due process represents.[68] Thus, it fails to consider that forcing the government to justify deprivations it seeks to impose may serve valid constitutional and social purposes regardless of the *result* of the process.[69]

D. Judicial Review of Agency Action

One major value of administrative agencies is their expertise. However, they must apply that expertise within the confines of the law. Judicial review is deemed necessary to assure a rational and legally appropriate decision, both when agencies adjudicate and when they make rules. In the United States, this judicial review is undertaken by the ordinary courts — not by special administrative courts, as is the case in some other systems. Review by generalist judges is thought to be a benefit since it counteracts tendencies toward a narrow agency perspective.

1. Right to Judicial Review of Agency Action

Right to Review in General The right to judicial review of agency action is provided by statute, either by the specific statute that governs that agency or by the APA.[70] Where there is no specific statute and the APA is the only possibility, a court will "begin with the strong presumption that Congress intends judicial review."[71] The question of whether there is a *constitutional* right to judicial review of all administrative action is one that has been debated, but not definitively resolved.

Interpretation of Statutes to Permit Review The issue of a constitutional right to judicial review has not been resolved in part because courts have tended to interpret statutes in such a way as to permit judicial review even when those statutes appear on their face to preclude it. For example, despite the fact that the Immigration and Nationality Act provides that all agency decisions in deportation cases "shall be final," judicial review was held to be available.[72] Congress later provided expressly for review by statute. However, in 1996 Congress removed the right to judicial review for aliens subject to deportation for having been convicted of committing certain aggravated felonies. The Court held that the right to direct appeal of the agency's decision had been removed. But it also held that review by means of *habeas corpus* was still available. This was so despite the fact that Congress had entitled its repealing sections "Elimination of Custody Review by Habeas Corpus." The Court held that the result was necessary in view of the lack of clarity of the *text* of the statutes and the need to avoid

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68 *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of Value*, 44 U. CHI. L. REV. 28, 46-57 (1976) (offering an alternative "value-sensitive approach"). *Cf. Saleeby v. State Bar*, 702 P.2d 525 (Cal. 1985) (including in California due process "the dignitary interest in informing individuals of the nature, grounds, and consequences of the action" and "freedom from arbitrary adjudicative procedures").

69 *See* Chapter III, text at note 135, where the individuality-reinforcing values of procedural fairness are discussed. Due process hearing rights apply only to adjudicative determinations and not to legislative changes. Thus, if an agency were promulgating a rule the effect of which would be to deprive a person of liberty or property, the trial-type procedures of *Goldberg v. Kelly* are not required before such a rule can be adopted. SCHWARTZ, *supra* note 2, §§5.6-5.8. For more on procedural due process rights, *see* JOHN E. NOWAK & RONALD D. ROTUNDA, HORNBOOK ON CONSTITUTIONAL LAW, 7TH ED. §§13.1-13.10 (West 2004).

70 5 U.S.C.A. §§701-706. *See* JOHN F. DUFFY & MICHAEL HERZ, A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES (ABA 2005).

71 *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

72 *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955).

the serious constitutional question that would arise should it interpret the amendments involved as removing all judicial review of the deportation orders involved.[73]

The statutory interpretations involved have on occasion appeared strained.[74] However, if Congress has clearly prohibited review, the Court has acquiesced, even when those decisions are alleged to be arbitrary and capricious, in violation of statutes.[75] A more difficult question is whether judicial review of *constitutional* issues could ever be denied. This issue is discussed in more depth in the chapter on constitutional law.[76] The Court has never decided the issue, but it has interpreted ambiguous statutes is such a way as to permit review "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[77]

2. Procedural Aspects of Judicial Review

Exhaustion of Administrative Remedies Generally, claimants aggrieved by agency action must obtain a final decision of the agency before resorting to judicial review.[78] This means that the claimant faced with a negative action by an agency must exhaust the appeal procedures the agency provides. This is said to assure economical use of judicial and administrative resources, to promote administrative autonomy and responsibility by providing the agency with the opportunity to correct its own mistakes, and to further the legislative purpose of granting authority to the agency by requiring that its procedures be respected. However, exhaustion will not be required if it would be futile, such as where the agency is bound by applicable law to decide against the claimant and the claimant wishes to challenge that law.[79]

Means of Obtaining Review Judicial review may be obtained by any available means. Usually, a petition for review is required to be filed within a certain number of days after the final decision.[80] In other cases, the agency may have to bring an enforcement action in court to gain compliance, at which time review will be provided in that proceeding. This is the case with some decisions of the NLRB, which must bring an

73 *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001); *Calcano-Martinez v. Immigration and Naturalization Service*, 533 U.S. 348 (2001). *Cf. Zadvydas v. Davis*, 533 U.S. 678 (2001) (interpreting statute as not providing for indefinite detention of aliens subject to deportation orders who cannot be deported in light of potential constitutional problems with any other interpretation).

74 *Lindahl v. Office of Personnel Management*, 470 U.S. 768 (1985) (statute providing that Navy disability determinations were "final and conclusive and are not subject to review" held not to preclude some judicial review of "misconstruction of the governing legislation" going "to the heart of the administrative determination").

75 *See, e.g., United States v. Wunderlich*, 342 U.S. 98 (1951) (decision of agency in government contract dispute), *But see* SCHWARTZ, *supra* note 2, §8.6 at 485-486 (criticizing lack of review as making agencies "virtual laws unto themselves").

76 *See* Chapter IX, pp. 330-331.

77 *Webster v. Doe*, 486 U.S. 592, 603 (1988). *See also Johnson v. Robison*, 415 U.S. 361, 366 (1974) (prohibition of review of veterans benefit cases did not prohibit review of constitutional issue). *But see* Scalia, J., dissenting in *Webster v. Doe, supra*. *Cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (Congress can properly bar review of attorney general's decision to commence deportation proceedings against illegal aliens even it that decision is alleged to constitute unconstitutional selective enforcement, since illegal aliens have no right to argue selective enforcement as a defense).

78 5 U.S.C.A. §704. *McKart v. United States*, 395 U.S. 185 (1969) (military draft classification not appealed administratively, so later judicial review is barred). However, exhaustion is not required where the administrative remedies are inadequate to award the relief the plaintiff seeks. *McCarthy v. Madigan*, 503 U.S. 140 (1992) (federal prisoner who sued prison officials for money damages was not required to exhaust prison administrative remedy).

79 *Bethesda Hospital Ass'n. v. Bowen*, 485 U.S. 399 (1988) (agency had no power to award reimbursement hospitals sought). *See generally* SCHWARTZ, *supra* note 2, §§8.33-8.40.

80 *See, e.g.*, 42 U.S.C.A. §405(g) (60 days for Social Security appeals).

action for enforcement in the Court of Appeals.[81] In some cases, review will be by way of defense against administrative enforcement and appeal from any negative decision in that proceeding. In addition, an action for an injunction or for declaratory relief may be used.[82] *Habeas corpus* was used in deportation cases until review under the APA was recognized.[83]

Standing A person seeking judicial review of agency action in federal court must have "standing" to contest that action. Standing generally requires that the person be one who is actually injured by the agency action.[84] However, when review is sought under the APA, an additional requirement beyond simple injury must be met. The APA provides for review only if the claimant's injury qualifies as an injury "within the meaning of a relevant statute."[85] This has been understood as requiring that the injury complained of be one that is within the "zone of interests" defined by the statute governing the agency action.

This requirement is most relevant when the injured plaintiff is not the party who was the direct subject of the administrative action. Such plaintiffs must show that the relevant statutes were intended to protect them from the type of injury they complain of. For example, when the Comptroller of Currency approved the applications of two banks to sell securities, the banks did not complain, but stock brokers and dealers who would face competition from the banks did file suit. The Court found that an arguable basis for the National Bank Act limiting securities brokerage activities of banks was to prevent competition with established securities dealers — the precise injury complained of by the plaintiffs.[86] Had the Court found that the sole purpose of the Act was to assure that banks did not fail by overextending their operations, then injury to competitors would not have been within that zone of interests. An example of a negative zone of interests case is one involving the decision of the federal Postal Service to permit certain private courier companies to engage in some international mail delivery. The postal workers' union sued to contest the decision, claiming that it was unlawful. The Court held that the zone of interest test was not satisfied: Congress's purpose in prohibiting private competition with the Postal Service was to assure that the Service received sufficient revenues, not to protect government postal workers' jobs.[87]

3. Scope of Review of Agency Action

Review of Fact Determinations The general rule is that agency determinations of issues of fact made after a trial-type hearing must be affirmed by a reviewing court if they are supported by "substantial evidence."[88] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support

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81 29 U.S.C.A. §160(e), (f).

82 An injunction is a court order stopping the defendant from doing something or requiring the defendant to do something. Declaratory relief is a declaration that the defendant's actions are unlawful. Both are discussed in greater detail in the chapter on Civil Procedure. *See* Chapter VII, pp. 241-244.

83 *Shaughnessy v. Pedreiro*, *supra* note 72. *Habeas corpus* is discussed in Chapter VIII, pp. 276-277.

84 Constitutional aspects of standing are discussed in Chapter IX, pp. 324-327.

85 5 U.S.C.A. §702.

86 *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388 (1987). Clearly, application of the zone of interest test can lead to varying results depending on the analysis of the relevant purposes of the statute — an analysis that often comes close to deciding the merits of the case.

87 *Air Couriers Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991). *See also Block v. Community Nutrition Institute*, 467 U.S. 340 (1984) (denying standing to consumers of milk products to challenge minimum prices set for milk handlers and producers).

88 5 U.S.C.A. §706(2)(E) and *Universal Camera v. Nat'l Labor Relations Bd.*, 340 U.S. 474 (1951).

a conclusion."[89] Many courts have held that this is largely the same standard used when trial judges review jury verdicts or appellate courts review a trial judge's factual findings to see if they are "clearly erroneous."[90] However, courts give great deference to the findings of agencies because of their expertise in the subject matter. Accordingly, the Supreme Court, has observed that the "court/court standard of review has been considered somewhat stricter (*i.e.*, allowing somewhat closer judicial review) than the APA's court/agency standards."[91] However, it has also been observed that applying the "substantial evidence" test — like reviewing jury verdicts and trial court findings of fact — is "more of an art than a science."[92]

Some agency decisions may be reviewed *de novo* by a court. This means that the court can examine the record as if it were the finder of fact in the first instance.[93] In some cases, *de novo* judicial review of fact issues is required by the Constitution.[94]

Review of Legal Issues Courts have the primary responsibility to say what the law is and thus have the power, in general, to determine *legal* issues *de novo* based on their own analysis of the law. But an agency interpretation of a statute that is embodied in an agency's legislative rule that was adopted through the notice-and-comment rule-making process is entitled to *Chevron* deference, and a court may not substitute its own view for that agency interpretation.[95] Similarly entitled to deference is an agency's interpretation of its own ambiguous rule,[96] so long as that interpretation is within the scope of the agency's delegated authority.[97] If an agency's legal interpretation is embodied in a ruling in a particular case, then *Chevron* deference does not apply and the agency's interpretation "'is entitled to respect' only to the extent that it has the 'power to persuade.'"[98]

Review of Mixed Fact-Law Issues Some issues of law are not "pure" law or fact issues. They seem legal, but have factual aspects to them, as where the legal standard is applied to the facts of the case to reach a conclusion in the statutory language — commonly referred to as "mixed" fact and law issues. In such instances, the reviewing court must affirm the finding if the application is reasonable.[99] Clearly the questions of

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89 *Consolidated Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938).

90 *See* Federal Rule of Civil Procedure 52 and Chapter V, p. 168 and Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L.REV. 70 (1944).

91 *Dickenson v. Zurko*, 527 U.S. 150, 153 (1999) (requiring that Federal Circuit Court of Appeals review patent and trademark office decisions under the APA standard and not "clearly erroneous").

92 AMAN & MAYTON, *supra* note 2, at 446. The *Dickerson* case cited in the last footnote contains a detailed discussion of the evolution of the APA standard of review.

93 This is true of many civil rights claims. *See Chandler v. Roudebush*, 425 U.S. 840 (1976) (employment discrimination).

94 *Agosto v. Immigration and Naturalization Service*, 436 U.S. 748 (1978) (*de novo* trial of citizenship issue in deportation proceeding required both by statute and the Constitution).

95 *See supra* p. 197 and Chapter II, p. 60.

96 *Auer v. Robbins*, 519 U.S. 452, 461-463 (1997) (whether sergeants were executive employees exempt from overtime pay requirements of Fair Labor Standards Act). But *Auer* deference would not apply to a "*post hoc* rationalizatio[n]" advanced by an agency in response to litigation challenging past agency action.

97 *Gonzales v. Oregon*, ___ U.S. ___, 126 S.Ct. 904 (2006) (attorney-general's interpretive rule prohibiting doctors from prescribing drugs to assist suicide under Oregon law was beyond his power under federal drug control laws, which are aimed at illicit drug trafficking).

98 *See United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001) (customs service reclassification of goods in tariff ruling), quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (administrator's bulletin).

99 *Nat'l Labor Relations Bd. v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (determination of whether "newsboys" who distributed papers on the street were "employees" within the meaning of the National Labor Relations Act).

whether the statute is clear or how "pure" an issue of law is are issues about which there is considerable room for disagreement.[100]

4. Review of Discretionary Agency Actions or Inaction

Many agency decisions are matters of discretion not dictated by the law or facts. Examples are the numerous decisions on funding, refusals to grant exceptions, "no-action" letters and other refusals to take action. The questions of whether such actions are subject to review and the scope of that review are important.

The APA appears on the surface to provide contradictory answers to the question of reviewability. On the one hand, it provides that a court may set aside agency action that is "arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law."[101] On the other hand, it prohibits judicial review of any matter "committed to agency discretion by law."[102] If action is truly committed to agency discretion, then it is difficult to see how a court is to determine whether the administrator's discretion was "abused." In other words, if there are *no* statutory standards limiting an administrator's actions, then it is difficult to see how judicial review would be anything more than a court arbitrarily substituting its decision for that of the administrator. The Court has determined that, unless "statutes are drawn in such broad terms that in a given case there is no law to apply" — no standards by which a reviewing court could judge the propriety of the decision — then the matter is "committed to agency discretion" and is not reviewable. But if there is some law to apply, then the decision is reviewable and those standards are applied to determine whether there was an abuse of discretion.[103]

The principal case in the area illustrates how both the question of reviewability is decided and the standard of "abuse of discretion" is applied. In *Citizens to Preserve Overton Park v. Volpe*,[104] the Secretary of Transportation released federal money to local authorities to fund construction of a highway through a park. A provision of the governing statute allowed such construction unless a "feasible and prudent" alternative route existed. If no alternative existed, the statute mandated that all possible steps be taken to "minimize harm" to the park. The Secretary took the position that the question of whether any alternative route was "feasible and prudent" was clearly non-reviewable discretionary action. The Supreme Court held that there was in fact "law to apply." The statute clearly indicated Congress's intent that park land be protected. Consequently, the standard to be applied was whether the Secretary had fully considered alternative routes and had properly determined that there were special problems with them. Thus, while a court in a case involving discretionary action cannot dictate what decision an administrator must reach, it can assure that the decision made is a rational one that takes into account the factors that the law requires to be taken into account.[105]

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100 *See generally* AMAN & MAYTON, *supra* note 2, §13.7. A similar fact-law distinction arises with respect to the division of labor between judge and jury. *See* Chapter III, p. 87.

101 5 U.S.C.A. §706(2)(a) (emphasis supplied).

102 5 U.S.C.A. §701(a).

103 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). Professor Schwartz disagrees with the premise that there must be statutory standards to apply, citing English practice as support. *See* SCHWARTZ, *supra* note 2, §8.11, at 495. Examples of discretionary actions not subject to review are the President's decision to accept or reject a list of miliary base closings, *Dalton v. Spencer*, 511 U.S. 462 (1994), and an agency's decision to discontinue funding a health program out of its lump sum appropriation. *Lincoln v. Virgil*, 508 U.S. 182 (1993).

104 401 U.S. 402 (1971).

105 It is important to emphasize that the "substantial evidence" rule and great deference to administrative agency fact-finding would not apply to discretionary decisions such as the one in *Overton Park*, because there was no trial-type administrative hearing. Indeed, the problem with the administrator's decision in *Overton Park* was that there was *no* record of reasons for it.

APA also permits suit to "compel agency action unlawfully withheld or unreasonably delayed."[106] However, the agency must clearly required by law to engage take "discrete action." Thus, in *Norton v. Southern Utah Wilderness Alliance*,[107] the Supreme Court held that the requirement that the Bureau of Land Management to manage wilderness areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness" did not require prohibition of off-road vehicles or any other "discrete action." The Court emphasized that the holding served the purpose of avoiding undue judicial interference with agencies' lawful discretion and judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.

5. Attorney Fees and Costs

The Equal Access to Justice Act was passed by Congress in recognition of the high cost of contesting actions of agencies and the beneficial effects of redressing lawless agency action or inaction. Consequently, in any case against the United States or one of its agencies, a federal court "shall award" attorney fees to any prevailing private party "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[108]

E. Presidential and Congressional Controls on Federal Agency Action

Federal agencies are subject to statutory commands and owe their continued existence to Congress and the President. Consequently, complete control of agencies is always available through legislation abolishing them or limiting their power. However, these means of control are not often resorted to. Instead, Congress and the President use less drastic and less direct means. These efforts are not completely successful in part because many agencies have been set up as independent precisely to avoid the effects of political influence. In addition, presidential and congressional influences often pull agencies in opposite directions, so they effectively cancel each other out.

1. Power Over Tenure of Agency Officials

Presidential Power of Appointment A major way to influence agency policy and rules is through the power to appoint the agency head or cabinet secretary whose department supervises the agency. The "appointments clause" of the Constitution provides that Congress shall establish the offices of government, that higher-level or "principal officers" will be appointed by the President subject to Senate confirmation, and that "inferior officers" may be appointed by the President, by the courts of law, or by department heads without need for Senate involvement, if Congress so provides.[109] The President's choice and the process of Senate approval of a Cabinet Secretary or agency head present opportunities to pick administrators who have particular views about the way the agency should be run and to extract promises regarding the future direction of the agency.

Presidential Removal Power The Constitution is silent about how federal administrative officers may be removed other than by way of impeachment by the Congress. Any presidential removal power would presumably be part of the grant of executive power in Article II, particularly the power to "take care that the Laws be faithfully

106 5 U.S.C.A. §706(1).

107 542 U.S. 55 (2004).

108 28 U.S.C.A. §2412(d)(1)(A). However, the maximum rate for attorney fees is $125 per hour.

109 Art. II §2 cl. 2.

executed."[110] But as noted in Chapter I, there are many "independent" administrative agencies. This independence is assured by providing for appointment terms that extend beyond the term of office of the President who appointed them and by limiting the presidential ability to remove them.[111]

The original caselaw on removal drew a distinction between administrative officials who perform "executive" functions and those who performed "quasi-judicial" and "quasi-legislative" functions. While the President retained the right to dismiss "those who are part of the Executive establishment" and who perform purely executive functions, he could not dismiss those "whose tasks require absolute freedom from Executive interference."[112] This test has been replaced by a more flexible functional one under which the President can freely dismiss only those officials who are essential to the President's performance of core presidential functions.[113] Thus, the distinction is drawn between executive branch officials performing "administrative" functions, whose dismissal Congress can regulate, executive officials exercising "political" executive authority, whom the President can dismiss at will.[114]

Civil Service Employees Below "inferior officers" are employees whose appointment and tenure are not subject to any constitutional restraints.[115] This provides a constitutional justification for the existence of a competitive, merit-based civil service system.[116] It is these individuals, who are protected from dismissal except for cause, who perform the daily functions of government administration.

Congressional Control Over Tenure of Agency Officials Though the Senate must approve presidential agency appointments, it is clear that Congress does not have the power itself to appoint executive officials. In *Buckley v. Valeo*,[117] the Supreme Court considered the constitutionality of provisions of the Federal Election Campaign Act. It authorized a Federal Election Commission to make rules regulating campaign practices and to investigate and prosecute violations of them. In an effort to achieve a political balance on the Commission in this sensitive political area, the Act provided for appointment of some commissioners by the President (without participation of the Senate) and some by the President *pro tempore* of the Senate and the Speaker of the House of Representatives.[118] The Supreme Court held the Commission so constituted

110 Art. II, §3. *See Myers v. United States*, 272 U.S. 52, 164 (1926) and NOWAK & ROTUNDA, *supra* note 55, at 264. The removal power has been a sore point between the President and Congress. The famous impeachment of President Andrew Johnson and his narrow acquittal in the Senate in 1867 — the only impeachment ever of a President — was based on his refusal to accede to a Tenure in Office Act passed by Congress that would have changed the tenure of all his cabinet officials (most of them inherited from President Lincoln) from service at the pleasure of the President to dismissal only with the concurrence of the Senate. Under *Myers*, *supra*, the Act violates separation of powers.

111 *See* Chapter I, p. 16.

112 *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (prohibiting presidential dismissal where Congress had provided by statute that a member of the Federal Trade Commission could be removed mid-term only for poor job performance).

113 *Morrison v. Olson*, 487 U.S. 654 (1988) (appointment and removal procedure for special prosecutor not invalid just because limits were placed on presidential power to dismiss her, since such limits did not "impede the President's ability to perform his constitutional duty").

114 *See* STRAUSS, *supra* note 1, at 68.

115 *Buckley v. Valeo*, 424 U.S. 1, 126, n. 162 (1976).

116 Another reason why the civil service is constitutional is that civil service employees are "inferior officers" whose appointment and dismissal are vested in department heads whose discretion to hire and fire is controlled by the merit requirements of the statute establishing the civil service. *See* STRAUSS, *supra* note 2, at 64 and *United States v. Perkins*, 116 U.S. 483 (1886) (when Congress vests appointment power in department heads, it may restrict the manner of removal).

117 424 U.S. 1 (1976).

118 These officials are the presiding officers of the two houses of Congress elected by their members.

violated the appointments clause. Since the Commissioners would be enforcing the law and would therefore be *executive* officers, they could only be appointed by the President with approval of the Senate and could not be appointed by legislative officials. The decision was supported by reference to the policy that underlies all separation of powers problems: the notion that "the same persons should not both legislate and administer the laws."[119]

Just as Congress cannot appoint executive agency personnel, it violates separation of powers for Congress to vest executive power in an official over whose tenure it already has control. In *Bowsher v. Synar*,[120] Congress passed a law intended to reduce the federal deficit. The law assigned certain duties to the Comptroller General, the official in charge of the Government Accounting Office, a legislative bureau that investigates and evaluates internal operations of government. The law instructed the Comptroller, upon being notified of certain fiscal information, to determine what spending cuts to make based on standards set out in legislation. These spending cuts were then to be transmitted to the President who was required to put them into effect. The Comptroller General's exercise of this kind of judgment, the Court held, was clearly executive action. The problem was that the Comptroller General, as head of a legislative agency, was subject to removal by Congress before expiration of his 15-year term. It violated separation of powers for Congress to vest executive decision-making power in an official under its control.[121]

2. Ongoing Presidential and Congressional Influence on Agency Action

Presidential Means of Control Beyond the power to appoint agency officials, the President has many opportunities to exercise ongoing control over agency policy and action. The degree of a President's control varies with the agency and depends in part on whether the agency is an executive agency, which is responsible to a presidential cabinet Secretary or other presidential appointee, or an independent agency. Actions of executive agencies can be supervised closely. "Major rules" generally must be cleared with the White House's Office of Management and Budget (OMB) and may result in considerable debate, negotiation and compromise.[122] The content and timing of the administrative rules may be affected. Enforcement priorities of agencies can be set that reflect the President's view as to the wisdom or importance of the law. A policy of agency *inaction* is the easiest to implement. Thus, there is a long history of executive branch officials and agencies reading statutory commands narrowly or "dragging their feet" in promulgating needed regulations or in initiating or pursuing enforcement actions in programs with which they disagree. To give a recent example, the Reagan and the first Bush administrations were repeatedly criticized for failing to enforce vigorously civil rights and environmental protection laws.

Presidential influence should not be overstated, however. Most federal administrative agencies are housed in the executive branch. However, of the approximately 5 million civilian and military personnel in the 14 departments of the government, the

119 424 U.S. at 272. The act had also provided that all appointees would need to be approved not just by the Senate, but by both houses of Congress — a provision that the Court struck down as well.

120 478 U.S. 714 (1986).

121 *See also MWAA v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991) (unconstitutional for members of Congress to serve on a board overseeing administration of federal airports because power they would exercise would be executive power and would be in a form other than legislation).

122 *See* OMB Executive Order No. 12291, 46 Fed. Reg. 13193 Feb. 17, 1981) (requiring that all executive agency action be cleared through OMB).

President gets to appoint only the top 3,000 or so. The remaining administrators who actually do the work carrying out policy are not so easy to control. They are part of the merit-based civil service system.[123] Generally the President cannot fire them and they have specialized knowledge and strong feelings about "their" agency's policies and practices. Further, the President and his staff or appointees are only one influence on agency personnel. As pointed out below, congressional committees have great influence over agencies.

President Harry S. Truman, who served from 1945 until 1953, was considered by many to have been a very strong President. But in dealing with the bureaucracy, he described his task as being "to bring people in and try to persuade them to do what they ought to do without persuasion. That's what I spend most of my time doing. That's what the power of the President amounts to."[124] Truman also commented on the eve of his successor, former Army General Dwight D. Eisenhower, becoming President: "He'll sit here and he'll say 'Do this! Do that!' and nothing will happen. Poor Ike — it won't be a bit like the Army."[125]

There are some legal limits to presidential intervention in agency matters even in those agencies whose heads the President has appointed. For example, the President may not seek to "impound" funds Congress intended that the agency spend.[126] In *Train v. City of New York*,[127] Congress had passed the Clean Water Act of 1972 over President Nixon's veto, but Nixon continued his opposition to the program and impounded funds by ordering the administrator of the Environmental Protection Agency to withhold several billion dollars that Congress had directed should go to fund construction of sewage treatment plants for New York City. The City of New York sued for release of the money. The Court held that the President had no power to order the agency to withhold the funds and that the agency must spend those funds as Congress directed.[128]

Congressional Power and Influence Over Agencies Congressional oversight of agencies has its source in the "power of the purse" given by the Constitution — the power to decide whether and to what extent to fund government operations.[129] The means by which congressional influence is most commonly exercised is through congressional committees. As noted in Chapter I, the original purpose of committees was to deal with the increased complexity and specialized nature of legislation in the modern world. But with the growth of administrative agencies, committees have developed a strong supervisory influence on their operations. Because committees are organized according to subject matter, their members develop expertise and a strong interest in an area of agency action, making it difficult for agencies to use their superior knowledge to escape scrutiny. Most important, since Congress has control over agency budgets, Congressional committee members can be very persuasive in convincing

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123 *See supra* p. 212.

124 Quoted in STRAUSS, *supra* note 2, at 61 n.32.

125 ALEX AYRES, ED., THE WIT AND WISDOM OF HARRY S. TRUMAN 43 (Meridian Books 1998).

126 Impoundment dates from 1803, when President Thomas Jefferson refused to spend $50,000 on defense of the Mississippi River. President Nixon was perhaps the biggest impounder of funds, at one point impounding as much as $25 billion.

127 420 U.S. 35 (1975).

128 A "settlement" of the impoundment dispute between Congress and the President enacted after *Train* is set out in 2 U.S.C.A. §681 *et seq.* (allowing the President to delay spending and propose recission of budgetary amounts, but prohibiting outright impoundment).

129 *See* Chapter I, p. 6.

agency heads to alter the way they are carrying out a particular Congressional program.[130]

To assist it in carrying out this oversight role, Congress has established powerful agencies of its own to do research and investigative work and to make recommendations in particular areas. Among them are the Government Accounting Office (GAO), the Congressional Budget Office and the Library of Congress. The GAO regularly issues reports on the performance of federal agencies.[131]

Congress has also reserved to itself the power of "legislative veto" of agency action or rules through use of a resolution or vote of one house or in some cases even a committee vote. However, in *Immigration & Naturalization Service v. Chadha*,[132] the Court held that a legislative veto by a single house of Congress violated the separation of powers and the "presentment" and "bicameral" clauses of the Constitution, which require that legislation be passed by both houses of Congress and presented to the President for approval or veto.[133] Legislation since 1996 provides in general that any "major" agency rule (as defined, there are around 80-100 major rules a year) must be submitted to both houses of Congress and may not take effect for at least 60 days after it is submitted to give Congress the chance to pass a joint resolution — approved by both houses and signed by the President — disapproving it. If this happens, the agency may not thereafter re-issue the same rule unless Congress enacts legislation allowing it to do so.[134] Congress is not often able to mobilize itself sufficiently within 60 days to stop even a significant percentage of these rules and the President may well refuse to sign the joint resolution. The device was first used successfully in 2001 to stop rules on ergonomics injuries in the workplace promulgated by the Occupational Safety and Health Administration (OSHA), after a major lobbying effort by business interests.[135]

PART II: Separation of Powers and Federalism Issues Involving Agencies

A. Administrative Agencies and Separation of Powers

From all that has been discussed, it is clear that administrative agencies exercise *executive* power when they enforce the law, exercise *legislative* power when they engage in rule-making and exercise *judicial* power when they adjudicate disputes under governing law. One might suppose that a system that purports to be based on separation of powers would have some difficulty with these mixed features of administrative agencies.[136] In fact, all these separation of powers questions have been settled

130 Even the influence of individual members of Congress on agency decisions have been tolerated at least before the adjudication stage. *DCP Farms v. Yeutter*, 957 F.2d 1183 (5th Cir. 1992).

131 Another tool facilitating holding agencies accountable is the federal Freedom of Information Act (FOIA), which gives individual citizens the right to obtain records held by a federal agency, 5 U. S. C. §§552, unless the documents fall within enumerated exemptions, see §§552(b). "[C]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Dept. of Justice v. Tax Analysts*, 492 U. S. 136, 151 (1989). *See also Dept. of the Interior v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1 (2001) (exemption for certain "inter-agency or intra-agency memorandums or letters").

132 462 U.S. 919 (1983).

133 *See* Art. I §7 cl. 2 & 3. One method of avoiding presidential veto is to attach a "rider" affecting particular administrative action to a bill the President wants. The President has no "line-item veto" power and must either approve or veto the entire bill presented to him. *See infra* note 137.

134 *See* 5 U.S.C.A. §§801-808.

135 Pub. L. 107-5 (2001). While OSHA had spent 10 years developing the rules, Congress took only a week to examine and vote to disapprove them.

136 *See* Chapter I, pp. 9-18, 34-37, and Chapter IX, pp. 324-682, where separation of powers is discussed.

by the Supreme Court in a way that has permitted longstanding agency practice to continue.

There are three dimensions to the separation of powers critique of federal administrative agencies: (1) that executive agencies are exercising legislative power, (2) that executive agencies are exercising judicial power, and (3) that one governmental organ, regardless of what branch it belongs to, combines executive, legislative and judicial functions "under one roof."

1. Agencies Exercising Legislative Power

The Court has viewed the problem of agencies exercising legislative power by promulgating rules as one of "delegation" of legislative power. The Court's position is that a statute does not improperly delegate legislative power so long as Congress provides "intelligible standards" to limit the discretion of the agency and to provide a basis for meaningful judicial review.[137] Only then can it be assured that the essentials of the legislative function of determining policy are being exercised by Congress and not by the agency. Thus, in *A.L.A. Schechter Poultry v. United States*,[138] the Court unanimously invalidated a statutory grant of administrative authority to establish "codes of fair competition" in various segments of business and industry with no indication of what the content of those codes should be.

The Court has never overruled the *Schechter* case, but the Court has sustained as sufficient direction from Congress that the Federal Communications Commission regulate broadcast licensing in accord with the "public interest,"[139] that a government department define and recover "excess profits,"[140] and that the federal Price Administrator fix "fair and equitable" commodities prices.[141] In the recent case of *Whitman v. American Trucking Associations, Inc.*,[142] the Clean Air Act directed the Environmental Protection Agency to set maximum air pollution levels that would be "requisite to protect the public health" with "an adequate margin of safety." The Court interpreted the phrase as supplying "intelligible principles" to guide the agency in promulgating air standards that were "sufficient, but not more than necessary" to protect public health. It pointedly rejected the Court of Appeals requirement that Congress provide "determinate criterion" for saying "how much [harm] is too much."[143]

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137 *Yakus v. United States*, 321 U.S. 414 (1944). *See also Touby v. United States*, 500 U.S. 160 (1991). The Court has consistently rejected the idea that Congress may properly give away whatever power it wants. *See Clinton v. City of New York*, 524 U.S. 417 (1998) (the "line item veto" case, holding that Congress's attempt to give the President the power to cancel certain appropriations that have been enacted into law violated the "presentment" clause, Art. I §7, which permits only two actions of the President "before it become[s] a Law": the President, who "shall sign it" if he approves it or "return it," *i.e.*, "veto" it, if he does not).

138 295 U.S. 495 (1935).

139 *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226 (1943).

140 *Lichter v. United States*, 334 U.S. 742, 778-786 (1948).

141 *Yakus v. United States*, 321 U.S. 414, 426-427 (1944). *See generally* Peter H. Aranson, Ernest Gellhorn, Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1982). Some have suggested that the *Schechter* case might still be good law on its facts since it involved a grant of open-ended power directly to the President (rather than to an agency) to makes rules in a vast area (reorganization of the economy) without any of the procedural requirements for promulgating rules that agencies must follow today. *See* STRAUSS, *supra* note 2, at 20-21. Others have suggested even more broadly that the anti-delegation doctrine might be on its way back. *See* AMAN & MAYTON, *supra* note 2, at 23-27, and *National Cable Television Assoc., Inc. v. United States*, 415 U.S. 336 (1974).

142 531 U.S. 457 (2001).

143 Concurring Justices chided the majority for "pretend[ing]... that the authority delegated to the EPA is somehow not 'legislative power,'" rather than "frankly acknowledging that the power delegated to the EPA is 'legislative' but nevertheless conclud[ing] that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Acknowledging this is no different, they maintained, than

Anti-delegation rules have somewhat more force on the state level, where one can find an occasional case decision striking down a state administrative rule for improper delegation of legislative power. But most states follow an approach similar to that used for the federal government.[144]

2. Agencies Exercising Judicial Power

In a common sense meaning of "judicial power," the hearing divisions of agencies clearly exercise judicial power when they hold hearings and decide disputes. If this is so, a problem arises with Article III of the Constitution, which specifies that "[t]he judicial Power of the United States, shall be vested in" federal courts staffed by "Article III" judges — judges whose independence in decision-making is protected by lifetime tenure subject only to removal by impeachment. Administrative adjudicators, sometimes referred to as "Article I" judges, do not have lifetime tenure.

The Court has had some difficulty with this issue. On the one hand, administrative agencies are a practical necessity in the modern age. On the other, there must be *some* limits on Congress's ability to assign the task of adjudicating disputes to non-lifetime-tenured adjudicators. Otherwise, Congress could give *all* federal judicial business to agencies or other non-life-tenured judges over whom it has greater influence. This would render the lifetime tenure requirements of Article III a nullity and defeat the Framers' purpose to establish a federal judiciary that is independent of Congress's will.[145]

There are three theories under which administrative adjudication by agencies is permitted, none of them entirely satisfying.

Public vs. Private Rights The traditional approach to the problem has been to divide potential judicial business into two categories: "public rights" and "private rights."[146] According to the Court, Article III judges are required only for adjudication of disputes over *private* rights. "Private rights" cases are tort, contract, property or other suits between private parties, including claims for damages between private parties provided for in federal statutes. The category also includes all criminal cases. These private rights are thought to be at the "core" of "judicial business" that cannot be handled by agencies, but must instead be adjudicated even in the first instance by an Article III judge or by a state court. "Public rights" are said to arise in matters between the government and individuals where the rights have been created by Congress and are thus subject to its control.[147] Public rights are said to include all manner of public benefits and privileges, such as Social Security payments, veterans' benefits, food stamps, and licenses. Congress can constitutionally create and assign determinations of public rights to purely administrative determination by Article I adjudicators.

The categories of public rights just listed are certainly the most numerous types of cases that administrative agencies handle and the private rights cases are the kinds of

what occurs routinely within the executive branch, where "the authority granted to . . . federal law enforcement agents is properly characterized as 'Executive' even though not exercised by the President." 531 U.S. at 488 (Stevens, J., concurring).

144 *See* AMAN & MAYTON, *supra* note 2, at 7.

145 Federal magistrate judges, bankruptcy judges and many of the judges on federal courts with specialized jurisdiction are also Article I judges. *See* Chapter V, pp. 173, 183-184. As such, the same constitutional difficulties and solutions that justify agency adjudicators apply to them.

146 *See Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (legislation authorizing bankruptcy judges with 14-year terms to adjudicate private rights cases violates Article III).

147 *Atlas Roofing v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977). Thus, under this theory Congress need not afford *any* judicial or administrative hearing remedies in public rights cases other than those required by procedural due process. *See supra*, pp. 202-206.

cases judges traditionally handled before the advent of the modern administrative state. However, the public-private rights distinction does not make much sense in terms of the purpose of Article III's lifetime tenure requirement as a safeguard against congressional influences on federal judges.[148] Any test of what cases require an independent Article III judge should include cases that are particularly subject to congressional intervention and should exclude cases that are not. Many *public* rights cases, such as suits to protect and expand government health and welfare assistance or to stop pollution or cutting trees on federal lands, are exactly the kinds of cases that invite political interference. At the same time, many *private* rights cases, such as contract disputes between corporations and suits by creditors on debts, are not likely to attract much political attention and are therefore the least in need of a judge who has lifetime tenure. In many ways, the public-private distinction would make more sense if it were *reversed*.

Agencies as "Adjuncts" to Courts An alternative rationale explains Article I agency adjudicators as "adjuncts" to an Article III court. Under this theory, agencies are allowed to adjudicate many private rights cases on the principle that they are "assisting" a court in deciding the case, with the Article III court making the *ultimate* decision. Thus, in the typical agency arrangement, the agency adjudicates the case in the first instance, but there will be *judicial review* of that decision by an Article III court. Thus, "the essential attributes of judicial power" are reserved to Article III courts, and the rule against non-Article III adjudication of private rights is not offended.[149] The problem with this theory is that it does not comport with reality. Most administrative agency adjudications are really final and binding when rendered without any need for the agency to seek approval of an Article III court.[150] Even when there is judicial review, virtually conclusive effect is given to the Article I adjudicator's administrative fact-finding and courts give great deference even on issues of law.[151]

The Functional Approach Because of difficulties with the public-private right test and the adjunct theories, the Supreme Court has seemed to back off both theories. It has taken a "functional" approach similar to that employed to resolve other separation of powers problems: it has interpreted Article III's judicial qualifications requirement in a manner that may not do complete justice to its wording, but generally serves the constitutional *function* it was designed to serve.[152] Applying the functional approach to Article I adjudicators, the Court has sought to balance two opposing factors: (1) Congress's interest in efficiency and expertise in having a particular category of cases adjudicated by an Article I adjudicator and (2) the danger of congressional influence over that category of cases. Using this standard, the Court allowed Congress to assign some private rights disputes to administrative adjudication.[153]

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148 *See* Chapter I, p. 9.

149 *See Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833 (1986), quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

150 An exception is the NLRB, which must seek enforcement of its decisions. *See supra* p. 207.

151 *See supra* pp. 208-210. The "adjunct" theory works somewhat better in describing federal magistrates, also classified as non-tenured Article I adjudicators, who work under the close supervision of an Article III district judge and for the most part only recommend decisions. *See* Chapter V, p. 183.

152 This approach can be directly traced to Justice White's dissent in *Northern Pipeline*, the last case to take the pure public-versus-private rights approach. *See supra* note 146.

153 *See, e.g., Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, (1985) (approving administrative system of reimbursement for development costs of chemical); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (approving administrative adjudication of disputes between federally-licensed securities brokers and their clients). Another constitutional objection to administrative adjudication has been that it violates the 7th Amendment right to a jury trial in civil cases. The Court has

The "functional" approach is subject to the usual criticisms of balancing tests — that it is impossible to balance dissimilar values against each other on any principled basis. Also, it ignores relatively clear text of the Constitution that vests "[t]he judicial Power" in Article III judges. Indeed, the Court's "functional" approach could be seen as nothing more than a device that allows the Court to switch to a higher level of generalization to avoid clear language. As such, it effectively reduces Article III's command to a standardless test of whether a particular arrangement offends the *general idea* of separation of powers as that idea is understood by a given majority of the Court at a given time.[154]

3. Intra-Agency Separation of Powers Problems

Even if the *inter-branch* separation of powers problems just discussed can be resolved, many argue that surely there must be an *intra-branch* separation of powers problem when rule-making, enforcement and adjudication functions are located "under one roof." As James Madison stated in Federalist No. 47, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[155] In addition there are the fundamental notions that "no man shall be a judge of his own cause" and that "the same persons should not both legislate and administer the laws."[156]

Professor Strauss has observed that "[i]t is hard to say as a theoretical matter why these arrangements satisfy the structural requirements of 'separation of powers,' although it is clear beyond doubt in the eyes of courts that they do."[157] The true reason why agencies have been sustained against constitutional challenge probably lies in the fact that they serve important functions in modern government, and that hobbling them by insisting on purity in separation of powers would not be a wise policy.

However, there is no need to resort to reasons of expediency, since, as just noted, separation of powers cases tend to require only that federal government power structures not offend the *functions served* by separation of powers. Applying this functional approach, agencies do not to violate separation of powers because they simply do not present the threat of tyranny that Madison and the other Framers were concerned about. First, modern agencies are relatively independent of all three branches and are not "captives" of any one branch. A greater threat would be presented if legislative, executive and judicial functions were combined in the President, the Congress or the courts. Second, while agencies enjoy a certain independence from any *one* branch, they are subject to the external and often competing influences exerted by *all three* branches noted earlier: the President appoints many agency heads and top officials, supervises their activities and may fire some of them, Congress monitors their operations through committee oversight and legislative mandates, and

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rejected this argument. *See Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n.*, 430 U.S. 442, 461 (1977); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989). See also AMAN & MAYTON, *supra* note 2, at 143-145 (criticizing the Court's view).

154 *See Morrison v. Olson*, 487 U.S. 654, 697 (Scalia, J., dissenting).

155 THE FEDERALIST PAPERS at 324 (Jacob E. Cooke ed.) (Wesleyan U. Press, Middletown, Conn. 1961) (originally published 1788).

156 *Buckley v. Valeo*, 424 U.S. 1, 272 (1967).

157 STRAUSS, *supra* note 2, at 16.

the courts review the legality of agency actions. This makes agencies less likely to threaten the tyranny Madison feared.[158]

A third reason agencies do not present serious separation of powers problems is said to found in that fact that, in reality, they combine enforcement, rule-making and adjudicative functions *only at the top levels*. The head of the agency and top advisors have the power to decide whether to promulgate a rule, whether and how to enforce the rule, and whether a contested case was properly adjudicated under the rule. Below the top level, functions are separated into different divisions of the agency. The most dangerous threat to fairness is probably influence by the enforcement division on the adjudicative division. Under the APA, however, ALJs may not be "responsible to or subject to" the "supervision or direction" of agency enforcement personnel and there may be no *ex parte* contact between them regarding a pending case.[159]

B. Federalism and Sovereign Immunity Limits on Suits to Redress Illegal Federal and State Agency Action

1. Suits Against Agencies Themselves

When judicial review was discussed, we considered several situations in which agencies were sued by individuals. Suits against agencies, however, can sometimes conflict with sovereign immunity — the doctrine under which that a sovereign cannot be sued without its consent. When judicial review is provided for by statute, as it often is, the relevant sovereign can be said to have given "consent." However, consent does not cover all forms of action against governmental agencies.

It is somewhat ironic that a country that threw off the yoke of monarchism and ratified a written constitution to assure that the government followed the rule of law, retains the doctrine of sovereign immunity.[160] Since sovereign immunity could effectively make the government unaccountable to the Constitution and laws, the tension between accountability and sovereign immunity has produced caselaw and legislation that modifies immunity concepts sufficiently to allow actions for most forms of *injunctive relief*. This at least allows a court to halt an illegal practice and to order that the government conform its conduct to the law in the future.[161]

Precisely what injunctive relief is allowed varies depending on whether the court handling the suit is a state or federal court and on what level of government is being sued. Consequently, it is necessary to consider all permutations of courts and defendants that are possible as a result of federalism.

a. Suits Against *Federal* Agencies in *Federal* Court

For actions in federal court "seeking relief *other than money damages*," the APA operates as a waiver of sovereign immunity and allows the United States to be named

158 *See* STRAUSS, *supra* note 2, at 14-17. The Supreme Court has also rejected due process challenges to combining investigative and adjudicative functions in one agency. *See Withrow v. Larkin*, 421 U.S. 35 (1975) (rejecting physician's argument that due process was violated because the agency that handled charges of professional misconduct against doctors had the power to investigate those charges, present them, and then rule on their validity, unless a risk of actual bias or prejudgment could be shown).

159 5 U.S.C.A. §554(d) and *supra* p. 199. ALJs are also exempt from agency performance review and have their tenure and compensation determined by the chief civil service commission. *See generally* AMAN & MAYTON, *supra* note 2, §8.5.2.

160 *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 4TH ED. §9.2.1 (Aspen 2003).

161 *See supra* note 82.

as a defendant.[162] Actions against the United States or its agencies for money damages are generally barred by sovereign immunity, but may be brought pursuant to statute. Primary among them are the Federal Tort Claims Act (FTCA) and the Tucker Act. The FTCA, enacted in 1946, provides for recovery for torts, providing for tort liability of the federal government "in the same manner and to the same extent as a private individual under like circumstances."[163] The Tucker Act, first enacted in 1855, provides for recovery of damages in "cases not sounding in tort," meaning primarily government contracts cases.[164] However, in keeping with the notion that there could be no suit in the absence of a congressional waiver of sovereign immunity, Congress has made exceptions to its waiver of immunity and exempted the United States from trial by jury and punitive damages.[165] In general, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[166]

b. Suits Against *Federal* Agencies in *State* Court

The APA's waiver of federal sovereign immunity explicitly waives it only for suit in *federal* court. Moreover, because of the nature of the federal structure contemplated by the Constitution and particularly the supremacy of federal law, state courts have no power to review or order relief with respect to the actions of federal officials or agencies. This rule was established in *Tarble's Case*.[167] In that case, the Supreme Court held that a state court in Wisconsin could not issue a writ of *habeas corpus* against a federal army recruiting officer ordering the release of an allegedly underage soldier. In addition, Congress has provided that federal officials may remove any state court suits against them to federal court.[168]

c. Suits Against *State* Agencies in *Federal* Court

Plaintiffs seeking redress for state violations of federal law have traditionally sought relief in federal rather than state court. The popularity of federal courts in such cases flows from the facts that federal judges are not part of the state governmental machinery, are generally more expert than state judges on issues of federal law, and are insulated from political pressure by their life tenure. As discussed in Chapter I, when the Constitution was being debated, the question of whether states gave up their sovereign immunity from suit in *federal* court arose. In the 1791 case of *Chisholm v. Georgia*,[169] the Supreme Court decided that Article III's grant of federal judicial power

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162 5 U.S.C.A. §702 (emphasis supplied). Before the APA was amended to waive immunity, suits against the U.S. for injunctive relief were permitted against the responsible officers, similar to the state officer suits described *infra* p. 222. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). *See generally* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT (Foundation 2000).

163 28 U.S.C.A. §§2671-2680. The FTCA in §1680 excludes certain kinds of claims, including claims arising in a foreign country, exercise of a "discretionary function," military activity during time of war, or fiscal operations, plus any claim for intentional torts committed by non-law enforcement personnel.

164 28 U.S.C.A. §1491(a)(1).

165 For a discussion of the FTCA and the Tucker Act, *see* CHEMERINSKY, *supra* note 160, §§9.2.3-9.2.4.

166 *Mobil Oil Exploration & Producing Southeast v. United States*, 530 U.S. 604 (2000) (government must refund $158 million paid for oil exploration rights by oil companies after it breached contract by following law imposing new requirements for approval of leases).

167 80 U.S. (13 Wall.) 397 (1871).

168 28 U.S.C.A. §1442(a)(1). *But see Mesa v. California*, 489 U.S. 121 (1989) (removal is proper only if the defendant official has some defense to the suit or prosecution based on federal law). *Tarble's Case* followed and resolved issues raised by the vigorous use of state courts to protect escaped slaves from being recaptured and sent back to the south on order of federal "slave commissioners." This history is related in the Gibbons law review article cited in note 88 of Chapter V.

169 2 U.S. (2 Dall.) 419 (1793). *Chisholm v. Georgia* was discussed in Chapter I, p. 37.

over suits in which a state is a party abolished state immunity from suit in the *federal* courts, regardless of whatever immunity the state might enjoy in its own courts. Congress and the states responded with passage and ratification of the 11th Amendment in 1798, reinstating that immunity. The immunity continues to exist today despite the diminution in states' rights wrought by the Civil War and the 14th Amendment's limits on state action.[170]

The literal wording of the 11th Amendment does not apply to bar suits for enforcement of *federal rights* brought by citizens against their *own* states. Nonetheless, the Supreme Court in the 1890 case of *Hans v. Louisiana*, held that, notwithstanding the wording of the 11th Amendment, such suits were nonetheless barred.[171] However, caselaw interpreting the 11th Amendment has worked a division between permissible injunctive relief and prohibited damages relief roughly similar the division created by the APA for federal court suits against the federal government. The Supreme Court in *Ex parte Young*[172] held that, while sovereign immunity prevents suits against *states*, it does not bar federal law claims against state *officials in their official capacities* at least where the suit is for prospective injunctive relief. The theory of *Young* was the fiction that an official acting contrary to superior federal law was for that reason no longer a state official and could be subjected to suit for such "individual conduct." However, this theory is a "legal fiction" since the relief awarded in an official-capacity officer suit binds the state and thus has the same effect as relief ordered against the state itself.[173] Moreover, the "officer-suit" fiction does not go so far as to allow an official-capacity officer suit for *damages* collectable from the state treasury.[174]

Congress has the power, if it chooses, to override state sovereign immunity from damages relief by passing a statute, if it makes clear on the face of that statute its intent to abrogate state immunity. However, Congress may do so only if it acts pursuant to powers granted to it by amendments ratified after 1798 — when the 11th Amendment was ratified. Since most of Congress's powers come from Article I (ratified 1789) and it does not qualify, the most important power for abrogation purposes is in section 5 of the 14th Amendment (ratified 1868).[175] As noted in Chapter IX, this power has been interpreted narrowly.[176]

Official capacity suits against state officials in federal court are generally asserted pursuant to 42 U.S.C.A. §1983, the Civil Rights Act of 1871, which makes "[e]very

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170 These limits are primarily the due process and equal protection clauses. The argument has been made that the 14th Amendment of its own force repealed the 11th Amendment, but the Court avoided deciding the question. *See Millikin v. Bradley*, 433 U.S. 267, 290 n.2 (1977).

171 134 U.S. 1 (1890). The 11th Amendment also applies to claims against states brought in federal *administrative agencies* as well. *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002). Sovereign immunity under the 11th Amendment does not bar suits against municipal subdivisions of states — cities, counties, townships and the like — unless those municipalities are acting as the "alter ego" of the state, *i.e.* serving simply as the agent of the state in carrying out what is really a state program. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).

172 209 U.S. 123 (1908).

173 The concept of suing the government by suing its officials was borrowed from English practice where a similar fiction was employed to allow some suits against the Crown. *See* Louis Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

174 *Edelman v. Jordan*, 415 U.S. 651 (1974).

175 *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), *overruling Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). One example of the exercise of this power is 42 U.S.C.A. §2000d-7 (allowing suits against states for discrimination under several civil rights laws). *See generally* CHEMERINSKY, *supra* note 160, §§7.1-7.7.

176 *See* pp. 337-339 and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (reading Congress's §5 powers narrowly as not authorizing it to abrogate state sovereign immunity in the absence of specific findings that such abrogation is a proportionate response to the problem).

person" acting "under color of" state law liable for injunctive or damages relief in federal court for violations of federal law. Suits for relief against administrative agency heads are facilitated by the fact that there is no requirement that the §1983 plaintiffs exhaust state administrative or judicial remedies.[177] However, there are three limits on the use of §1983 as a method of judicial review of state agency action. The first is that the plaintiff can only raise federal constitutional or statutory issues since the statute is only addressed to deprivations of federal rights. Second, relief may not include any accrued retroactive money judgment against a state agency, as discussed above. Third, if the state administrative proceeding is an enforcement action brought *against* the would-be federal plaintiff by the state agency, the federal court will be required to abstain from jurisdiction to permit the state proceeding to take its course. If those proceedings are decided against the party, that party will be relegated to state court judicial review.[178]

d. Suits Against *State* Agencies in *State* Court

As stated in Chapter I, states retain whatever rights and powers they had as sovereign international states, except to the extent that they gave up those rights and powers in the Constitution. Among the rights retained is a state's sovereign immunity from suit in its own courts absent consent. However, many states have allowed suit on terms similar to those allowed by the federal government, discussed above. Other states have abolished or waived their sovereign immunity completely.[179]

Nonetheless, the Supreme Court recently extended 11th Amendment immunity — just discussed above — to bar suits filed in *state* court, despite the terms of that Amendment limiting its application to suits in federal court.[180] The rationale was that states were protected by an unspoken constitutionally based sovereign immunity from suit, of which the 11th Amendment was only one manifestation. Thus, for *state-law* claims in state court, state law sovereign immunity will govern whether and to what extent those claims are permitted. For *federal-law* claims in state court, the same 11th Amendment that applies in federal courts will determine under what circumstances suits will be permitted — usually limited to prospective injunctive relief.[181]

2. Suits Against Administrative Officials for Personal Liability

Despite the sovereign immunity of governmental bodies, it is sometimes possible to recover a *personal* money judgment against an administrative *official* for bad faith illegal actions. These suits are not barred by sovereign immunity because the suit is solely against the official and does not result in any government liability.[182]

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177 *Patsy v. Florida International University*, 457 U.S. 496 (1982). The plaintiff may be bound by certain findings of fact made at any trial-type state administrative hearing, if the federal plaintiff did in fact pursue state administrative remedies. *See University of Tennessee v. Elliott*, 478 U.S. 788 (1986).

178 *See Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986) (federal court must abstain in favor of pending state civil rights administrative proceeding against federal plaintiff). This is part of "*Younger* abstention," discussed in Chapter V, p. 193.

179 *See* PROSSER & KEETON'S HORNBOOK ON TORTS, 5TH ED. §§131-132 (West 1984, 1988). More detail about the immunity of states from tort liability is set out in Chapter XI, p. 413.

180 *Alden v. Maine*, 527 U.S. 706 (1999) (suit by state employees under federal Fair Labor Standards Act is barred by state sovereign immunity).

181 If 11th Amendment jurisprudence proves too much for literal-minded readers, its incongruities have amused others as well. *See* William Burnham, *"Beam Me Up, There's No Intelligent Life Here": A Dialog on the 11th Amendment with Lawyers from Mars*, 75 NEBRASKA L. REV. 551 (1996).

182 *See Scheuer v. Rhodes*, 416 U.S. 232 (1974) (suit for personal injuries by college students against Ohio governor and National Guard soldiers called out to quell student unrest not barred by 11th Amendment). *See generally* CHEMERINSKY, *supra* note 160, §7.1-7.7.

Suits Against State Officials for Violating Federal Rights It should be noted as well that personal damages suits are generally possible *only* against administrative officials. The 1871 Civil Rights Act, discussed above, provides broadly for suit in state or federal court for damages liability against "every person" acting under color of state law who violates federal rights. Howoever, there are several common law immunities that the Court has presumed that Congress meant to continue to apply despite the broad statutory language. Legislators,[183] judges[184] and prosecutors are immune for action taken in their capacity as such.[185] However, they are amenable to suits for personal damages when they take action in their *administrative* capacities.[186]

Administrative actors are liable only if they acted in "bad faith" — defined as action which the official reasonably should have known would violate the plaintiff's rights.[187] The determination of bad faith is an objective one and has nothing really to do with the actual state of mind of the defendant. It is a purely legal question of whether the official's actions violated clearly established federal rights. The Court has recently stated that "[t]he qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent and those who knowingly violated the law."[188] Compensatory damages may be awarded and punitive damages are available if evil motive or intent or recklessness is shown.[189]

Suits Against Federal Officials There is no statute like §1983 providing for a private right of action for damages for violation of the Constitution or federal law against *federal* officials. However, the Court in *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*[190] implied a private right to sue for damages for bad faith constitutional violations. All the common law immunities set out above for state officials apply to their federal counterparts.[191] For all other claims, if federal officials are acting within the scope of their official capacity, the suit is treated as if it were against the United States and is handled in accordance with the FTCA. If the federal employees involved

183 *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators); *Eastland v. United States Serviceman's Fund*, 421 U.S. 491 (1975) (federal legislators); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (local legislators). High-level administrators or judges who act as "legislators" by promulgating rules may also be entitled to legislative immunity. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980). Legislative immunity applies to bar not only damages, but injunctive relief as well.

184 *Stump v. Sparkman*, 435 U.S. 349 (1978) (state judge who illegally ordered sterilization of minor was immune from damages; though order was not authorized by law, it was a judicial act); *Butz v. Economu*, 438 U.S. 478 (1978) (federal administrative law judge entitled to same judicial immunity as regular judges).

185 *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). *See also Briscoe v. LaHue*, 460 U.S. 325 (1983) (police officer witnesses).

186 *See Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), *rev'd on other grounds* 442 U.S. 228 (1979) (congressman may be liable for sex discrimination in hiring his staff since that action was administrative rather than legislative); *Burns v. Reed*, 500 U.S. 478 (1991) (prosecutor not entitled to immunity for giving erroneous advice to police, since that was an administrative act not connected with representation of government in court). A clear and concise summary of the complicated law in this area can be found in CHEMERINSKY, *supra* note 160, §§8.1-8.11.

187 *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (suit against Department of Defense officials for retaliatory discharge of plaintiff who exposed cost overruns).

188 *Hunter v. Bryant*, 502 U.S. 224 (1991) (*per curiam*).

189 *Smith v. Wade*, 461 U.S. 30 (1983).

190 403 U.S. 388 (1971).

191 One that is unique to the federal context is that the President is absolutely immune from any damages liability for actions taken pursuant to his office. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). However, there is no immunity for a President, even temporary immunity while President, from suit for actions taken before becoming President. *See Clinton v. Jones*, 520 U.S. 681 (1997)

are determined not to have been acting within the scope of their employment, then suit may proceed in state court under applicable state law.[192]

192 28 U.S.C.A. §2679.