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ADMINISTRATIVE LAW: JUDICIAL REVIEW—PRESERVER OF THE PROCESS

MICHAEL P. WAXMAN*

Introduction

Administrative law has experienced substantial change since the passage of the Administrative Procedure Act (APA).[1] Originally conceived as the governmental entities which were responsible for the detail work (fact finding and enforcement) of implementing legislative objectives with review by the judicial branch,[2] administrative agencies (quasi-independent parts of the executive branch) have lately become the target of attack by the very branches of government that created them.[3] Indeed, while both the legislative and executive branches have tried to override agency action or remove agency authority,[4] only the federal courts have steadfastly maintained the review procedures originally established by the APA.

Two significant problems arise in the efforts of the legislative and executive branches to provide extrajudicial review of administrative agency action. First, unlike the traditional judicial review procedure of precedential decisions by life-tenured judges, the policy decisions of Congress and the President reflect the "political realities" of reelection.

Second, Congress sometimes issues vague directions to administra-

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1. 5 U.S.C. §§ 500-706 (1976 & Supp. IV 1980).

2. *See* S. BREYER AND R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 37-84 (1979).

3. *See* McGowan, *Congress, Court and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1135-39 (1977).

4. This has been true on both the executive and "independent" agency levels: *E.g.*, EXEC. ORDER NO. 12,291, 46 FED. REG. 13,193 (1981); and, Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 58 (1976 & Supp. IV 1980). The validity of one-house vetoes has been questioned. Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), *aff'd* INS v. Chadha, 51 U.S.L.W. 4907 (June 23, 1983). Subsequent to writing this article the Supreme Court held the 1-house legislative veto unconstitutional as a violation of the separation of powers. *See* INS v. Chadha, 51 U.S.L.W. 4907 (June 23, 1983). The Supreme Court also invalidated the 2-house veto of an independent regulatory agency's exercise of legislative rule-making power. *See* U.S. Senate v. FTC, 51 U.S.L.W. 3488 (July 6, 1983); U.S. House of Rep. v. FTC, 51 U.S.L.W. 3617 (July 6, 1983). *But see* Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064 (1981); and Levinson, *Legislative and Executive Veto Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982).

HeinOnline -- 59 Chi.-Kent L. Rev. 331 1982-1983

tive agencies. Often these are reflective of the essential process of congressional compromise. Unfortunately, as the political pendulum swings, the review of administrative agency action by Congress may be considered unresponsive or too responsive to those directions.[5]

In contrast to politically motivated review, the chief benefit of judicial review has been a continuity of legal precedent which is consonant with our common law heritage and the separation of power.[6] In order to preserve a detached presence the judiciary is often required to assess the power of the court to review an agency's actions. Traditionally, judicial review is precluded only where there is "clear and convincing evidence" of congressional intent to preclude review.[7] On the other hand, following closely upon the exhaustion of administrative remedies,[8] appellate courts will not ordinarily decide a question which was not raised before an administrative agency or a district court.[9]

During the 1981-82 judicial season the Seventh Circuit decided a number of cases which required analysis of the breadth of judicial power to review administrative agency methods of decision-making and the preclusion of appellate courts from considering issues not raised below. If exceptions to precedent are symbolic of the development of administrative law this was a pennant-winning year for the Seventh Circuit. The following cases reveal the quest for continuity in judicial precedential development.

PRECLUSION OF JUDICIAL REVIEW

Although the clear language of Section 701(a)(2) of the Administrative Procedure Act precludes judicial review of agency action "com-

5. *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

6. *See* R. RABIN, PERSPECTIVES ON THE ADMINISTRATIVE PROCESS 2-6 (1979).

7. Abbott Laboratories v. Gardner, 387 U.S. 136, 139-41 (1967).

8. This standard was succinctly set forth in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). Recent Supreme Court decisions have chipped away at the standard (*e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976)) or reinforced it (*e.g.*, FTC v. Standard Oil Co. of California, 449 U.S. 232 (1980)). The standard has survived but its application is sometimes restricted. *See* K. DAVIS, ADMINISTRATIVE TREATISE § 20.11 (2d ed. 1978 & Supp. 1982) (hereinafter "K. DAVIS").

9. Traditionally appellate courts will not decide a question not raised before the administrative agency. Professor Davis has asserted that in the wake of Mathews v. Eldridge, 424 U.S. 319 (1976), appellate courts might radically alter this principle. K. DAVIS, *supra* n.8, §§ 20.11, 20.16. Professor Davis argues that this is especially true for the Seventh Circuit. K. DAVIS, *supra* n.8, § 20.15 at 292. The Seventh Circuit declared in Myron v. Chicoine, 678 F.2d 727, 732 n.7 (7th Cir. 1982), that it does not view *Mathews* as an abolition of this well-established principle. The decision in Dow Chem. Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982), indicates that the Seventh Circuit may be more willing to consider "unraised" issues in administrative law cases than it admits.

HeinOnline -- 59 Chi.-Kent L. Rev. 332 1982-1983

mitted to agency discretion by law,"[10] the United States Supreme Court nonetheless has enunciated a strong presumption against precluding judicial review.[11] Indeed the Court has declared that such preclusion will occur only where there is "clear and convincing evidence" of congressional intent to preclude review.[12]

The Supreme Court wrestled with this conflict in *Citizens to Preserve Overton Park v. Volpe*.[13] In that case the Court held the exception to judicial review is "very narrow" and applicable only in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply. . . ."[14]

Professor Davis has been openly critical of the *Overton Park* "law to apply" standard for reviewability.[15] He asserts that prior to *Overton Park* a court had the power to review as declared in the "language of the APA in [section] 706(1)(A) that '[t]he reviewing court shall . . . set aside agency action . . . found to be . . . an abuse of discretion' . . . . [T]he law was clear that one role of reviewing courts was to protect against 'abuse of discretion' whether or not 'law' existed to apply."[16] Professor Davis concludes that the judicial review function has been crippled by the "law to apply" test.[17]

Despite Professor Davis' views, the federal courts consistently have attempted to apply the *Overton Park* rule. In *Jaymar-Ruby, Inc. v. F.T.C.*,[18] Jaymar, among other companies, had produced voluminous material pursuant to an investigative subpoena issued by the FTC. Upon Jaymar's entry into a cease and desist Consent Order, the FTC ended its investigation. Subsequently, the FTC received requests from various state attorneys general pursuant to section 6(f) of the FTC Act seeking access to the FTC's Jaymar file to determine if Jaymar had violated various state antitrust or deceptive trade practice laws.[19]

The Commission determined that providing the files to the attorneys general would not jeopardize the material's commercial sensitiv-

10. 5 U.S.C. § 701(a)(2) (1976 & Supp. IV 1980).
11. Morris v. Gressette, 432 U.S. 491, 500-01 (1977).
12. Abbott Laboratories v. Gardner, 387 U.S. 136, 139-41 (1967).
13. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).
14. *Id.* at 410, *quoting* S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945). "In the whole, huge body of law of judicial review of administrative action, only one infection seriously festers and grows worse—the law that reviewability depends on presence or absence of 'law to apply.'" K. DAVIS, *supra* n.8, § 28.16 at 499.
15. *Id.*
16. *Id.*
17. *Id.*
18. 651 F.2d 506 (7th Cir. 1981).
19. *Id.* at 509.

HeinOnline -- 59 Chi.-Kent L. Rev. 333 1982-1983

ity.[20] Jaymar instituted suit seeking a declaratory judgment and injunctive relief to prevent the FTC from permitting the attorneys general access to the files.[21] The district court held the Commission's decision to release the materials was within the agency's unreviewable discretion under section 701(a)(2) of the APA.[22]

The Seventh Circuit considered whether the FTC's decision to disclose its investigative files to state attorneys general pursuant to the Federal Trade Commission Improvements Act of 1980[23] was judicially reviewable. The FTC's actions were based on an amendment to section 46(f) of the Federal Trade Commission Act[24] which specifically authorized the FTC to share any "privileged" information with any state law enforcement agency that requested information.[25] The only restrictions on the sharing of the information was that the agency certify (1) that the information will remain confidential and (2) that the information will be used only for official law enforcement purposes.[26]

The Seventh Circuit held that judicial review of FTC actions pursuant to section 46(f) was precluded under the *Overton Park* "exception."[27] The court stated that because Congress did not specify any statutory criteria to be considered by the FTC in reaching its decisions under section 46(f), Congress did not intend judicial review of FTC decisions to disclose.[28] This interpretation was supported by a comparison of the various sections of the FTC Improvements Act of 1980 which specifically provided for judicial review, unlike section 46(f) which made no mention of judicial review.[29] The Seventh Circuit claimed that the failure to refer to judicial review in 46(f) raised a presumption that Congress did not intend judicial review.[30]

The *Jaymar-Ruby* opinion ignores Professor Davis' concerns about *Overton Park*. In addition, the court's decision raises two new concerns. First, despite citation to *Southern Railway Co. v. Seaboard Allied Milling Corp.*,[31] the Seventh Circuit apparently ignored the Supreme Court's language in *Southern Railway* which expanded on the

20. *Id.*
21. *Id.* at 509-10.
22. Jaymar-Ruby, Inc. v. FTC, 496 F. Supp. 838 (N.D. Ind. 1980).
23. 15 U.S.C. § 58 (1976 & Supp. IV 1980).
24. 15 U.S.C. § 46(f) (1976 & Supp. IV 1980).
25. *Jaymar-Ruby*, 651 F.2d at 510-11.
26. *Id. See* 15 U.S.C. § 46(f) (1976 & Supp. IV 1980).
27. *Jaymar-Ruby*, 651 F.2d at 510-11.
28. *Id.* at 511-12.
29. *Id.* at 510.
30. *Id.*
31. 442 U.S. 444, *reh'g denied*, 444 U.S. 890 (1979).

HeinOnline -- 59 Chi.-Kent L. Rev. 334 1982-1983

Overton Park test. In *Southern Railway*, the Court stated that the question is not whether the agency has "law to apply" in its determination but whether the reviewing court has "law to apply."[32] Citing *Overton Park*, the Supreme Court in *Southern Railway* said, "[O]n the face of the statute there is simply no 'law to apply' in determining if the [agency's] decision is correct."[33]

The second issue is the Seventh Circuit's reference to congressional failure to act as inferring intent not to act.[34] Unlike the opinions in *Southern Railway* and *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*,[35] the *Jaymar-Ruby* court indicated that intent by inference alone can be a sufficient basis to decide that agency discretion was unreviewable as a matter of law.[36] This interpretation would lessen greatly the *Abbott Laboratories* "clear and convincing evidence" test.[37] Although the *Jaymar-Ruby* decision is probably the right result, the mechanisms used by the court to get there leave significant unresolved issues.

JUDICIAL REVIEW—POWERS OF THE COURT

In *Wright v. Califano*[38] the Seventh Circuit held that the district court abused its discretion by ordering that all applications for participation in federal social security programs not timely processed by the U.S. Department of Health and Human Services (HHS) would be automatically approved.[39] Although the Seventh Circuit was clearly concerned about the large number of social security applicants who were entitled to benefits but whose applications were caught up in the mammoth backlog of cases at HHS, the court reasoned that sometimes the burden on the administrative agency outweighed the due process right of potential welfare recipients.[40]

32. *Id.* at 455-56.

33. *Id.*

34. *Jaymar-Ruby*, 651 F.2d at 510.

35. 605 F.2d 1016 (7th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980). Both *Southern Railway* and *Board of Trade* held agency decision-making immune from judicial review. The court's decisions were each based on three factors: In *Southern Railway* the factors were the actual language of the Act, its relationship to other statutory provisions and its legislative history. In *Board of Trade* the factors were the actual language of the Act, its relationship to other statutory provisions and the nature of the agency's authority.

36. *Jaymar-Ruby*, 651 F.2d at 510.

37. Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). *See* note 12 *supra* and accompanying text.

38. 587 F.2d 345 (7th Cir. 1978).

39. *Id.* at 356-57.

40. *Id.* at 354-56.

HeinOnline -- 59 Chi.-Kent L. Rev. 335 1982-1983

However, in *Smith v. Miller*[41] the Seventh Circuit indicated there was a limit to its tolerance of administrative backlog in public welfare cases. In *Smith*, the Illinois Department of Public Aid maintained a system which would only reimburse providers of special medical care to welfare recipients if the recipients had received the Department's "prior approval" for such care.[42] If the care was provided before approval, the provider would not be paid even if it later qualified for reimbursement.[43] Smith was a representative of a class whose past or pending requests for special medical or dental care were not processed promptly enough to satisfy the requirements of Title XIX of the Department of Health, Education and Welfare (HEW) (now Health and Human Services) regulations interpreting the Social Security Act.[44]

Conceding that the district court had authority to fashion an equitable remedy, the Department on appeal questioned the district court's exercising its equitable powers in anticipation of the Department's failure to observe the court's order.[45]

The Seventh Circuit quickly disposed of the questions concerning the right of the district court to order a remedy that anticipates an administrative agency's failure to comply. The court noted, "Many courts have exercised equitable powers to force a state to make or continue making public relief payments until the state's administration of its public aid program comports with federal statutory or constitutional standards."[46]

Wright v. Califano confirmed the state's broad discretion to set standards of need and determine the initial eligibility criteria for its public assistance program.[47] The Seventh Circuit distinguished *Smith* from *Wright* on the basis of the potential recipient's place in the welfare system. Unlike in *Wright*, the *Smith* recipients had already been subject to and met the medicaid eligibility criteria.[48] The distinction between those applicants who are making an initial application for wel-

41. 665 F.2d 172 (7th Cir. 1981).

42. *Id.* at 173-74.

43. *Id.* at 174.

44. *Id.*, *quoting* 42 U.S.C. § 1396(a)(8) (1976 & Supp. IV 1980).

45. *Smith*, 665 F.2d at 175.

46. *Id.* at 175. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Eder v. Beal, 609 F.2d 695 (3d Cir. 1979).

47. *Wright*, 587 F.2d at 350-54. *See* Rosado v. Wyman, 397 U.S. 397, 408 (1970).

48. *Smith*, 665 F.2d at 176. Two other factors may have affected the *Smith* decision. First, as noted earlier, services provided before approval would *never* be compensated despite subsequent qualification for treatment. *See* text accompanying notes 42 and 43, *supra*. Second, since the issuance of the district court's order 93% of all applications for specialized medical care requiring prior approval under the Department's regulations were eventually approved. 665 F.2d at 176.

HeinOnline -- 59 Chi.-Kent L. Rev. 336 1982-1983

fare benefits and those already qualified has been commonly accepted in "due process" cases.[49] The Seventh Circuit in *Smith* found it is within a district court's discretion to presume that a state will not comply with its order and contemplate relief for noncompliance.[50]

Once the court determined that the medicaid recipients in the *Smith* case had greater rights than those in the *Wright* case, it then reweighed the balance of harm to the individual recipients as opposed to the burden on the state agency. On one side was the financial and/or medical care loss to individuals denied certain medicaid coverage because the state had taken too long to process claims. On the other side was the financial loss to the state from being forced to grant coverage to everyone who had passed initial screening regardless of whether some claims later turned out to be fraudulent. The Seventh Circuit concluded that the backlog harmed the potential medical recipient far more than the agency.[51] The court held that where the scales tip to the potential recipient the district court may order "automatic approval."[52]

SUBPOENA ENFORCEMENT CONSIDERATIONS

Courts have usually been willing to compel compliance with subpoenas issued by administrative agency officials because they have understood the necessity for a full explication of the facts before the agency can make a reasoned decision. Courts have applied to their review of administrative agency subpoenas the same sort of criteria they apply to subpoena requests of parties in a judicial setting. Essentially, the courts have looked to the relevance of the subpoenaed material to the hearing[53] and the burden on the subpoenaed party in supplying the material.[54] In addition, third parties to administrative hearings may also raise their nonparticipant status as a factor in weighing the burdensomeness of a subpoena issued against them.[55]

Burdensomeness is usually measured by a balancing of the need for and probative value of the subpoenaed material by the requesting

49. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Rosado v. Wyman, 397 U.S. 397 (1970); Wright v. Califano, 587 F.2d 345 (7th Cir. 1978).
50. *Smith*, 665 F.2d at 180.
51. *Id.* at 176.
52. *Id.* at 178.
53. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).
54. *See, e.g.*, FTC v. Shaffner, 626 F.2d 32, 38 (7th Cir. 1980).
55. FTC v. Bowman, 149 F. Supp. 624, 629-30 (N.D. Ill. 1975), *aff'd*, 248 F.2d 456 (7th Cir. 1957). *See also* W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW, at 569 (7th ed. 1979).

HeinOnline -- 59 Chi.-Kent L. Rev. 337 1982-1983

party, against the various burdens that will be incurred by the subpoenaed third party in providing the documents.[56] The subpoenaing party's need for the information is often measured by the benefit expected to be derived from the subpoenaed documents.[57]

The burden on the subpoenaed party traditionally includes: (1) the material to be submitted is confidential[58] and (2) the amount of time, effort and inconvenience to obtain the material[59]—although the latter is rarely sufficient by itself.[60] The confidentiality problem can often be resolved by a "protective order."[61] Although there have been circumstances where a protective order has been insufficient to satisfy the burden of confidentiality, it usually eliminates or lessens the burden sufficiently to permit enforcement.[62] Where the burden of compliance is too great, a subpoena request may be denied or reduced in scope.[63]

Dow Chemical Co. v. Allen[64] has added academic freedom as a new factor that may be considered in weighing the burden on a subpoenaed party. In *Dow*, the Environmental Protection Agency (EPA) issued an emergency order to suspend certain uses of two herbicides manufactured by Dow. In the subsequent hearing, Dow requested that the Administrative Law Judge (A.L.J.) issue subpoenas compelling certain University of Wisconsin researchers to disclose virtually all information they possessed relative to an on-going study which formed a part of the basis for the EPA's decision to issue the emergency suspension order. The University of Wisconsin (UW) study related to the effects of the use of some of the herbicides produced by Dow. Although the agency no longer based its argument for suspension upon the study, the A.L.J. issued the subpoenas. However, the district court refused to enforce them.[65]

56. *See* In re Zuchert, 28 F.R.D. 29 (D.D.C. 1961), *aff'd in part sub. nom.*, Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 296 (1963); FCC v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957).

57. *See* W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW, at 568 (7th ed. 1979).

58. *See* FCC v. Cohn, 154 F. Supp. 899, 913 (S.D.N.Y. 1957).

59. *Id.* at 908.

60. *See* United States v. Theodore, 479 F.2d 749 (4th Cir. 1973); FTC v. Standard American, Inc., 306 F.2d 231 (3d Cir. 1962); and Adams v. FTC, 296 F.2d 861 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962).

61. "When the burden asserted in defense to a subpoena is . . . [the] commercial risks involved in providing [the subpoenaed documents or information] the judicial response is . . . to consider issuance of a protective order." *See* W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW, at 567 (7th ed. 1979).

62. *See* FTC v. Lonning, 539 F.2d 202, 210-11 (D.C. Cir. 1976).

63. *See, e.g.*, United States v. Powell, 379 U.S. 48 (1964).

64. 672 F.2d 1262 (7th Cir. 1982).

65. *Id.* at 1266. The history of the parties in this case is intricate. The United States was the original petitioner for enforcement in the district court but withdrew from the appeal of the dis-

HeinOnline -- 59 Chi.-Kent L. Rev. 338 1982-1983

On appeal, the Seventh Circuit independently assessed the burden of compliance on the UW research team. It held that the district court did not abuse its discretion in finding "that the risk of even inadvertent premature disclosure so far outweighed the probative value of and need for the information as to itself constitute an unreasonable burden on respondents."[66] Despite the fact that the Federal Insecticide, Fungicide, and Rodenticide Act[67] specifically recognized the need to subpoena documents from non-parties,[68] the Seventh Circuit nonetheless supported the district court's consideration of third party status as a factor in weighing whether there was an undue burden on the subpoenaed party.[69]

Finally, despite the fact that neither the parties nor the district court had raised the issue, the Seventh Circuit decided to address the question of the subpoena's burden on academic freedom[70] which was raised in an *amicus curiae* brief filed by the State of Wisconsin.[71]

The Seventh Circuit, citing *University of California Regents v. Bakke*,[72] asserted that academic freedom is a special concern of the first amendment.[73] A "First Amendment scholar" rather than any judicial precedent was cited to tie university laboratory scholarly research to the first amendment special concern for academic freedom.[74] Having tied scholarly research to academic freedom, the court noted that like other constitutional rights academic freedom must be balanced against important competing interests.[75] However, the only case cited for this principle is totally unrelated to the issues in *Dow*.[76]

trict court's order denying enforcement. Dow, the intervening petitioner in the district court, perfected the appeal. A group of Vietnam veterans and families of servicemen were permitted as intervenors because of the relevance of the studies to suits arising out of servicemen's exposure to the defoliants used in Southeast Asia between 1962 and 1971. The State of Wisconsin appeared as amicus curiae. *Id.* at 1266 n.2.

66. *Id.* at 1274.

67. 7 U.S.C. § 136 (1976 & Supp. IV 1980).

68. 7 U.S.C. § 136d(d) permits an Administrative Law Judge to issue a subpoena to "any person."

69. *Dow*, 672 F.2d at 1277.

70. *Id.* at 1274-77. As noted in Judge Pell's concurring opinion, the court had sufficient grounds to uphold the district court without addressing the burden on academic freedom. Judge Pell refused to join in the academic freedom part of the opinion. *Id.* at 1278-80.

71. *Id.* at 1274. Oddly, in Myron v. Chicoine, 678 F.2d 727, 732 n.7 (7th Cir. 1982), the Seventh Circuit emphasized, in dicta, that it is generally unwilling to take a new issue on appeal, much less establish it as a new factor in future decision-making.

72. 438 U.S. 265, 312 (1978).

73. *Dow*, 672 F.2d at 1274.

74. *Dow*, 672 F.2d at 1275 *citing*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 594 (1970).

75. *Id.*

76. Barenblatt v. United States, 360 U.S. 109, *reh'g denied*, 361 U.S. 854 (1959), involved a

HeinOnline -- 59 Chi.-Kent L. Rev. 339 1982-1983

Despite the "surprisingly sparse" case law "considering the standard to be applied where the issue is academic freedom of the university [or its researchers] to be free of governmental interference,"[77] the court stretched to find Supreme Court precedent (once again cases without fact situations similar to *Dow*)[78] that "suggests that to prevail over academic freedom the interests of government must be strong and the extent of intrusion carefully limited."[79]

The Seventh Circuit concluded that scholarly research under its academic freedom umbrella "may properly figure into the legal calculation of whether forced disclosure would be reasonable."[80] It then proceeded to support the district court's denial of the subpoena based on this new standard.[81]

SUBSTANTIAL EVIDENCE: USE OF MECHANICAL DEVICES IN ADMINISTRATIVE DECISION-MAKING

Can an Administrative Law Judge, after taking and determining evidence, be required by the administrative agency to substitute a mechanical "grid" for his usual discretion in deciding whether the evidence qualifies a party for coverage under a disability program? If so, should relevant evidence which is not contemplated in the "grid" be considered in the decision-making process? These novel issues were the subject of two Seventh Circuit decisions with resolution of the latter surprisingly preceding the former.

In 1978 the Department of Health, Education and Welfare (Health and Human Services) initiated a procedure to expedite and improve the uniformity of social security disability cases. The procedure, to be applied after an A.L.J. takes evidence and makes evidentiary findings, required that the A.L.J. apply his or her evidentiary findings to the Social Security Administration's medical vocational guidelines ("grid") and thereby determine whether there are jobs available in the United

criminal contempt conviction of a teaching fellow who refused to answer questions concerning his membership in the Communist Party.

77. *Dow*, 672 F.2d at 1275.

78. Sweezy v. New Hampshire, 354 U.S. 234, *reh'g denied*, 355 U.S. 852 (1957); Keyishian v. Board of Regents, 385 U.S. 589 (1967). *See also* Board of Regents v. Roth, 408 U.S. 564, 581-82 (1972) (Douglas, J. dissenting).

79. *Dow*, 672 F.2d at 1275. The court also noted in a related discussion that a protective order "would not have eliminated the chilling effect which invariably accompanies governmentally authorized intrusions into the intellectual life of the university." *Id.* at 1278.

80. *Dow*, 672 F.2d at 1276-77. The court's sole support for this conclusion, Richards of Rockford v. Pacific Gas and Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976), is the only known case in the area.

81. *Dow*, 672 F.2d at 1277.

HeinOnline -- 59 Chi.-Kent L. Rev. 340 1982-1983

States for the disability claimant.[82]

The use of the "grid," as described above, has been the subject of considerable judicial debate. In *Santise v. Harris*,[83] a district court concluded that "H.E.W.'s reliance on a grid, drawn in advance to cover a wide variety of individual cases, does not satisfy its obligation of basing its conclusion on substantial evidence."[84] The *Santise* court explained that the grid was especially harmful because the A.L.J. is required by regulation to decide in accordance with the chart, and thus it fails to fulfill the A.L.J.'s, and thus the agency's, obligation to decide each claim on a case by case basis.[85]

Where the application of the grid results in a determination of disability the courts have consistently upheld the grid and over-ruled an A.L.J. decision of no disability.[86] But, where the use of the grid produces a finding of no disability the courts have not been as quick to overrule an A.L.J.'s separate determination.[87]

In *Cannon v. Harris*,[88] the appellant challenged the failure of the A.L.J. and the grid to consider non-exertional limitations (*e.g.*, alcoholism) on her ability to work. Cannon had suffered significant infirmities which led to major surgery. Subsequent to the surgery she applied for disability insurance benefits and Supplemental Security Income. Both were denied initially. Upon reconsideration, the A.L.J., after reviewing medical and vocational reports (but failing to assess an allegation of alcoholism in the reports) found, applying the grid, that Cannon retained the residual functional capacity for light work.[89] After the A.L.J.'s decision was approved by final agency action, and upheld by the district court, Cannon appealed to the Seventh Circuit.[90]

The Seventh Circuit reversed the case concluding that:

> Where non-exertional limitations have been shown, either alone or

82. 43 Fed. Reg. 55349 (1978). Although the regulations have been revised [see 45 Fed. Reg. 55566 (1980)] the analysis used in Cannon v. Harris, 657 F.2d 513 (7th Cir. 1981), is unchanged in its application. For examination of the *Cannon* analysis see text accompanying notes 89-94, *supra*.

83. 501 F. Supp. 274 (D.N.J. 1980), *rev. sub nom.*, Santise v. Schweiker, 676 F.2d 925 (3d Cir. 1982) (upholding the use of the grid).

84. *Santise*, 501 F. Supp. at 276.

85. *Id.* at 275-77.

86. *See, e.g.*, Parker v. Harris, 626 F.2d 225 (2d Cir. 1980); Hicks v. Califano, 600 F.2d 1048 (4th Cir. 1979).

87. *Compare* Kirk v. Secretary of Health and Human Services, 667 F.2d 524 (6th Cir. 1981), and Stallings v. Harris, 493 F. Supp. 956 (W.D. Tenn. 1980) (upholding use of grid to find no disability) with Cowart v. Schweiker, 662 F.2d 731 (11th Cir. 1981), and Vasquez v. Schweiker, 534 F. Supp. 670 (N.D. Cal. 1982) (reversing use of grid to find no disability).

88. 651 F.2d 513 (7th Cir. 1981).

89. *Id.* at 516.

90. *Id.*

HeinOnline -- 59 Chi.-Kent L. Rev. 341 1982-1983

> in combination with exertional limitations, the guidelines cannot be used to direct a finding of not disabled. In such cases a finding of not disabled can be made only after further consideration of the claimant's non-exertional impairments in light of his unique vocational characteristics.[91]

The court found the A.L.J.'s failure to consider a factor not included in the grid a sufficient basis for overruling his decision.[92] The court reasoned that because social security disability hearings are nonadversarial the A.L.J. is obliged to discover and assess additional undisclosed information relevant to non-exertional vocational impairments.[93]

Cannon left two very large questions open: (1) Is the binding grid system itself acceptable; and (2) If so, what is the value of the grid if a "non-exertional impairment" is alleged?

Less than a year after *Cannon* the Seventh Circuit decided *Cummins v. Schweiker*.[94] First, Cummins directly attacked the A.L.J.'s mandatory use of the grid to deny benefits as unsupported by substantial evidence. Second, Cummins asserted that because a non-exertional impairment was involved the A.L.J. was precluded from applying the grid.

Cummins was a middle-aged manual laborer who was blind in one eye, had some arthritis and, due to a recent automobile accident, had a permanent but mild weakness on the right side of his body. By applying the grid, the A.L.J. held that Cummins was incapable of performing the heavy work he had done before but he was capable of sedentary work and, therefore, not "disabled" within the meaning of the regulation.[95]

The Seventh Circuit concluded that, despite the binding nature of the criteria, the grid applied a broader (and presumably more valid) knowledge of the labor market than the ad hoc judgments of an A.L.J. who would base his decision on the testimony of vocational experts and other witnesses presented at trial.[96] Mandatory use of the grid was held not only lawful under HHS's grant of authority but a highly appropri-

91. *Id.* at 517 (citation omitted).

92. *Id.* at 518-20.

93. *Id.* at 519. The court emphasized that this was even truer in Cannon's case because she was not represented by counsel. *Id.*

94. 670 F.2d 81 (7th Cir. 1982).

95. *Id.* at 82-83.

96. *Id.* This conforms with research on Social Security hearings. In disability cases " . . . hearings are quite informal. Witnesses, other than vocational or medical experts, seldom testify, and the expert witness is seldom subjected to searching or lengthy cross-examination." J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS 64 (1978).

HeinOnline -- 59 Chi.-Kent L. Rev. 342 1982-1983

ate vehicle to streamline the adjudication of social security disability cases and bring about greater uniformity in their results.[97]

Cummins also asserted, like Cannon, that his non-exertional impairment required the A.L.J. to go beyond the grid.[98] But here, unlike in *Cannon*, the A.L.J. considered factors (non-exertional limitations) outside the grid in making the required findings of fact. The A.L.J., supported by substantial evidence, found that the non-exertional impairment would not alter the application of the grid.[99] The Seventh Circuit has clearly concluded in possible non-exertional impairment situations that the grid should be applied with consideration of the possible non-exertional impairment but a change should occur from the grid decision only if the non-exertional factor warrants a change.[100]

Professor Davis has indicated he felt the weaknesses of the current administrative law system lie in its isolation of the A.L.J. from a significant amount of specialized information more readily accessible to the agency as a whole.[101] Now, in the Seventh Circuit, the mandatory use of the grid upheld in *Cannon* and *Cummins* permits an A.L.J. to use the full resources of the agency in his or her independent decision-making.

PHYSICIAN'S TESTIMONY IN SOCIAL SECURITY HEARINGS

Cummins also put a ceiling on the value of the testimony of treating physicians in social security hearings. In *Allen v. Weinberger*[102] the Seventh Circuit held that once it is determined that an impairment exists, the opinions of the treating physician should be given substantially greater weight than the impressions of a doctor who sees the claimant only once.[103] In *Cummins* the court noted that the mere fact that the claimant's physician happened to be a treating physician did not, *per se*, entitle his evidence to have controlling weight.[104]

AGENCY LEGISLATIVE V. INTERPRETATIVE RULEMAKING

A legislative rule is the product of an exercise of delegated legislative power to make laws through rules. An interpretative rule is any

97. *Cummins*, 670 F.2d at 83.
98. *Id.* at 83-84.
99. *Id.* at 84.
100. *Id. But see* Cowart v. Schweiker, 662 F.2d 731, 736 (11th Cir. 1981) and Vasquez v. Schweiker, 534 F. Supp. 670, 671 (N.D. Cal. 1982) (a nonexertional impairment may automatically eliminate the use of the grid).
101. *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.8-17.10 (2d ed. 1980).
102. 552 F.2d 781 (7th Cir. 1977).
103. *Id.* at 786-87.
104. *Cummins*, 670 F.2d at 84.

HeinOnline -- 59 Chi.-Kent L. Rev. 343 1982-1983

rule an agency issues without exercising delegated legislative power to make law through rules. The importance of the distinctions is whether it is necessary to give notice and hold hearings on the proposed rule.[105]

Sometimes it is difficult to determine whether a rule or an amendment to a rule is legislative or interpretative. The agency's classification of its rules is not automatically accepted by the courts.[106] Instead, the courts usually look to the "effect" of the agency rule rather than the label the agency has put on its action.[107] This problem may be compounded if the agency action follows an adverse judicial decision on the rule.[108]

In *Marshall v. Barlow's, Inc.*,[109] the Supreme Court invalidated warrantless inspections pursuant to an OSHA regulation which permitted OSHA officials to "promptly take appropriate action, including compulsory process, if necessary," upon an employer's refusal to permit entry by an OSHA inspector.[110] In a footnote, the Supreme Court stated that "a regulation expressly providing that the Secretary could proceed ex parte to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for 'compulsory process.' "[111] In response to the Supreme Court's note, the Secretary of Labor amended the regulation by defining "compulsory process" to mean, "[T]he institution of any appropriate action, including *ex parte* application for an inspection warrant or its equivalent."[112]

Subsequent to the Department's amendment of the regulation, an OSHA inspector visited Rockford Drop Forge. After the inspector was denied entry OSHA obtained an *ex parte* warrant pursuant to the amended regulation.[113] The company challenged the inspector's warrant, in *Rockford Drop Forge, Co. v. Donovan*,[114] claiming that OSHA could not utilize the *ex parte* procedure because the Secretary failed to follow the notice and hearing procedures required for legislative rule-

105. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.8 (2d ed. 1979) at 36.

106. *Id. See, e.g.*, Marshall v. Huffines Steel Co., 488 F. Supp. 995, 999 (N.D. Tex. 1979), *aff'd sub nom.*, Donovan v. Huffines Steel Co., 645 F.2d 288 (5th Cir. 1981); Cerro Metal Products v. Marshall, 620 F.2d 964, 975-82 (3d Cir. 1980). *But see* Marshall v. W & W Steel Co., 604 F.2d 1322 (10th Cir. 1979).

107. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 7.17-7.19 (2d ed. 1979).

108. *See* Chamber of Commerce of the United States v. OSHA, 636 F.2d 464 (D.C. Cir. 1980).

109. 436 U.S. 307 (1978).

110. *Id.* at 327.

111. *Id.* at 320, n.15.

112. 29 C.F.R. § 1903.4(d) (1978).

113. Rockford Drop Forge Co. v. Donovan, 672 F.2d 626, 627-28 (7th Cir. 1982).

114. *Id.*

HeinOnline -- 59 Chi.-Kent L. Rev. 344 1982-1983

making.[115] In response, the government argued that the amendment only made explicit what the agency already had the power to do.[116]

The Seventh Circuit concluded that the Department's action "was only an interpretation of the prior version and therefore exempt from rule-making procedures by Section 4(b)(A) of the Administrative Procedure Act. . . ."[117] Relying on the footnote in *Barlow's*, the Seventh Circuit found that the Supreme Court had approved the amended procedure in advance of the Secretary's action.[118] The only other rationale for this holding was the cryptic assertion that the majority of federal appeals courts had adequately explained the issue and the Seventh Circuit chose not to repeat their arguments.[119]

Curiously enough the opinions cited by the Seventh Circuit are far from uniform in their analysis and there are only two published decisions, an unpublished one, a concurring opinion and a dissent.[120] In fact, the cases are consistent in result only—*i.e.*, the challenged regulation in each case was held not to violate the APA. Yet, despite the court's citation of two cases[121] which found a violation of Section 4(b), it failed to respond to the findings of the Secretary's action as a legislative act. Most importantly, the Seventh Circuit did not consider whether the new regulation had a "substantial impact." Even if the regulation was classified as "interpretative" the Department nonetheless was required to determine whether the regulation had a substantial impact warranting notice and comment procedures.[122]

Finally, the Seventh Circuit's reading of the footnote in *Barlow's* is not the only logical interpretation of the Supreme Court's determination. One could just as easily analyze the Supreme Court's decision as a rejection of the previous OSHA regulation.[123] Consequently, any future regulation would have to undergo the same scrutiny as other regu-

115. 5 U.S.C. § 553(b) (Supp. IV 1980).
116. *Rockford*, 672 F.2d at 630.
117. *Id.*
118. *Id.*, *citing* Marshall v. Barlow's, Inc., 436 U.S. 307, 320 n.15 (1978).
119. *Rockford*, 672 F.2d at 630.
120. Stoddard Lumber Co. v. Marshall, 627 F.2d 984, 989-90 (9th Cir. 1980); Marshall v. Seaward Int'l, Inc., 644 F.2d 880 (4th Cir. 1981) (unpublished); Donovan v. Huffines Steel Co., 645 F.2d 288, 289-91 (5th Cir. 1981) (Rubin, J., concurring); Cerro Metal Products v. Marshall, 620 F.2d 964, 983-85 (3d Cir. 1980) (Seitz, C.J., dissenting).
121. Donovan v. Huffines Steel Co., 645 F.2d 288 (5th Cir. 1981); Cerro Metal Prod. v. Marshall, 620 F.2d 964 (3d Cir. 1980).
122. *See* National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90, 95-97 (D.D.C. 1967), *aff'd per curiam*, 393 U.S. 18 (1968). *See also* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.17-7.19 (2d ed. 1979). *But see* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977).
123. It "would appear to be as much within the Secretary's power as the regulation currently in force . . . ." Marshall v. Barlow's Inc., 436 U.S. 307, 320 n.15 (1978).

HeinOnline -- 59 Chi.-Kent L. Rev. 345 1982-1983

lations. In other words the Supreme Court did not decide in advance of seeing them that the new "ex parte" regulations were lawfully promulgated. This question was properly left to the court responsible for review of the new regulations. Surprisingly, the Seventh Circuit preferred not to do its own analysis of the new regulations but to take a short cut by finding the issue already decided by the Supreme Court and the other federal courts.

CONCLUSION

Congress enacts laws and expects administrative agencies to perform under the direction of those laws. Unfortunately, due to the necessary compromises of the political system congressional direction is often muddled or vague. As the political winds shift administrative agencies are sometimes admonished for following the direction too closely or not closely enough. Congress could change the administrative direction by altering the substantive law. Instead, Congress has acted to create an extra-judicial review mechanism outside the APA process.

During the 1981-82 season, the Seventh Circuit has correctly served the judicial role in the administrative process. Its decisions assessed the congressional direction and filled in gaps awaiting Congress' changes in the substantive law. The courts, as the proper repository of the review function, thus continue the process until Congress acts to change the direction.

HeinOnline -- 59 Chi.-Kent L. Rev. 346 1982-1983