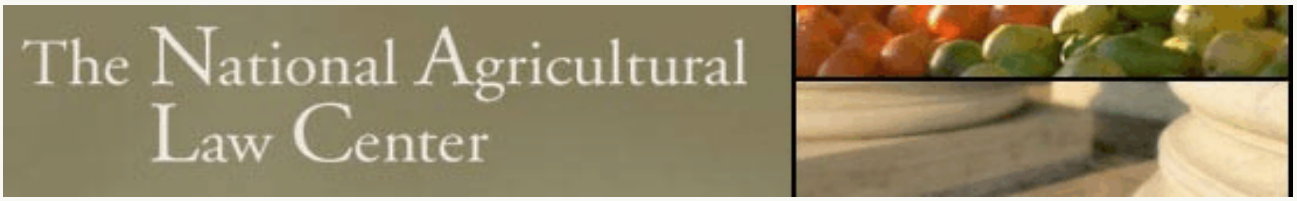

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An Agricultural Law Research Article

Dealing with the USDA: Federal Administrative Law Basics

by

Christopher R. Kelley

The National Agricultural Law Center
University of Arkansas School of Law
1 University of Arkansas
Fayetteville, AR 72701

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Christopher R. Kelley*

"**Administrative law is not for sissies**."
Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511.

I. Introduction

This article is intended to offer insight into dealing with the United States Department of Agriculture (USDA) by providing an introduction to some of the most basic principles of federal administrative law. The USDA, like all federal agencies, was created by Congress. President Lincoln signed the legislation creating the USDA in 1862. That legislation and the subsequent organic authority for the USDA is now codified at 7 U.S.C. §§ 2201, 2202, and 2204.

Because federal administrative agencies are created by Congress, the "cardinal rule number one of administrative law" is that "the legislature creates agencies and sets limits on their authority." William F. Fox, Jr., *Administrative Law* § 1 at 5 (3rd ed. 1997)[hereinafter Fox](noting that "[a] misunderstanding of this basic concept can lead to erroneous assumptions about an agency's ability to deal with a particular issue or problem"). Thus, a federal agency's authority is both granted and limited by Congress.

Congress often gives federal agencies a broad range of powers, including the authority

- to conduct research and disseminate information;
- to make rules and regulations governing its internal operations and the rights and obligations of private parties (i.e., legislative authority);
- to issue licenses and permits;
- to conduct investigations and law enforcement activities (i.e., executive authority); and
- to adjudicate disputes between private parties and the agency (i.e., judicial authority).

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* Associate Professor, University of Arkansas School of Law; Faculty Director, National AgLaw Center

These powers are usually associated with a regulatory mission, for the presence of a regulatory mission is the hallmark of "modern administrative agencies." *See* Daniel J. Gifford, *Administrative Law* 2 (1992)(characterizing the Interstate Commerce Commission, created in 1887, as the "first modern administrative agency"). Because of these powers, "*[a]dministrative agencies* are governmental bodies other than the legislature and the courts that affect the rights or duties of individuals or entities." Arthur Earl Bonfield & Michael Asimow, *State and Federal Administrative Law* 1 (1989)[hereinafter Bonfield & Asimow]; *see also* 5 U.S.C. § 551(1) (defining "agency" for purposes of the Administrative Procedure Act).

II. Foundations and Functions of Administrative Law

Federal administrative law is a mixture of constitutional law, statutory law, and case law, including judicially created doctrines and principles. Summarized,

> [a]dministrative law is that branch of the law that controls the administrative operations of government. Its primary purpose is to keep governmental powers within their legal bounds and to protect individuals against the abuse of such powers. It sets forth the powers that may be exercised by administrative agencies, lays down the principles governing the exercise of those powers, and provides legal remedies to those aggrieved by administrative action.

Bernard Schwartz, *Administrative Law* § 1.1 at 1 (3d ed. 1991)[hereinafter Schwartz](footnote omitted).

Despite the breadth of this definition, the context within which administrative law has developed and is applied is narrow for "[e]very administrative law case arises out of a controversy between a private party and some administrative agency." *Id*. § 1.2 at 3. Although all litigated controversies involve at least two opposing parties,

> [t]here is a fundamental difference between the parties in administrative law cases and those in private law cases. Private law cases involve private persons as plaintiffs and defendants. There is a basic equality, in theory at least, between the parties, even though they may differ substantially in resources and abilities. The situation is different in administrative law cases. Here the body politic has stepped in; the private party is confronted not by another private person, but by an agency of government, endowed with all the power, prestige, and resources enjoyed by the possessor of sovereignty. The starting point is the basic inequality of the parties. *The goal of administrative law is to redress this inequality — to ensure that, so far as possible, the individual and the state are placed on a plane of equality before the bar of justice*.

Id. § 1.16 at 36-37 (emphasis supplied).

Administrative law has its limits, however:

> Administration is an inherently political process. Attempts to make it more fair or more accountable must accept that fact. Politics cannot be legislated away and political influences can be regulated, or moderated, only in modest ways. But these conclusions should not cause alarm if the political system is itself open and accountable. Administrative law and process cannot be superior to the system that produces it.

Richard J. Pierce et al., *Administrative Law and Process* § 9.6 at 498 (1999).

A. Constitutional Limits on Agency Action

Constitutional principles bear on administrative law in several fundamental respects. Two important constitutional restraints are the rarely enforced limitation on the congressional delegation of authority to administrative agencies and the procedural due process limitation on the agencies' exercise of that authority. Both of these limitations are discussed under separate headings below.

In addition, the Fourth Amendment's limitations on unreasonable searches and seizures apply to federal agencies. *See, e.g., Marshall v. Barlow's Inc.*, 436 U.S. 307, 320 (1978); *United States v. Biswell*, 406 U.S. 311, 314 (1972). The Fifth Amendment applies to agency subpoenas, though the protection it affords is limited. *See* 3 Jacob A. Stein et al., *Administrative Law* § 20.04[2][b] at 20-67 (1997). These limitations include the following:

> (1) Records of corporations and other organizations, including a partnership of three partners, are not subject to the privilege [;] (2) One person's records in the custody of another person may be denied the privilege [;] (3) Records of a person "not compelled to do anything" may be used [;] (4) A person given immunity may be compelled to be a witness against himself [;] (5) Records required to be kept are outside the privilege [; and] (6) Compulsory reporting is often permissible.

1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 4.6 at 167 (3d ed. 1994)[hereinafter Davis & Pierce].

Constitutional limitations also come into play with respect to congressional and executive controls over agency authority. As an example of the latter limitation, in *INS v. Chadda*, 462 U.S. 919, 954 (1983), the Court held unconstitutional under Article I, Section 7, a statutory scheme that allowed either branch of Congress to nullify an order of the Attorney General suspending deportation of an alien. In *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), the Court invalidated the statutory mechanism for making appointments to the Federal Elections Commission under the Appointments Clause of Article II, Section 2.

Finally, Article III's "case and controversy" provision imposes certain "standing" requirements on those seeking to challenge agency action in federal court. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). "Standing" also involves the prudential "zone of interests" test. *See, e.g., National Credit Union Admin. v. First National Bank & Trust Co.*, 522 U.S. 479 (1998); *Bennett v. Spear*, 406 U.S. 311, 314 (1997). *See generally* Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 Geo. Mason L. Rev. 237 (1999)(analyzing cases applying the zone of interest test).

1. Delegation of Authority and Separation of Powers

Although the constitutional limitation on the congressional delegation of authority to federal agencies is rarely enforced, the limitation is addressed here to underscore the principle that federal

agencies are creatures of Congress. That is, statutes are "the source of agency authority as well as of its limits." Schwartz, *supra*, § 4.4 at 171 (footnote omitted). Thus, underlying any agency action are two questions:

- first, whether the agency exceeded the scope of its authority (i.e., was the agency's action ultra vires?); and
- second, whether the delegation of authority was proper.

The first question is a matter of statutory interpretation; the second implicates the constitutional separation of powers principle.

The Constitution divides the powers of the federal government into three categories—legislative, executive, and judicial. It also vests these powers separately. Article I vests legislative authority in Congress. Article II vests the executive power in the President. Article III vests "the judicial Power of the United States" in judges with lifetime tenure and salary protection.

Administrative agencies are within the executive branch. Congress, however, often delegates legislative (rulemaking) and judicial (adjudicative) powers to federal administrative agencies. As a result, some contend that the confluence of legislative, judicial, and executive powers within administrative agencies has resulted in their becoming a "fourth" branch of government. *See* Ernest Gellhorn & Ronald M. Levin, *Administrative Law and Process In a Nutshell* 10 (3d ed. 1990)[hereinafter Gellhorn & Levin]; *see also FTC v. American Nat'l Cellular*, 810 F.2d 1511, 1516 (9th Cir. 1987)("Certainly the modern proliferation of administrative agencies has severely strained the Framers' pristine notion of separation of powers."). Others carry this contention further by asserting that "[t]he post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1231 (1994)(footnotes omitted). Following a brief flurry of invalidations of early New Deal legislation, however, the Court has not embraced the notion that the modern administrative state is unconstitutional.

a. The Delegation of Legislative Authority

As early as 1892, the Court declared "[t]hat Congress cannot delegate legislative power . . . is a principle universally recognized. . . ." *Field v. Clark*, 143 U.S. 649, 692 (1892). This "rule" was based in the theory that the American people had delegated legislative power to Congress, and the general rule is that delegated authority cannot be "redelegated." Schwartz, *supra*, § 2.1 at 43. Notwithstanding this seemingly inflexible "rule," the law of delegation "has moved from the theoretical prohibition against any delegation of legislative power . . . to a rule against unrestricted delegations (i.e., those that are not limited by *standards*). . . ." *Id*. § 2.1 at 44 (citing *Industrial Dep't v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980)(Rehnquist, J., concurring)).

In two 1935 cases, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), and *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935), the Court struck down delegations of authority to administrative agencies on the grounds that either no standards accompanied the delegation or the standards were too broad. *See also Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)(striking down delegation of authority to committees consisting of industry representatives). Since then the Court has never enforced the "nondelegation doctrine" with respect to legislative powers. Instead,

> [t]he Court has become increasingly candid in recognizing its inability to enforce any meaningful limitation on Congress' power to delegate its legislative power to an appropriate institution. "[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). "[T]he nondelegation doctrine do[es] not prevent Congress from obtaining the assistance of its coordinate Branches." Id. at 372.

1 Davis & Pierce, *supra*, § 2.6 at 66; *see also Industrial Dep't v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980)(Rehnquist, J., concurring)("The most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases.").

The "rule" against unrestricted delegations is difficult to square with the reality that congressional "standards" accompanying delegations can be "assigned to one of four categories: meaningful standards, traditional empty standards, lists of unranked decisional goals, and contradictory standards." 1 Davis & Pierce, *supra*, § 2.6 at 67. In *Mistretta v. United States*, 488 U.S. 361, 372 (1989), the Court substituted "intelligible principle" for "standard," but the consequences are essentially the same:

> The law of delegation is unsatisfactory not, as critics contend, because courts still insist upon standards, but because legislatures fail to include meaningful standards in statutes delegating power[,] and most courts are willing to accept meaningless formulas such as "public interest" to avoid the need to strike down delegations. The result has been greater acceleration in the growth of executive power. As new crises have arisen, the tendency has been to deal with them by vesting the Executive with virtual blank checks unrestrained by legislative controls.

Schwartz, *supra*, § 2.17 at 72. For an illustration of what this can mean, consider the following remarks of Justice Harlan in his dissent to a decision upholding a statute delegating authority, without standards, to the Secretary of Interior to allocate water resources among competing states:

> [T]he political pressures that will doubtless be brought to bear on the Secretary as a result of this decision are disturbing to contemplate. Furthermore, whatever the Secretary decides to do, this Court will surely be unable effectively to review his actions, since it will not know what guides were intended by Congress to govern those actions.

Id. § 2.15 at 68 (quoting *Arizona v. California*, 373 U.S. 546, 626 (1963)(Harlan, J., dissenting)).

The United States Supreme Court's reluctance to find an unconstitutional delegation of authority does not mean that all courts have been so inclined. For example, the Eighth Circuit recently held a portion of the Indian Reorganization Act of 1934 unconstitutional as an excessive delegation of legislative authority. *South Dakota v. United States Dep't of Interior*, 69 F.3d 878, 885 (8th Cir. 1995), *vacated and remanded*, 519 U.S. 919 (1996); *see also International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991)(holding that a statute, as interpreted by the agency, violated the nondelegation doctrine by conferring unfettered discretion); *International Union, UAW v. OSHA*, 37 F.3d 665 (D.C. Cir. 1994)(upholding the same statute, after remand, based on a new agency interpretation of it). *See*

generally Bernard Schwartz, *Administrative Law Cases During 1995*, 48 Admin. L. Rev. 399, 400-02 (1996)(noting that the Eighth Circuit's decision in *South Dakota v. United States Dep't of Interior* "may require reconsideration of the general assumption that limitations upon delegations to agencies are passe in federal administrative law.").

More recently, the D.C. Circuit's decision in *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam), revived attention to the delegation doctrine by striking down the National Ambient Air Quality standards promulgated by the EPA on the grounds that the agency construed the Clean Air Act in a manner that "effects an unconstitutional delegation of legislative power." *Id*. at 1034. The court's decision raised a host of questions, causing one observer to wonder "why did the court think the issue raised a proper delegation doctrine problem at all, as opposed to the normal administrative challenge to the agency's action as arbitrary and capricious?" David C. Frederick, *Constitutional Law and Separation of Powers in* Developments in Administrative Law and Regulatory Practice: 1998-1999, 19, 22 (Jeffrey S. Lubbers, ed. 2000). In the end, however, the United States Supreme Court unanimously reversed the D.C. Circuit's decision and, staying true to settled delegation doctrine, ruled that Congress had provided an "intelligible principle" sufficient to withstand constitutional challenge. *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 474-76 (2001).

b. The Delegation of Judicial Authority

The congressional authority to delegate judicial power to administrative agencies also has been upheld. As a general rule, agencies may adjudicate rights so long as provision is made for judicial review. Schwartz, *supra*, § 2.18 at 76 (citing *Northern Pipeline Constr., Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 115 (1982)(White, J., dissenting)). In addition, administrative agencies may impose monetary penalties without providing for a jury trial so long as "public" rights, not "private" rights, are at stake. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 450 (1977)("public rights" cases are "cases in which the Government sues in its sovereign capacity to enforce public rights created by statute within the power of Congress to enact. . . ."). *But see Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 586 (1985)(stating that the public rights-private rights dichotomy does not provide "a bright line test for determining the requirements of Article III"); *Commodity Futures Trading Comm'n (CFTC) v. Schor*, 478 U.S. 833, 857 (1986)(upholding the CFTC's authority to decide a common law counterclaim in a reparations proceeding: "the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III.").

Agencies may define offenses that constitute a crime where Congress has so authorized and established the penalty. *United States v. Grimaud*, 220 U.S. 506, 523 (1911); *see also Loving v. United States*, 517 U.S. 748 (1996)(upholding a delegation of power to the President to prescribe the aggravating factors that permit a court martial to impose the death penalty upon a member of the armed forces convicted of murder). Only a court, however, may impose a sentence of imprisonment. *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

2. Procedural Due Process

The Fifth Amendment's procedural Due Process Clause places limits on federal administrative agencies' adjudicatory (judicial) power. As discussed below, due process generally does not apply to the exercise of an agency's rulemaking (legislative) power.

a. Administrative Adjudications

1. Interests Protected

A threshold issue under the Due Process Clause is whether a protected interest is at stake. The Due Process Clause only protects "life," "liberty," and "property" interests. Statutory "entitlements" may create the requisite "property" interest. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985). With respect to entitlements, due process protects only "the security of interests that a person has already acquired in specific benefits. . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972). If the statute makes the receipt of the governmental benefit dependent upon the availability of funding or agency discretion, the benefit is not an entitlement. *Colson ex rel. Colson v. Sillman*, 35 F.3d 106, 108-09 (2d Cir. 1994).

2. "Flexible Due Process"

Once the determination has been made that a protected interest is at stake, the next question is—"What process is due"? Procedural due process is fundamentally a requirement of notice and a hearing. What process is "due" depends on the circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)("due process is flexible and calls for such procedural protections as the particular situation demands"). Under the currently employed "flexible due process" standard, the answer to the question of what process is "due" essentially turns on a cost-benefit test that weighs the private interests affected, the risk of an erroneous determination, the likely value of additional procedural safeguards, the public interest, and the administrative burdens. *United States v. Raddatz*, 447 U.S. 667, 677 (1980). The same test determines when the process is due. *Compare Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)(trial-type hearing due before termination of welfare benefits) *with Mathews v. Eldridge*, 424 U.S. 319, 340 (1976)(pre-termination trial-type hearing not due for Social Security disability benefits).

(i) The Right to Notice

Prior notice is ordinarily a due process requirement. The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In exigent circumstances, however, summary action may be taken, with the opportunity for a hearing being provided promptly thereafter. *E.g., FDIC v. Mallen*, 486 U.S. 230, 240 (1988).

(ii) The Right to a Hearing

Ordinarily, a "hearing" encompasses the right to present evidence and argument. Under the flexible due process standard, however, notice need not be followed by a trial-type hearing. Moreover, an oral hearing may not be required where, under the circumstances, a "paper hearing" will provide adequate protection of due process protected interests. *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)(holding that an informal, nonadversary evidentiary review following administrative segregation of an inmate was constitutionally adequate).

(iii) Telephone Hearings

Although telephone hearings are unlikely to offend the Due Process Clause, there is some question whether a telephone hearing complies with the Administrative Procedure Act's (APA) requirement codified at 5 U.S.C. § 556(b) that the presiding officer "shall preside at the taking of evidence." As discussed later in this outline, "formal" agency adjudications must be conducted under procedures that are consistent with the APA's requirements. According to Professor Schwartz, "[i]t is hard to see how one can ‹preside' at a hearing conducted outside one's physical presence." Schwartz, *supra*, § 6.8 at 316. *See also Purba v. INS*, 884 F.2d 516, 518 (9th Cir. 1989)(ruling that "[u]ntil Congress chooses to change the wording of the [APA], telephone hearings . . . simply are not authorized by statute"). The USDA's Office of General Counsel disagrees with Professor Schwartz, however. *See* 60 Fed. Reg. 8446, 8447 (1995)(preamble to final rules to be codified at 7 C.F.R. pts. 47, 50-54, 97 and 9 C.F.R. ch. II and pt. 202)(opining that "[t]here is no provision in the Administrative Procedure Act that explicitly requires face-to-face adjudicatory hearings and we found nothing to indicate that Congress intended to exclude the use of telecommunication in adjudicatory proceedings conducted pursuant to the Administrative Procedure Act"). As an indication that Congress may view telephone hearings as acceptable, at least where the parties consent, Congress amended immigration statutes in 1996 to permit the use of telephone hearings in deportation proceedings. *See* 8 U.S.C. § 1229a(b)(2)(A).

(iv) The Right to Present Evidence

"Even when an agency is required by statute or by the Constitution to provide an oral evidentiary hearing, it need do so only if there exists a dispute concerning a material fact. An oral evidentiary hearing is *never* required if the only disputes involve issues of law or policy." 1 Davis & Pierce, *supra*, § 8.3 at 389. Otherwise, "[t]he right to a hearing . . . embraces the right to present evidence." *Morgan v. United States*, 304 U.S. 1, 18 (1938). There is no right, however, to present evidence that is merely cumulative of evidence already presented. *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 158 (1941).

(v) The Applicability of Rules of Evidence

Unless a statute provides to the contrary, agencies are not bound by evidentiary rules. *Cunanan v. INS*, 856 F.2d 1373, 1374 (9th Cir. 1988). Under the "legal residuum rule," however, agency reliance on evidence that would be inadmissible in a court may implicate the due process clause. That is, "[u]nder the `legal residuum' rule it is generally considered that a finding is not substantially supported absent the presence of at least a residuum of evidence competent under the exclusionary rules." *Young v. Board of Pharmacy*, 462 P.2d 139, 142 (N.M. 1969). The United States Supreme Court, however, has somewhat limited the application of the rule in the federal courts. Based on *Richardson v. Perales*, 402 U.S. 389 (1971), some federal courts follow the view that "hearsay can be substantial evidence if it has sufficient probative force for a reasonable person to accept it as adequate to support the agency conclusion." Schwartz, *supra*, § 7.6 at 382 (citations omitted); *see also* 2 Davis & Pierce, *supra*, § 10.4 at 137 ("Most of the post-*Perales* cases support the view that no rule should exist that evidence inadmissable in a jury case may not be substantial, but that substantiality should be determined by appraising the evidence in its full context."). "Thus, hearsay is freely admissable and may even by itself constitute the substantial evidence needed to support an agency finding." Bernard Schwartz, *Administrative Law Cases During 1995*, 48 Admin. L. Rev. 399, 404 (1996)(footnote omitted).

(vi) The Availability of Discovery

There is no constitutional right to discovery in administrative proceedings. *Kenrich Petrochemicals v. NLRB*, 893 F.2d 1468, 1484 (3d Cir. 1990).

(vii) The Right to Counsel

The right to be represented by counsel is not invariably required. *Compare Goldberg v. Kelly*, 397 U.S. 254, 270 (1970)(right to be heard includes right to counsel in welfare termination), *with Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 305 (1985)(upholding statute limiting attorneys fees to $10 in veteran death and disability benefit proceedings).

(viii) Financial Interest, Personal Bias, or Prejudice

Due process ordinarily requires a neutral or unbiased decisionmaker. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *see generally Liteky v. United States*, 510 U.S. 540 (1994)(discussing the bases for the neutral decisionmaker requirement). A decisionmaker may not have a financial interest in the matter. *Gibson v. Berryhill*, 411 U.S. 564 (1973)(holding that due process was denied optometrists who worked for corporations where individual members of a licensing board consisting of independent optometrists had a personal pecuniary interest in keeping corporate chain stores out of the business). Personal bias or prejudice will disqualify an adjudicator. Nevertheless, "[g]eneral partiality toward prolabor, procompetition, or other policies that the agency is established to further should be distinguished from partiality or hostility toward specific persons." Schwartz, *supra*, § 6.18 at 343. Similarly, the preconceptions that nearly always are present in agency adjudications must be distinguished from prejudgments. While a prejudgment violates due process, prejudgment essentially requires proof that the agency had completely closed its mind before the proceeding. *Id*. § 6.19 at 347(relying on *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683 (1948)); *see also* 2 Davis & Pierce, *supra*, § 9.8 at 83-85 (noting that "[n]either judges nor administrators are likely to be held disqualified on account of closed minds, because proof of closed minds is normally impossible. . . .").

Participation in the prosecution, even before joining the agency, may constitute bias. For example, in *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), the FTC chairman had played an active role in the investigation while serving as chief counsel to a Senate subcomittee. In doing so, he had developed many of the facts upon which the FTC decision depended. The court held that he should have been disqualified for bias because the opinions he had formed were “conclusions as to facts . . . .” *Id*. at 765.

(ix) Congressional Pressure

Agency bias can arise from congressional pressure, and the leading case holding that an agency's decisionmaking process was improperly biased by congressional pressure is *Pillsbury v. FTC*, 354 F.2d 952 (5th Cir. 1966). Subsequently, the Fifth Circuit narrowed the reach of its decision in *Pillsbury* in a federal farm program dispute, *DCP Farms v. Yeutter*, 957 F.2d 1183 (5th Cir.), *cert. denied*, 113 S. Ct. 406 (1992). *See generally* Douglas J. Murray, Comment, *Administrative Law and Procedure—Agriculture: Administrative Proceedings Determining Eligibility for Federal Crop Subsidies Labeled Nonadjudicative: The Pending Threat of Unrestrained Congressional Interference with Administrative Proceedings*, DCP Farms v. Yeutter, 957 F.2d 1183 (5th Cir. 1992), 69 N.D. L. Rev. 435 (1993)(criticizing the Fifth Circuit's decision). For a more recent case addressing congressional interference, see *ATX, Inc. v. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994).

(x) The "Combination of Functions" and "Command Influence"

Agency bias also can result from the "combination of functions" within an agency. Nonetheless, the combination of the functions of investigator, prosecutor, and judge within an agency has withstood due process challenges. *E.g., Withrow v. Larkin*, 421 U.S. 35 (1975). Indeed, "[t]he Supreme Court has never held a system of combined functions to be a violation of due process, and it has upheld several such systems." 2 Davis & Pierce, *supra*, § 9.9 at 101 (citations omitted). Where an individual agency official serves dual roles, however, the result may be different. *Sheldon v. SEC*, 45 F.3d 1515, 1519 (11th Cir. 1995)(holding that "an agency can combine investigative, adversarial, and adjudicative functions, as long as no employees serve in dual roles").

A problem related to the combination of functions is "command influence." This problem can arise where, for example, a decisionmaker is subject to the supervision of someone engaged in investigation or prosecution. In such instances, proof of prejudice is required. *See Marcello v. Bonds*, 349 U.S. 302 (1955).

(xi) The "Principle of Necessity"

"Under the `principle of necessity,' a biased or otherwise disqualified judge can decide a case if there is no legally possible substitute decisionmaker." Bonfield & Asimow, *supra,* at 153; *see also United States v. Will*, 449 U.S. 200 (1981). This principle is most appropriately applied to agency heads. "Even personal bias or financial interest will not disqualify the head of the agency where there is no substitute provided by law to try the case." Schwartz, *supra*, § 6.20 at 353 (footnotes omitted). Yet, "[w]here the bias is one that will infect the tribunal in every case, the necessity rule should not be used. Otherwise, an agency institutionally tainted with financial interest of the worst sort, such as the Alabama Board of Optometry in *Gibson v. Berryhill* [411 U.S. 564 (1973)], could never be successfully challenged on bias grounds." *Id*. (footnote omitted).

(xii) The Imposition of Sanctions

The "no punishment without notice" due process requirement also applies to administrative agencies. *See generally Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)(discussing the constitutional "fair notice" requirement). Thus, agencies must provide fair notice "in the statements and regulations setting forth the actions with which the agency expects the public to comply." *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)(citing *Radio Athen, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968)). "In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability." *Id*. at 1328.

On a related matter, the due process clause may require the government to bear the burden of proof by clear and convincing evidence when it alleges fraud or some other quasi-criminal conduct. In USDA proceedings, this may be pertinent when the USDA alleges that a producer acted in bad faith or that a program participant adopted or participated in a "scheme or device" to evade program rules. *See Vandervelde v. Espy*, 908 F. Supp. 11, 16-18 (D.D.C. 1995).

(b) Administrative Rulemaking

Agency rulemaking generally is not subject to the constitutional due process limitation for the same reasons the limitation does not apply to legislatures. *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 244-46 (1973). With respect to legislative actions establishing property tax

assessments, the United States Supreme Court has distinguished instances in which specific facts about a particular property were in dispute (adjudicative facts) from instances in which only broad or general facts (legislative facts) involving all taxpayers required consideration. In the former instance, a hearing is required. *Londoner v. Denver*, 210 U.S. 373, 385 (1908). In the latter instance, a trial-type hearing is not required. *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915). In part, the distinction recognizes the impracticality of requiring the numerous individuals who might be affected by a rule or statute be given a hearing before the rule or statute could be adopted. *See Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984). Given this impracticality, the basic rule can be summarized as follows:

> Due process does not constrain an agency's choice of decisionmaking procedures when it acts in a legislative manner, i.e., when it makes a policy-based decision that purports to apply to a class of individuals. Due process does, however, limit the agency's choice of procedures when it makes a decision that uniquely affects an individual on grounds that are particularized to the individual.

2 Davis & Pierce, *supra*, § 9.2 at 123 (Supp. 2000). In narrow circumstances an ex parte communication in the rulemaking process may violate due process. *See Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959)(FCC rulemaking proceedings affecting only two potential licensees).

(c) Violations of Agency Procedural Rules

Not all procedural shortcomings or irregularities are constitutional violations. Virtually all federal agencies have adopted procedural rules for the conduct of their adjudications. The requirement that they follow these rules is found in administrative law, not constitutional law. In other words, the failure of an administrative agency to follow its own procedural rules violates the principle that agencies are bound by their own regulations. *Vitarilli v. Seaton*, 359 U.S. 535, 547 (1959); *see also Service v. Dulles*, 354 U.S. 363 (1957)(setting aside the discharge of an employee because the agency had not complied with its applicable procedural regulations); *see generally* Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 Admin. L. Rev. 653, 678-86 (1992)(discussing a possible due process foundation to the rule that agencies are bound by their own regulations). Such a failure, however, does not necessarily mean that the agency has violated anyone's constitutional due process rights. Schwartz, *supra*, § 5.2 at 226 ("There is a common tendency to confuse nonconstitutional procedural rights with due process procedural rights.").

B. Statutory Limitations on Agency Action

Federal administrative agencies are congressionally created. They must act within the scope of their legislative grant of authority, and their actions must be consistent with the statute or statutes they are charged with administering. Hence, the primary statutory limitation on an agency's authority is the agency's enabling legislation. Actions outside the statutory limitation are ultra vires.

Most federal administrative agencies are also governed by the federal Administrative Procedure Act (APA). Enacted in 1946, the APA is an exceptionally important statute:

> As a long-lived generic statute, the APA has taken on many of the characteristics of a constitution. The APA provides the statutory structure on which federal administrative

> law is built, in much the same manner that the Sherman Act provides the basic structure of antitrust law. Like the Sherman Act and the U.S. Constitution, the APA uses many malleable terms that have permitted courts to change the binding judicial interpretations of the statute over time in an effort to improve the process of administrative decisionmaking.

1 Davis & Pierce, *supra*, § 1.1 at 2.

The APA contains the Freedom of Information Act (FOIA) and the Privacy Act. While both statutes are important, they are beyond the scope of this article. Many secondary sources covering both statutes are available, and at least one government publication does a good job of explaining both, United States Dep't of Justice, *Freedom of Information Act Guide & Privacy Act Overview* (1993).

The remainder of this article primarily focuses on the rulemaking, adjudication, and judicial review provisions of the APA. In addition to agency organic acts and the APA, other statutes have an impact on agency operations and liabilities. One of these statutes is the Federal Tort Claims Act (FTCA), codified at 28 U.S.C. §§ 1346(b) and 2671-2680. The FTCA provides for a limited waiver of the government's sovereign immunity by conferring jurisdiction on the district courts for claims against the United States

> for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The FTCA does not waive sovereign immunity for intentional torts, with certain exceptions applicable to torts by "investigative or law enforcement officers." *Id.* § 2680(h). A major exception to liability is provided for "discretionary functions." *Id.* § 2680(a). Under the Court's decision in *United States v. Gaubert*, 499 U.S. 315, 331-32 (1991), this exception is very broad. It essentially precludes FTCA claims based on circumstances in which the government employee had discretion and exercised that discretion in making a policy decision. *See generally* 3 Davis & Pierce, *supra*, § 19.4 at 229-52 (discussing the FTCA and its exceptions). For a recent and instructive discussion of the exception in the context of the USDA's enforcement of the United States Warehouse Act, see *Appley Brothers v. United States*, 7 F.3d 720 (8th Cir. 1993). On remand, the district court held that the discretionary function exception did not apply under the facts. *Appley Brothers v. United States*, 924 F. Supp. 944 (D.S.D. 1996). The Eighth Circuit affirmed. *Appley Brothers v. United States*, 164 F.3d 1164 (8th Cir. 1999).

Sovereign immunity for contract actions against federal administrative agencies is waived by the Tucker Act. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). Except with respect to contracts subject to the Contract Disputes Act, 41 U.S.C. §§ 601-603 (and scattered sections), the federal district courts have concurrent jurisdiction with the United States Court of Federal Claims for money damages up to $10,000. Contract claims for more than $10,000 must be brought in the Court of Federal Claims. Combining a contract claim with a statutory claim under the APA can present complex questions regarding the government's waiver of sovereign immunity, as illustrated in *North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.), *cert. denied*, 474 U.S. 931 (1985).

C. Observations on Estopping Federal Agencies

As noted above and as will be illustrated in the discussion that follows, the APA is subject to judicial interpretation. In addition to the judicial gloss placed on the APA, various judicially created doctrines that have roots elsewhere than in the APA have become an integral part of federal administrative law. Before turning to an examination of the APA, a word or two should be said about one of those doctrines: The prohibition against equitably estopping the federal government. As expressed by Professor Fox, "THE GOVERNMENT MAY NOT BE ESTOPPED. YOU RELY ON ADVICE GIVEN YOU BY AGENCY PERSONNEL AT YOUR PERIL." Fox, *supra*, § 45 at 243.

This rule has its origins in a USDA crop insurance case, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). Simply stated, this case stands for the proposition that what matters is what the agency's regulations say, not what agency personnel says or doesn't say. *See id.* 332 U.S. at 384-85 ("Inevitably `the terms and conditions' upon which valid governemental insurance can be had must be defined by the agency acting for the Government. . . . Accordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act. . . .") As Professor Fox puts it: "The only legitimate source of information for agency rules is the text of the rules themselves. Good faith reliance on either erroneous advice or a misreading of the rules (what some students like to call an `honest mistake') is simply irrelevant." Fox, *supra*, § 45[a] at 244. Or, in the Court's words, "Men must turn square corners when they deal with the Government." *Merrill*, 332 U.S. at 385.

The *Merrill* rule has its critics. *See, e.g.,* Schwartz, *supra*, § 3.18 at 152-54. Nonetheless, it still stands. Part of the rationale behind the rule is that published statutes and rules are notice to all, irrespective of actual knowledge. Also, government employees "are but servants of the law," and, "[t]here would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties, as though performed in compliance with it." *Moffat v. United States*, 112 U.S. 24, 31 (1884). Though the Court has suggested in dicta that "affirmative misconduct" by a federal employee might form the basis for equitable estoppel, *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981), the Court has virtually closed the door on any estoppel claim that might give rise to the payment of money. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990)(relying, in part, on the Appropriations Clause to hold that a court cannot require the government to spend money when the expenditure is not authorized by statute). *See generally* 2 Davis & Pierce, *supra*, § 13.1 at 229-40 (discussing equitable estoppel against the federal government).

Occasionally farm program participants seek to recoup or retain erroneously paid program benefits by invoking equitable estoppel. Such was the case in *Harrod v. Glickman*, 206 F.3d 783 (8th Cir. 2000). There, the plaintiff farmers had received disaster assistance payments based on crop losses that later were discovered to have been partially attributable to a defective fungicide. As a result, their losses did not qualify for disaster assistance, and they so informed the USDA. Shortly before their trial against the fungicide’s manufacturer, an USDA Office of General Counsel (OGC) attorney advised the farmer’s attorney that the USDA would not seek to recover the disaster assistance payments because of the enactment of a statute limiting the USDA’s right to recover erroneously paid payments. This statute, however, has been enacted after the payments were made, and it was not expressly retroactive. At the trial, the jury was informed that the farmers had received disaster assistance. The jury returned a verdict for the farmers, but it was unclear whether the amount awarded took into account the disaster assistance payments. The USDA subsequently sought a refund of the disaster assistance payments. Before the Eighth Circuit, the farmers maintained that the OGC’s attorney was sufficient “affirmative misconduct” to warrant estopping the USDA from collecting the payments. The Eighth Circuit rejected this claim, concluding that “[g]iven the overwhelming weight of cases holding that estoppel will not lie against the government, it was, in our view, unreasonable for

the appellants to rely on the oral statement of the government's attorney, particularly when the retroactive effect of the new rule was questionable." *Id*. at 793.

With respect to the federal farm programs, the availability of administrative equitable relief may mitigate the potentially harsh consequences of the *Merrill* rule. The so-called "misinformation/misaction rule" embodied in 7 C.F.R. § 718.8 authorizes the FSA to grant benefits to a program participant who relies in good faith on the erroneous information or action of FSA personnel. That regulation is authorized by 7 U.S.C. § 1339a. *See also* 7 C.F.R. § 718.7 (authorizing administrative equitable relief in cases of incomplete compliance with program rules). The granting of this relief is discretionary with the FSA. Also the USDA NAD Director has the same authority to grant administrative equitable relief in the administrative appeal process. *See* 7 U.S.C. § 6998(d). The denial of administrative equitable relief is judicially reviewable under the "abuse of discretion" standard found in the judicial review provisions of the APA, 7 U.S.C. § 706(2)(A). *See Golightly v. Yeutter*, 780 F. Supp. 672, 678-79 (D. Ariz. 1991); *Lucio v. Yeutter*, 798 F. Supp. 39, 44 (D.D.C. 1992).

Finally, although the Supreme Court has never expressly invoked equitable estoppel against the federal government, the courts of appeals have. For an exhaustive and excellent discussion of when equitable estoppel will lie against the federal government, see *Fredericks v. Commissioner of Internal Revenue*, 126 F.3d 433 (3d Cir. 1997). In an opinion carefully drafted by Judge Aldisert, the Third Circuit noted that the majority of the circuits recognize estoppel as an equitable defense against government claims. At a minimum, however, "affirmative misconduct" by government officials must be demonstrated. *Id*. at 438. In addition, Judge Aldisert observed, certain other factors were relevant:

> Those factors are: 1) the impact of the estoppel on the public fisc; 2) whether the government agent or agents who made the misrepresentation or error were authorized to act as they did; 3) whether the governmental misconduct involved a question of law or fact; 4) whether the government benefitted from its misrepresentation; and 5) the existence of irreversible detrimental reliance by the party claiming estoppel.

Id. at 449. In addition to analyzing how each of these elements favor or disfavor estoppel against the government, Judge Aldisert's opinion collects in string citations various courts of appeals cases in which the government was estopped. In short, anyone considering claiming estoppel against the federal government would be well-advised to ponder what Judge Aldisert sets forth in *Fredericks*.

D. The Administrative Procedure Act (APA)

As relevant here, the APA is organized as follows:

- Definitions: 5 U.S.C. § 551;
- Freedom of Information Act: *id.* § 552;
- Privacy Act and Open Meetings Act: *id.* §§ 552a-552b;
- Procedural rules governing "informal" rulemaking: *id.* § 553;
- Procedural rules governing "formal" adjudication and "formal" rulemaking: *id.* §§ 554-557;
- Procedural rules governing the imposition of sanctions and licensing matters: *id*. § 558;

- Procedures and standards applicable to judicial review: *id.* §§ 701-706; and
- Congressional review of agency rulemaking. *id.* §§ 801-808.

The APA makes distinctions between "formal" and "informal" rulemaking and adjudication. As discussed below, "formal" rulemaking and adjudication involve trial-type proceedings. Because such proceedings are cumbersome and costly, Congress rarely requires agencies to follow them. Hence, most agency rulemaking and adjudication is "informal."

The APA does not apply to "informal" adjudication, although some have suggested that 5 U.S.C. § 555(e) "could be used to provide some structure for `informal adjudication.'" Walter Gellhorn et al., *Administrative Law* 228 (8th ed. 1987)[hereinafter Gellhorn]. In effect, "informal" adjudication procedures are left for the agency to develop.

With respect to rulemaking and adjudication, the following chart illustrates the APA's structural dichotomy between the "informal" and "formal" procedures:

	Rule Making (§§ 552-553)	Adjudication (§ 554)
Informal	All: publication, § 552(a)(1); petitions to alter rules, § 553(e) Substantive only: notice, participation, statement of "basis and purpose," 30-day delay between publication and taking effect, § 553	(§ 555(e))
Formal	Notice, § 553(b); hearing, § 556; intermediate and final decision, § 557; 30-day delay between publication and taking effect, § 553(d); publication, § 552(a)(1); petitions to alter rules, § 553(e)	Notice, informal settlement; separation of functions, § 554; hearing, § 556; intermediate and final decision, § 557; declaratory orders, § 554(e)

See Gellhorn, *supra*, at 228. With respect to informal rulemaking, this chart reflects the fact that "rules of agency organization, procedure or practice" are exempted from all of the requirements of section 553. These rules are not exempted from the APA's publication or petition provisions, however.

The distinctions between substantive rules and rules of agency organization, procedure, or practice are discussed below.

IV. APA Rulemaking and Adjudication

The APA divides agency action into three categories: (a) rulemaking, (b) adjudication, and (c) everything else. Of the three categorical activities, rulemaking is arguably the most important. *See generally* Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* (1994)(developing the thesis that rulemaking is the single most important function performed by agencies).

A. Rules and Rulemaking

1. Rules

In relevant part, the APA provides that a "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe laws or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4).

In general, a rule "`regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct.'" Administrative Conference of the United States, *A Guide to Federal Agency Rulemaking* 40 (2d ed. 1991)[hereinafter *Federal Agency Rulemaking*](quoting *Attorney General's Manual on the Administrative Procedure Act* 14-15 (1947)). *See also* Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 37-43 (3d ed. 1998)[hereinafter Lubbers].

Most rules are of "general" rather than "particular" applicability. Nonetheless, "the drafters of the APA wished certain actions of a particular nature, such as the setting of future rates or the approval of corporate reorganizations, to be carried out under the relatively flexible procedures governing rulemaking. Consequently, the words `or particular' were included in the definition." *Id*. at 41 (footnote omitted).

2. Rulemaking

"Rulemaking" is the "process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Unless Congress specifically authorizes otherwise, rules must be prospective in their application and cannot have retroactive effect. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213-16 (1988). Although the APA contemplates that rules will be made through its rulemaking procedures, the United States Supreme Court has held that agencies are generally free to use their own judgment in determining whether to make new law by rulemaking or by adjudication. *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974).

3. Types of Rules

Much of the practice of administrative law involves issues relating to the promulgation and application of administrative rules. "Rules" and "rulemaking" under the Administrative Procedure Act (APA) are potentially confusing subjects for three reasons—

- First, agencies make rules in several ways:

a. By "formal" or "on the record" rulemaking under APA §§ 553, 556, and 557;

b. By "informal" or "notice and comment" rulemaking under APA § 553;

c. By publishing press releases, internal handbooks, and other guidances, the contents of which do not also appear in the Federal Register, a process sometimes referred to as "publication rulemaking." Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1467 (1992)[hereinafter Strauss](footnote omitted). Agencies often resort to such "publication rulemaking" or "nonrule rulemaking" because of real and perceived delays and difficulties associated with APA rulemaking. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1393 (1992); *see also* 1 George C. Coggins, *Public Natural Resources Law* § 7.03[2][d] (1990)(discussing the evolution of the USDA Forest Service Manual and the legal status of its contents); and

d. By adjudication, unless, as it rarely does, Congress requires the agency to make rules legislatively. Although the United States Supreme Court has held that agencies may make new agency law by adjudication, *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 293-94 (1974), the APA distinguishes "rulemaking" from "adjudication." Under the APA, adjudications result in "orders," not "rules." 5 U.S.C. § 551(7).

• Second, when construed broadly, "rules" can be categorized as:

a. Legislative rules;

b. General statements of policy;

c. Interpretive (or interpretative) rules; and

d. Rules of agency organization, procedure, or practice.

Some caution is warranted, however, in construing the term "rules" so broadly. Some commentators maintain, quite appropriately, that "[u]nder the Administrative Procedure Act . . . there are two types of rules that can be promulgated: legislative rules and interpretive rules." Phillip M. Kanaan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 Admin. L. Rev. 213, 213 (1996)(footnote omitted).

• Third, although some courts and commentators equate legislative rules with substantive rules, others maintain this synonymous treatment is misleading. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind the Public?*, 41 Duke L.J. 1311, 1321-27 (1992)[hereinafter Anthony]. Professor Anthony observes that substantive standards can be found in legislative rules, interpretive rules, and policy statements. As discussed below, the latter two categories are not, by definition, legislative rules.

Private parties who either are regulatees or beneficiaries of programs administered by a federal agency must wrestle with this confusion in two contexts:

1. When seeking to determine what standards are binding on them, the courts, and the agency; and

2. When seeking to bind the agency in circumstances when the "rule" is not binding on private parties or the courts. Such circumstances may arise when, in effect, a private party is seeking to "estop" the agency from deviating from its stated position.

a. The APA Definition of "Rule"

Notwithstanding the fact that rules can be divided into four categories, the APA does not expressly define the differences between legislative rules, interpretive rules, policy statements, and procedural rules. It does not even use the term "legislative rules." Instead, APA § 551(4) defines "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4). This definition, however, suffers from its generality because "the APA definition of `rule,' if read literally, is broad enough to encompass virtually any statement an agency might make in any context." 1 Davis & Pierce, *supra*, § 6.1 at 226 (citations omitted). Or, as Professor Anthony notes:

> Issuances encompassed by this definition come in a myriad of formats and bear a myriad of labels: legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidances, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others.

Anthony, *supra*, at 1320 (footnote omitted).

Obviously not every statement an agency might make in any context is a "rule" within the meaning of APA § 551(4). As a practical matter, private parties who deal with federal agencies are concerned primarily, if not exclusively, with rules that have a *legally* "binding effect" on members of the public, the courts, and the agency. If any statement regarding agency rules can be made with certainty, it is that valid "legislative rules" have that effect. Nonetheless, agencies sometimes treat nonlegislative rules as if they were legislative rules. Professor Anthony characterizes such rules as "spurious rules." Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 Admin. L.J. 1, 10 (1994)("Such rules have no legal force, but because they are treated as binding by the agency, they are spuriously given the appearance of legal force." (footnote omitted)). *See also* William Funk, *A Primer on Nonlegislative Rules*, 53 Admin. L. Rev. 1321 (2001); Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 Admin. L. Rev. 1313 (2001); Randolph J. May, *Ruling Without Real Rules–Or How to Influence Private Conduct Without Really Binding*, 53 Admin. L. Rev. 1303 (2001); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803 (2001). The discussion that follows offers guidance for distinguishing legislative rules from "spurious rules" and other statements issued by an agency.

b. Legislative Rules

A legislative rule is a substantive rule implementing a statute that the agency is statutorily empowered to make and that is duly promulgated under APA § 553. Professor Anthony would add that the agency also must intend to make a legislative rule, not an interpretive rule or a policy statement. Anthony, *supra*, at 1322 (listing six requirements that must be met by a legislative rule). *See also American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993)(discussing the limited utility of the "intent to exercise legislative power" test for identifying

legislative rules). Thus, a "`legislative rule is the product of an exercise of delegated legislative power to make law through rules.'" *Id*. (citation omitted).

A valid legislative rule is binding on private parties, the courts, and the agency. It has the same force and effect as a statute; that is, it has "the force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979). "This *binding effect* is the chief identifying feature of a legislative rule: its nature and purpose is to alter citizens' legal rights in a decisive fashion." Gellhorn & Levin, *supra*, at 315-16 (noting that "to say that such a rule has `the force and effect of law' does not mean that it is immune from judicial review; courts can entertain challenges to the rule on various grounds"). While valid legislative rules bind the issuing agency, *United States v. Nixon*, 418 U.S. 683, 694-96 (1974), an agency "may be able to waive them in appropriate cases for the benefit of individual members of the public, at least if the rights of third parties are not prejudiced thereby." Bonfield & Asimow, *supra*, at 249 (citing *American Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624 (D.C. Cir.)(en banc), *cert. denied*, 385 U.S. 843 (1966)).

Legislative rules must be congressionally authorized and "reasonably related to the purposes of the enabling legislation." *Mourning v. Family Publications Serv.*, 411 U.S. 356, 369 (1973). "[A]n agency has the power to issue binding legislative rules only if and to the extent Congress has authorized it to do so." 1 Davis & Pierce, *supra*, § 6.3 at 234 (citations omitted). Moreover, legislative rules must be consistent with the controlling statute. *Brown v. Gardner*, 513 U.S. 115, 121-22 (1996). In other words, legislative rules are subject to challenge on grounds other than the procedures under which they were promulgated.

Unless they apply to a matter exempted under APA § 553(a) and the exemption has not been waived by the agency, legislative rules must be legislatively adopted under the APA. One of the two categorical exemptions in APA § 553(a) is the exemption provided for in APA § 553(a)(2) pertaining to "public property, loans, grants, benefits, or contracts." This exemption would apply to some of the USDA's rulemaking including, for example, domestic commodity program rules and federal crop insurance contracts. In *Rainbow Valley Citrus Corp. v. Federal Crop Ins. Corp.*, 506 F.2d 467, 468-69 (9th Cir. 1974), this exemption was invoked to uphold a 1970 rule adopted without compliance with APA § 553 that reclassified certain lands as uninsurable for federal crop insurance purposes.

The APA § 553(a)(2) exemption no longer applies to the USDA because in 1971 the USDA waived the exemption. 36 Fed. Reg. 13,804 (1971). *See generally Rodway v. United States Dep't of Agriculture*, 514 F.2d 809, 813-14 (D.C. Cir. 1975)(discussing the USDA's waiver of the exemption). As a result, the USDA is "fully bound . . . to comply . . . with the procedural demands of the APA" when making legislative rules. *Id*. at 814.

The APA-mandated procedures for rulemaking are discussed in more detail below. For the present purpose of defining a "legislative rule," it suffices to note that most rulemaking is by "notice and comment" under APA § 553. Although the "notice and comment" requirements of APA § 553 will not apply in some circumstances, such as when "good cause" is demonstrated under APA § 553(b)(B), legislative rulemaking at least requires the giving of notice and an opportunity for public comment. Moreover, all legislative rules must be published in the Federal Register. Unless "good cause" is shown under APA § 553(d)(3) or the rule "grants or recognizes an exemption or relieves a restriction" under APA § 553(d)(1), publication must occur thirty days before the rule becomes effective. Legislative rules published as final rules in the Federal Register appear the following year in the Code of Federal Regulations.

Apart from the "standing" exemptions found in APA § 553, only on relatively rare occasions does Congress exempt agencies from complying with the APA's "notice and comment" requirements. One such exemption is found in the 1996 farm bill, formally known as the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888-1197. Because Congress

passed the 1996 farm bill in April, 1996, well into the planting season in some parts of the country, Congress exempted the USDA from the notice and comment requirements in issuing regulations implementing Title I of that Act. Pub. L. No. 104-127, § 161(d)(1), 110 Stat. at 934-35.

Unlike legislative rules, interpretive rules, general statements of policy, and rules of agency organization, procedure, and practice do not have to be promulgated under the APA. APA § 553(b)(A) provides that "notice and comment" rulemaking does not apply to such statements. 5 U.S.C. § 553(b)(A). Because such rules are not legislatively promulgated, they are not legislative rules.

Interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice do not have the same legally binding effect as legislative rules. As discussed below, however, interpretive rules may be accorded sufficient deference by the courts to make them outcome determinative. When this happens, it is the court, not the interpretive rule, that imposes the legally binding effect to the contents of the interpretive rule. *See Sims v. United States*, 252 F.2d 434, 438 (4th Cir. 1958)("Administrative interpretations are not absolute rules of law which must necessarily be followed in every instance, but are only helpful guides to aid courts in their task of statutory construction."), *aff'd*, 359 U.S. 108 (1959). While not binding by definition, general statements of policy may have coercive effect as a practical matter. Moreover, rules of agency organization, procedure, or practice can affect parties outside the agency in both insignificant and significant ways. *See Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)(observing that "`even office hours . . . necessarily require conformity on the part of the public'" (citation omitted)). The discussion that follows defines these categories of agency statements and discusses whether and to what extent they have a binding effect.

c. Rules of Agency Organization, Procedure, or Practice

Rules of agency organization, procedure, or practice are usually collectively referred to as "procedural rules." Jeffrey S. Lubbers & Nancy G. Miller, *The APA Procedural Rule Exemption: Looking for a Way To Clear the Air*, 6 Admin. L.J. 481, 482 (1992)[hereinafter Lubbers & Miller]. Though a convenient collective description, "the term ‘procedural rule’ has no clear definition." *Id*. at 482 (footnote omitted).

The procedural rule exemption from compliance with the rulemaking procedures of APA § 553 "has generally covered matters such as agency rules of practice governing the conduct of its proceedings and rules delegating authority or duties within an agency." *A Guide to Federal Agency Rulemaking, supra*, at 49. In addition to covering matters such as the time period for competing railroads to file applications responding to proposed mergers, *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983), the exemption has been held to cover agency instructions, guidelines, and procedures, including relatively specific standards for determining what kinds of activities would result in enforcement reviews under the Medicare program's peer review organization program, *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1043-52 (D.C. Cir. 1987).

In essence, the exemption

> requires agencies and courts to distinguish between procedural rules and substantive rules. There are many rules that are easy to categorize, e.g., a rule specifying the time limit for filing a response to a complaint is procedural, while a rule imposing a new
>
> > binding obligation on regulatees is substantive. Unfortunately, however, there are many rules that can as easily bear one characterization as another.

1 Davis & Pierce, *supra*, § 6.4 at 248. As the District of Columbia Circuit recently confessed, "we have struggled with the distinction between `substantive' and `procedural' rules. . . ." *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994). *See also* 1 Davis & Pierce, *supra*, § 6.4 at 250 ("There are scores of lower court opinions that apply the procedure substance distinction to a wide variety of agency rules that are difficult to classify. They form an untidy body of law that defies accurate summary treatment. Given the inherent difficulty of the enterprise, the boundary between substantive rules and procedural rules is likely to remain murky.").

Courts have developed various tests for determining whether a rule is a procedural rule but none of these tests has been universally accepted. If there is a rule of thumb, it may be that "[t]he likelihood that a regulation will pass muster as `procedural' is in direct proportion to its insignificance." Gary J. Edles & Jerome Nelson, *Federal Regulatory Process: Agency Practices and Procedures* § 4.2II (2d ed. 1994).

One test "depends simply upon whether [the rule] addresses some sort of agency procedure." Lubbers & Miller, *supra*, at 485 (citing as an example *Southern California Edison Co. v. Federal Energy Regulatory Comm'n*, 770 F.2d 779 (9th Cir. 1985)). This test, however, "is unhelpful because substance can be masked as procedure." *Id*. at 489. Recognizing this, other courts have used a "substantial impact" test. *Id*. at 485 (citing as an example *National Motor Freight Ass'n v. United States*, 268 F. Supp. 90 (D.D.C. 1967)(three-judge panel), *aff'd mem.*, 393 U.S. 18 (1968)). This test focuses on the magnitude of a rule's impact, not on the impact's nature. At some "undefined level," the rule becomes subject to APA § 553. *Id*. at 485-86.

The District of Columbia Circuit has looked to whether a particular rule "`encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.'" *Id*. at 486 (citing *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987)). As that Circuit recently indicated, an aspect of that test examines whether the rule changes "*substantive standards*." *JEM Broadcasting*, 22 F.3d at 327 (emphasis in original). More broadly, the court observed:

> Our oft-cited formulation holds that the "critical feature" of the procedural exception "is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." . . . "Of course, procedure impacts on outcomes and thus can virtually always be described as affecting substance, but to pursue that line of analysis results in the obliteration of the distinction that Congress demanded." . . . The issue, therefore, "is one of degree," and our task is to identify which substantive effects are "sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA."

Id. at 326-27 (citations omitted).

The District of Columbia Circuit's approach has been characterized as "problematic" because "[c]ourts have either not engaged in useful analysis or they have used the test in a way that could effectively eliminate the statutory distinction between procedural and substantive rules." Lubber & Miller, *supra*, at 489. For its part, the now-defunct Administrative Conference of the United States (ACUS) recommended as follows:

> In determining whether a proposed rule falls within the statutory exception for rules of agency "procedure or practice," agencies should apply the following standard: A rule is within the terms of the exception when it both (a) relates solely to agency methods of

> internal operations or of interacting with regulated parties or the public, and (b) does not (i) significantly affect conduct, activity, or a substantive interest that is the subject of agency jurisdiction, or (ii) affect the standards for eligibility for a government program.

Id. at 496 (quoting ACUS Recommendation 92-1, 1 C.F.R. § 305.92-1)(defining "program" to include "those involving benefits, contracts, licenses, permits, and loan guarantees" *Id*. at 496 n.10).

d. Policy Statements

A general statement of policy is neither legally binding on the public or the courts nor judicially enforceable against an agency. In other words, it does not establish a "binding norm." *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). Instead, “a *general statement of policy* states how the agency intends to use its lawmaking power in the future but does not attempt to bind anyone immediately." Gellhorn & Levin, *supra*, at 318. *See also A Guide to Federal Agency Rulemaking*, *supra*, at 58 ("Policy statements are issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power in subsequent adjudications or through rulemaking. Often policy statements are issued to guide agency personnel in administering laws, and sometimes they are addressed to the public." (footnote omitted)).

Once a pronouncement is determined to be a general statement of policy two principles follow: (1) The policy statement can be adopted without compliance with APA § 553, and (2) the policy statement is not legally binding. The more difficult issue, however, is determining whether a pronouncement is a general policy statement. This issue most often arises in the context of a pronouncement that has not been promulgated in compliance with APA § 553. In this context,

> the proper question . . . is not whether the policy document *is* a legislative rule. Rather, the proper question is whether the nonlegislative document *should have been* issued as a legislative rule in the circumstances. The key to that question is . . .: *Did the agency intend the document to bind? Has the agency given it binding effect?* If the answer to either of these questions is "yes," the document should have been issued as a legislative rule.

Anthony, *supra*, at 1327.

As Professors Davis and Pierce observe, determining whether an agency pronouncement has a binding effect is not always easy. Courts will examine, but not necessarily follow, an agency's representations concerning the intended effect of a pronouncement. *See* 1 Davis & Pierce, *supra*, § 6.2 at 232. Whether the result of sloppiness or the product of strategic choice, an agency may use ambiguous or inconsistent language (such as variously using "must" and "should"), thus leaving uncertainty over the pronouncement's intended effect. Nonetheless,

> [t]he beauty of the "binding effect" test lies in its ability to frustrate agency attempts to use ambiguity to further illegitimate strategic goals. A court may interpret an ambiguous statement as binding or not binding, but the agency cannot have it both ways. If the court concludes that the agency statement is binding in some important respect, it will hold that the statement is a "rule" that can be promulgated only through the use of rulemaking procedures and that is potentially reviewable to the same extent as any other rule. If instead the court concludes that the statement is a general statement of policy, courts will not permit the agency to give its statement binding effect on members of the public.

1 *id*. § 6.2 at 229.

Although not *legally* binding, general statements of policy may, as a practical matter, have a coercive effect. That is, "[t]o the extent that an agency possesses significant discretionary power over a class of regulatees or beneficiaries, many are likely to `comply' `voluntarily' with an agency's `nonbinding' statement of its preferred policies." 1 *id*. § 6.2 at 232.

e. Interpretive Rules

Strictly defined, "an *interpretive rule* differs from a legislative rule in that it is not intended to alter legal rights, but to state the agency's view of what existing law already requires." Gellhorn & Levin, *supra*, at 317. "[T]he courts do not treat interpretations as making new law, on the theory that they merely restate or explain the preexisting legislative acts and intentions of Congress." Anthony, *supra*, at 1324 (footnote omitted). Rules that make "new law" are not interpretive; rather, they are legislative and must have been promulgated as legislative rules before they can be given binding effect. "Rules have been found to make `new law,' and thus to be legislative, where they fill a statutory gap by imposing a standard of conduct, create an exemption from a general standard of conduct, establish a new regulatory structure or otherwise complete an incomplete statutory design." *A Guide to Federal Agency Rulemaking, supra*, at 62 (citing Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 394).

The distinction between legislative and interpretive rules has been characterized as "fuzzy." *Avoyelles Sportsman's League, Inc. v. Marsh*, 715 F.2d 897, 909 (5th Cir. 1983). Nonetheless, the District of Columbia Circuit recently offered the following reconciliation of its case law:

> Accordingly, insofar as our cases can be reconciled at all, we think it almost exclusively [is] on the bases of whether the purported interpretive rule has "legal effect", which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993). With regard to the fourth criteria, the court noted:

> A rule does not, in this inquiry, become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted. If that were so, no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another.

Id.

Professors Davis and Pierce have praised the guidance offered by the *American Mining Congress* criteria. They maintain, however, that "[t]he second criterion—publication in the Code of Federal Regulations (CFR)—should not be used in any attempt to distinguish between a legislative rule and an interpretative rule. . . ." 1 Davis & Pierce, *supra*, § 6.3 at 71-72 (Supp. 2000).

A note of caution: Not all rules that "interpret" are interpretive rules. Legislative rules can be "interpretive." The distinction between a legislative rule that interprets a statute or another rule and an interpretive rule is found in the definition of a legislative rule—that is, the agency has the statutory power to make the rule and it exercises that power in compliance with APA § 553. As noted above, unlike legislative rules, "[i]nterpretive rules do not require notice and comment. . . ." *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995); *see also Hoctor v. United States Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996)("There are no formalities attendant upon the promulgation of an interpretive rule, but this is tolerable because such a rule is `only' an interpretation."). This exemption for interpretive rules from compliance with APA § 553 is "to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings." *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

f. An Aside Regarding Professor Anthony's Categories of "Rules"

Professor Anthony contends that "[a]n interpretive rule is an agency statement that was not issued legislatively and that interprets language of a statute (or of an existing legislative rule) that has some tangible meaning." Anthony, *supra*, at 1325 (footnotes omitted). Professor Anthony adds the phrase "tangible meaning" to his definition based on the proposition that "[a] rule that purported to interpret a vacuous statutory term like `just and reasonable' or `public interest, convenience, and necessity' would not be interpretive; if it were issued by legislative rulemaking it would be a legislative rule, but if not, such a rule would be a policy statement." *Id*. at 1325 n.62.

Professor Anthony treats legislative rules, interpretive rules, and policy statements as all being substantive, or, as to interpretive rules and policy statements, as having the potential of being substantive. Policy statements are Professor Anthony's default category of substantive, nonlegislative rules: "A policy statement is an agency statement of substantive law or policy, of general or particular applicability and future effect, that was not issued legislatively and is not an interpretive rule." *Id*. at 1325 (footnotes omitted).

Professor Anthony notes that "[n]onlegislative rules (interpretive rules and policy statements), by definition, are not *legally* binding on the courts, the agency, or the public." *Id*. at 1327-28. Yet he also maintains that "[a]n agency may *nonlegislatively* announce or act upon an interpretation that it intends to enforce in a binding way, so long as it stays within the fair intendment of the statute and does not add substantive content of its own." *Id*. at 1313 (footnote omitted) (emphasis supplied). He contends that this also applies to interpretations of an agency's own legislative rules. His supporting theory is that, if it is a statute being interpreted, Congress has already acted legislatively, and, if a legislative rule being interpreted, the agency has already acted legislatively. *Id*. at 1313-14. On the other hand, Professor Anthony maintains that when the interpretive rule "does not merely interpret, but sets forth onto new substantive ground through rules that it will make binding, the agency must observe the legislative process laid down by Congress." *Id*. at 1314 (footnote omitted). He thus treats nonlegislative rules that interpret "specific statutory or regulatory language" as an exception to the rule that nonlegislative interpretive rules are not binding, at least to the extent that the interpretation is "within the fair intendment of the statute [or legislative rule] and does not add substantive content of its own." *Id*. at 1313-15. For a more recent treatment of this subject by Professor Anthony, see Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 Admin. L. Rev. 1045 (2000).

g. The Binding Effect of Interpretive Rules

Professors Davis and Pierce offer a view of the binding effect on nonlegislative interpretive rules that differs from Professor Anthony, although all three may be saying essentially the same thing.

They contend that interpretive rules, at least those that interpret statutory language, are also not binding on private parties or the courts. Their contention recently found support from the Supreme Court in its decision in *Christensen v. Harris County,* 529 U.S. 576, 586-88 (2000). In *Harris County*, the Court ruled that an interpretation of the Fair Labor Standards Act contained in a Department of Labor opinion letter was not entitled to the deference accorded to statutory interpretations found in legislative rules. In other words, as discussed below, *Chevron*-like deference did not apply. “Instead,” the Court explained, “interpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L.Ed. 124 (1944), but only to the extent that those interpretations have the ‘power to persuade’ . . . .” *Id*. at 587(citations omitted). *See also United States v. Mead Corp.*, 533 U.S. 218, 227-39 (2001)(discussing *Christensen* and ruling that *Skidmore* deference applied to a United States Customs Service tariff classification ruling).

Likewise, interpretive rules are not judicially enforceable against the agency. "A court may choose to give binding effect to the position taken by an agency in an interpretative rule, but it is the court that provides the binding effect of law through its process of statutory interpretation; the agency's interpretative rule serves only the function of potentially persuading the court that the agency's interpretation is correct." 1 *id*. § 6.3 at 234. *See also Federal Agency Rulemaking*, *supra*, at 65 ("An agency issuing an interpretive rule (i.e., an interpretation which merely reminds parties of existing law or interprets a statute without creating new rights and duties) may well intend that its interpretation bind its own personnel, and it may expect compliance from regulated individuals or entities. Nonetheless, the agency cannot expect the interpretation to be binding in later proceedings; because it does not have the force of law, parties can challenge the interpretation.").

When a *legislative rule* "interprets" an ambiguous statute that the agency has been delegated authority to implement, the agency's interpretation is binding on a court if it offers a "permissible construction of the statute." *Chevron v. Natural Resources Council, Inc.*, 467 U.S. 837, 842-43 (1984). When the interpretation is found in an *interpretive rule*, not a legislative rule, a different degree of deference applies: "a court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (citations omitted). *See also* Davis & Pierce, *supra*, at § 6.3 at 236 ("Both Congress and the courts have long recognized . . . that `interpretive rules,' exempt from the notice and comment procedure by APA § 553, do not have binding effect either on citizens or on courts. Thus, the *Chevron* test does not apply to interpretive rules.").

The deference accorded to interpretive rules, sometimes called "*Skidmore* deference" based on *Skidmore v. Swift & Co*., 323 U.S. 134 (1944), is weaker than the "*Chevron* deference" accorded to legislative rules that interpret. In *Skidmore*, the agency had not been given the power to make legislative rules. Hence, the agency could not make rules that were legally binding on a court. Professor Davis and Pierce describe the distinction between *Chevron* deference and *Skidmore* deference as follows:

> [T]he judicial deference to be accorded a legislative rule [*Chevron* deference] is a strong form of deference attributable to the fact that the agency is exercising legislative power granted it by Congress using the procedures Congress authorized for that purpose.
>
> . . . .
>
> *Skidmore* deference is not based on the institutional legitimacy of the agency pronouncement; an interpretative rule cannot have binding effect because Congress

> has not authorized any agency to issue an interpretative rule with binding effect. *Skidmore* deference is based solely on common sense. A court should consider adopting the position taken in an agency interpretative rule because there are reasons to believe that agency positions are wise and correct.

1 Davis & Pierce, *supra*, § 6.3 at 242 (noting also that "[t]he *Skidmore* opinion states that deference due interpretative rules is based solely on their potential power to persuade").

Notwithstanding the rule that interpretive rules interpreting statutes are not binding on the courts, Professors Davis and Pierce note that "an interpretative rule binds federal courts when it explains or interprets a legislative rule unless the interpretative rule is inconsistent with the legislative rule, violates the Constitution or a federal statute, or is plainly erroneous." 1 *id*. § 6.3 at 248 (relying on *Stinson v. United States*, 508 U.S. 36 (1993)). As more often stated, an "administrative interpretation is controlling unless plainly erroneous or inconsistent with the regulation. 1 *id*. at § 6.10 at 281 (relying on *Bowles v. Seminole Rock Co.*, 325 U.S. 410 (1945)). Underlying this principle is the notion that "[t]he agency typically is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purposes in issuing the rule." 1 *id*. at § 6.10 at 282.

Professors Davis and Pierce are critical of *Stinson* because the non-legislatively-issued administrative "commentary" in which the interpretation was found did not claim to have binding effect: "The *Stinson* Court held . . . that courts must give the commentary greater authoritative effect than the [agency] claimed for it. . . . That part of the reasoning seems wrong." 1 Davis & Pierce, *supra*, § 6.10 at 285 (citation omitted). On the other hand, Professors Davis and Pierce suggest that *Stinson* can be interpreted "merely as a reaffirmation of long-standing principles," including the principle articulated in *Udall v. Tallman*, 300 U.S. 1 (1965). 1 *id*. § 6.10 at 284.

Udall v. Tallman stands for the proposition that courts must give "great" deference to an agency's interpretation of its own regulations. "The classic statement of the rule is the `plainly erroneous' standard: if the language of a regulation is ambiguous, a court must accept an administrative construction of it that is not `plainly erroneous or inconsistent' with the language of the regulation." Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. Cin. L. Rev. 681, 722 (1984) (footnote omitted). *See also* Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 Ariz. St. L.J. 109 (1991). In this regard, as Professors Davis and Pierce note, "[a]n interpretation of a rule inconsistent with the language used by the agency in a legislative rule fails to satisfy the requirement that citizens have adequate notice of permissible and impermissible conduct." 1 Davis & Pierce, *supra*, § 6.10 at 282-83.

Professors Davis and Pierce also note that the Supreme Court is not always consistent in its invalidation of an agency's interpretation of one of its legislative rules. For example, they note that in *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), the Court ruled that "a court can reject an agency interpretation only if an `alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.'" 1 *id*. § 6.10 at 225 (Supp. 2000). Yet in *Director, Office of Worker Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994), the Court found the regulation interpreted by the agency to be "too vague and ambiguous to support the agency's interpretation," thus, according to Professors Davis and Pierce, making it "difficult, if not impossible, to reconcile the majority opinion in *Greenwich* with the majority opinion in *Thomas Jefferson*." 1 *id*. § 6.10 at 226 (Supp. 2000).

Finally, Professors Davis and Pierce observe that "[n]umerous circuit courts have distinguished *Stinson* and held that a policy statement [or interpretive rule] does not bind a court if it does not interpret a legislative rule. In that situation, the policy statement has only a potential persuasive effect on a court." 1 *id*. § 6.2 at 162 (Supp. 2000)(citing *United States v. Hill*, 48 F.3d 228 (7th Cir. 1995); *United States v. Mathena*, 23 F.3d 87 (5th Cir. 1994); *United States v. Sparks*, 19 F.3d 1099 (6th Cir. 1994); *United States v. Anderson*, 15 F.3d 278 (2d Cir. 1994); *United States v. O'Neill*, 11 F.3d 292 (1st Cir. 1993); *United States v. Levi*, 2 F.3d 842 (8th Cir. 1993); and *United States v. Hooker*, 993 F.2d 898 (D.C. Cir. 1993).

The gist of this discussion is that only *legislative rules* have binding effect on private parties, the courts, and agencies. The only exception is where an *interpretive rule* is interpreting a legislative rule. In that case, the court will give the interpretive rule "great" deference. This deference may be the same as, or nearly the same as, *Chevron* deference.

h. Can an Agency's "Nonbinding" Pronouncements "Bind" the Agency?

There is one remaining issue to consider. This issue is whether an otherwise "nonbinding" pronouncement can bind an agency. While raised, this issue is by no means fully developed in this outline.

The District of Columbia Circuit has stated that an "agency remains free in a particular case to diverge from whatever outcome . . . [a] policy statement or interpretive rule might suggest." *Vietnam Veterans of America v. Secretary of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988). On the other hand, Professor Strauss argues that APA § 552(a) offers a basis for binding agencies to their positions published in the Federal Register, even if the position is not contained in a legislative rule. Strauss, *supra*, at 1466-75. APA § 552(a)(1), a section of the APA commonly known as the Freedom of Information Act (FOIA), provides, in relevant part, as follows:

> Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> . . . .
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency. . . .
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . .

5 U.S.C. § 552(a)(1).

> Section 552(a)(2) provides, in relevant part:
> Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> . . . .
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public;

> unless the materials are promptly published and offered for sale. . . . A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on used, or cited as precedent by an agency against a party other than an agency only if—
>
> > (i) it has been indexed and either made available or published as provided by this paragraph; or
> > (ii) the party has actual and timely notice of the terms thereof. . . .

5 U.S.C. § 552(a)(2).

Professor Strauss observes that this language "strongly suggests" that if an agency does comply with the APA's publication requirements, the materials identified in APA § 552(a) "may be `relied on, used, or cited as precedent' *against the agency* although they do not serve to bind the public." Strauss, *supra*, at 1467-68 (footnote omitted). He also observes that *Vietnam Veterans of Am. v. Secretary of the Navy*, 43 F.2d 528, 536-37 (D.C. Cir. 1988), collects and discusses several cases in which the District of Columbia Circuit has bound agency to otherwise nonbinding pronouncements. *Id*. at 1473.

Ultimately, as Professor Strauss acknowledges, this argument runs up against the general rule that the government may not be estopped, particularly if "the result would require the payment of money from the Public Treasury contrary to a statutory appropriation—the argument that underlies the residual availability of the sovereign immunity defense. . . ." *Id*. at 1474. Without taking the argument further, Professor Strauss observes:

> Treating interpretive rules and policy statements as binding on the government often will require no direct expenditure of funds; and a straightforward reading of section 552(a) suggests that such treatment has, in any event, been consented to. Strikingly, the contrary arguments are prudential ones: Permitting judicial enforcement of "internal" instructions will only discourage the government from providing instructions, and thus secure regularity of bureaucratic behavior in the usual case—that is, it is *not* that the instructions do not bind or should not bind the government officials to whom they are addressed, but that judicial as distinct from executive enforcement of their requirements threatens more harm (adventitious lawsuits, distraction of government efforts, discouragement to the announcement of policy) than good.

Strauss, *supra*, at 1474 (footnote omitted). *See also* Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws,"* 64 Tex. L. Rev. 1 (1985)(discussing, among other matters, the general rule articulated in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), that the federal government cannot be estopped by the words and deeds of its employees).

Any development of this argument would have to take into account *Rinaldi v. United States*, 434 U.S. 22 (1977), and analogous cases. *See* 3 Davis & Pierce, *supra*, § 17.7 at 146 ("Numerous lower court decisions have interpreted and applied *Rinaldi* as standing for the proposition that the policies set forth in the U.S. Attorney's Manual do not bind the Department of Justice but should be given binding effect against Justice Department lawyers when the agency asks a court to do so." (citations omitted)).

i. USDA Internal Operating Manuals and Handbooks

Applying these or substantially similar criteria pertaining to legislative rules, interpretive rules, general statements of policy, and rules of agency organization, procedure and practice, courts have held that directives contained in certain USDA internal operating manuals are not legally binding as legislative rules. *See, e.g., Hoctor v. United States Dep't of Agriculture*, 82 F.3d 165, 169-72 (7th Cir. 1996)(USDA Animal Health and Inspection Service internal directive not binding); *Jones v. Espy*, No. 90-2831-LFO, 1993 WL 102641, at *10 (D.D.C. Mar. 17, 1993)(unreported decision)(ASCS Handbook directives not binding); *Hawkins v. State Agriculture and Conservation Committee*, 149 F. Supp. 681, 686 (S.D. Tex. 1957)(same), *aff'd*, 252 F.2d 570 (5th Cir. 1958); *Westcott v. United States Dep't of Agric.*, 611 F. Supp. 351, 356-58 (D. Neb. 1984)(same), *aff'd*, 765 F.2d 121 (8th Cir. 1985); *Graham v. Lawrimore*, 185 F. Supp. 761, 764 (E.D.S.C. 1960)(same, citing *Hawkins*), *aff'd*, 287 F.2d 207 (4th Cir. 1961); *Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452, 455 (9th Cir. 1971)(USDA Forest Service Manual directives not binding); *Oregon Natural Resources Council v. Devlin*, 776 F. Supp. 1440, 1447-49 (D. Or. 1991)(same); *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548, 1551 (Fed. Cir. 1992)(same, but concluding that Forest Service Manual is evidence of agency's customs and practices). *See also* Anthony, *supra*, at 1336 ("Nonlegislative provisions in United States Department of Agriculture (USDA) manuals are legion, and they are enforced."). *See generally* Christopher R. Kelley, *Recent Developments in Federal Farm Program Litigation*, 25 U. Memphis L. Rev. 1107, 1109-18 (1995)(discussing the legally binding effect of the ASCS Handbook in light of *Jones v. Espy*); Christopher R. Kelley & John S. Harbison, *A Guide to the ASCS Administrative Appeal Process and to the Judicial Review of ASCS Decisions* (pt. 1), 36 S.D. L. Rev. 14, 30-32 (1991)[hereinafter Kelley & Harbison](discussing the ASCS Handbook).

j. EPA Guidance Manuals

The D.C. Circuit has held that provisions in an EPA guidance manual pertaining to requirements under the Clean Air Act that broadened the underlying EPA rule were unenforceable absent compliance with applicable rulemaking procedures. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023-28 (D.C. Cir. 2000).

B. Orders and Adjudication

The APA contemplates that, in addition to making rules, agencies will adjudicate disputes between private parties and the agency and issue orders. "`Adjudication' means agency process for the formulation of an order." 5 U.S.C. § 551(7). "`Order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6). As explained below, whether an agency is engaged in adjudication or rulemaking, the process may be "formal" or "informal."

C. Formal Rulemaking and Adjudication

As a general proposition, agencies must follow the APA's "formal" rulemaking and adjudication procedures when the governing statute requires that either the rulemaking or the adjudication must be made "on the record after opportunity for an agency hearing." *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 241 (1973). Otherwise, the agency is free to use "informal" rulemaking or adjudication processes. Courts cannot compel agencies to adopt procedures beyond those required by statute or the Constitution. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

Within the APA's confines, agencies may establish their own formal rulemaking and adjudication procedures. To assist agencies in that respect, the Model Adjudication Rules Working

Group of the Administrative Conference of the United States (ACUS) recently published model adjudication rules. Administrative Conference of the United States, *Model Adjudication Rules* (1993). Despite these and other efforts directed at improving administrative processes, Congress ended funding for ACUS in 1995. *See* William Funk, *R.I.P. A.C.U.S.*, Admin. & Reg. L. News, Winter 1996, at 1. The annual budget for ACUS was about $1.8 million. *Id*.

The APA's "formal" rulemaking and adjudicatory provisions provide for trial-type hearings presided over by an agency official or, more commonly, an administrative law judge (ALJ). Either the rule or the order must be supported by the evidence introduced at the hearing. *See* 5 U.S.C. § 556(d)("A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.").

In both formal and informal agency proceedings, "the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before administrative agencies in the absence of a statutory requirement that such rules are to be observed." *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 155 (1941). The Federal Rules of Evidence are designed for jury trials, not agency-tried cases. "Agencies are not lay juries. Rather, they are experts in the fields for which they adjudicate disputes." 2 Davis & Pierce, *supra*, § 10.2 at 120. If any policy contained in the Federal Rules of Evidence is appropriate for use by agencies, it is the policy underlying Rule 703. That rule allows experts "to rely on otherwise inadmissible evidence if that evidence is `of a type reasonably relied upon by experts in the . . . field.'" 2 *id*. *See also* 5 U.S.C. § 556(d) ("Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record and those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.").

In both formal and informal adjudicatory proceedings under the APA, the "preponderance of the evidence" standard generally applies. *Bender v. Clark*, 744 F.2d 1424, 1428-30 (10th Cir. 1984). "`[W]here particularly important individual interests or rights are at stake,' such as the potential deprivation of individual liberty, citizenship, or parental rights," the clear-and-definite standard applies. *Id*. at 1429 (citations omitted). *See generally* 2 Davis & Pierce, *supra*, § 10.7 at 171-72 (concluding that "the preponderance of the evidence standard of proof applies to the vast majority of agency actions" except "in situations in which the Constitution requires a higher standard . . . , situations in which Congress explicitly requires an agency to use a more demanding standard, and . . . agency actions that are not subject to APA § 556(d)").

In formal proceedings, the proponent of the rule or order has the burden of proof. 5 U.S.C. § 556(d). Until 1994, this burden was understood to be only the "burden of going forward," and the "burden of persuasion" could be assigned to the opponent. In other words, "[t]he final burden in the sense of answering the question of who wins if all the evidence is inadequate or unconvincing may be on the opponent of the order, not the proponent." 2 Davis & Pierce, *supra*, § 10.7 at 166 (relying on *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 925 (1977)). In 1994, however, the United States Supreme Court ruled that the APA imposes both the burden of production and the burden of persuasion on the proponent of a rule or order. *Director, Office of Workers Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

Parties may be represented by counsel. 5 U.S.C. § 555(b). If otherwise authorized by law, subpoenas may be issued. *Id.* § 555(d). If agency rules so permit, depositions may be taken. *Id.* § 556(c)(4).

The hearing must be conducted in an impartial manner, and the presiding officer may be disqualified for bias or on other grounds. *Id*. § 556(a); *see also id.* § 554(d) (limiting the presiding officer's ex parte consultations and supervision of investigatory and prosecutorial personnel in adjudications). Testimony is subject to cross-examination, although "[i]n rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." *Id.* § 556(d). In formal adjudications, issues may be resolved or narrowed by declaratory orders. *Id*. § 554(e). If no genuine issues of material fact are presented, agencies may resolve matters by summary judgment. *See Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600 (1st Cir. 1994).

Agencies may take official notice of facts. Indeed, the United States Supreme Court "has long allowed agencies to resolve issues of legislative fact based on judgment and expertise, rather than on evidence." 2 Davis & Pierce, *supra*, § 10.6 at 158 (legislative facts "are utilized for informing a court's legislative judgment on questions of law and policy" while adjudicative facts are "facts concerning immediate parties," *id*. at 152-53). The APA, however, requires that "[w]hen an agency decision rests on official notice of a material fact not appearing in the record, a party is entitled, on timely request, to an opportunity to show the contrary." 5 U.S.C. § 556(e).

When an ALJ presides over the hearing, as is common, the final decision is preceded by a recommended or initial decision. *Id*. § 557(b). Before the preliminary decision is issued, the parties may propose findings and conclusions, together with supporting reasons. *Id*. § 557(c). The initial decision becomes final unless timely appealed to the agency. *Id*. § 557(b). "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." *Id*.

Throughout the formal adjudication and rulemaking process, ex parte communications are prohibited. 5 U.S.C. § 557(d). An ex parte communication is "an oral or written communication not on the public record with respect to which reasonable prior notice is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter." *Id.* § 551(14). "The statutory prohibition on ex parte communications should apply only to communications with respect to contested, material adjudicatory facts. It should have no application to issues of policy or legislative facts." 2 Davis & Pierce, *supra*, § 8.4 at 391.

All decisions are part of the record, and they must include the findings and conclusions and their basis or reasons. 5 U.S.C. § 557(c). "The transcript of the testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the official record for decision. . . ." *Id*. § 556(e).

Although formal rulemaking and adjudication is rarely required, formal adjudication is more common than formal rulemaking. The "formal" process is rarely required because it is cumbersome; for example, FDA formal rulemaking proceedings on whether peanut butter should have 87.5% or 90% peanuts took nine years to complete and produced a 7,736 page transcript. Schwartz, *supra*, § 4.12 at 193.

D. Informal Rulemaking

Most agency rulemaking is done informally under APA § 553. "Informal" agency rulemaking is commonly called "notice and comment" rulemaking. In most circumstances, four basic procedures must be followed in informal rulemaking:

- The agency must give notice of the proposed rulemaking (NPRM) in the Federal Register. 5 U.S.C. § 553(b). While the notice must at least describe the subjects or issues to be addressed in the proposed rules, the notice often will be accompanied by the text of the proposed rules.

- The agency must provide an opportunity for public comment. *Id*. § 553(c). Normally this is done through written comments. The comments must be received by the close of the comment period, which, by executive order, is currently sixty days.

- The agency must explain the basis and purpose of its final rules. In this regard, the agency is generally required "to respond in a reasoned manner to the comments received. . . ." *Rodway v. United States Dep't of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975).

- The agency must publish the final rules in the Federal Register not less than thirty days before their effective date.

The APA exempts agencies from complying with the giving of notice and the opportunity for public comment "when the agency for good cause finds (and incorporates the findings and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). Complying with the notice and comment requirements is impracticable when these requirements would impede the timely implementation of urgently needed rules as when, for example, safety rules must be promulgated without delay. *See Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212 (9th Cir. 1995). The "unnecessary" exemption covers minor rules unlikely to be of particular public interest. The "contrary to the public interest" exemption covers, for example, situations in which notice and comment would give affected persons the opportunity to act quickly and defeat the rules' purpose. *See De Rieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974).

In the Contract with America Advancement Act of 1996, Congress amended the APA by adding a new chapter eight entitled "Congressional Review" and codified at 5 U.S.C. §§ 801-808. As of March 29, 1996, no "major rule" can take effect until sixty days after the agency submits a copy of the rule and certain other documents to both the House and the Senate and the Comptroller General. During the sixty-day period, Congress can veto the rule by enacting a joint resolution of disapproval which, in turn, is subject to presentment and potential veto by the President. A "major rule" includes both any rule that has an annual effect of the economy of $100 million or more and any rule that would cause "a major increase in costs or prices" or "significant adverse effects on competition, employment, investment, productivity, innovation," or global competition. *See generally* Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 Admin. L. Rev. 95 (1997).

Some agencies have experimented with negotiated rulemaking. *See generally* Administrative Conference of the United States, *Negotiated Rulemaking Sourcebook* (1990)(collecting statutory and other materials on negotiated rulemaking). Others have used "direct final rulemaking" in which the agency provides a thirty-day comment period and makes the rule effective in sixty days if no adverse comments are received. If an objection is received, the process starts over as ordinary notice and comment rulemaking. *See* 58 Fed. Reg. 47,206 (1994)(notice of direct final rulemaking by the USDA Animal and Plant Health Inspection Service).

Law professors and others have criticized the current state of agency rulemaking because of the delays and administrative burdens associated with it. The APA's procedures are not the primary

source of the difficulties. Instead, the difficulties arise from other sources, such as Executive Order No. 12,291 requiring review of major agency rules by the Office of Management and Budget (OMB):

> The order requires agencies to (1) evaluate the costs and benefits of any proposed major rule; (2) evaluate alternatives to each proposed rule; (3) select the option that maximizes net benefits to society; (4) submit proposed major rules to OMB for review before they are issued in final form; and, (5) delay issuance of a rule if OMB concludes that further consultation with it or with another agency is necessary to insure that the rule complies with the order. OMB review of major rules has had three direct effects on agency rulemaking: increased costs, increased delay, and increased inter-agency friction. The combination of these three direct effects has had the indirect effect of encouraging agencies to substitute for informal rulemaking two inferior methods of making and announcing policy decisions: stating broad reasons for decisions reached in adjudicating individual disputes and issuing what have come to be known as "non-rule" rules, i.e., putatively nonbinding statements of policy contained in operating manuals, staff instructions, and the like.

Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 62 (1995)(footnote omitted).

In addition, "ossification" results from actions taken by Congress and the judiciary, particularly the latter:

> With the exception of a few agencies, the judicial branch is responsible for most of the ossification of the rulemaking process. Through interpretation and application of sections 553 and 706 of the APA, courts have transformed the simple, efficient notice and comment process into an extraordinarily lengthy, complicated, and expensive process that produces results acceptable to a reviewing court in less than half of all cases in which agencies use the process. In particular, the courts have completely rewritten the statutory requirement that an agency must incorporate in each rule a "concise general statement of [its] basis and purpose." To have any realistic chance of upholding a major rule on judicial review, an agency's statement of basis and purpose now must discuss in detail each of scores of policy disputes, data disputes, and alternatives to the rule adopted by the agency. Any data gap or any gap in the stated reasoning with respect to any issue can provide the predicate for judicial rejection of the rule on the basis that the agency violated its duty to engage in reasoned decisionmaking. Even after an agency has devoted many years and vast resources to a single rulemaking, it confronts a 50 percent risk that a reviewing court will hold the resulting rule invalid.

Id. at 66 (footnotes omitted).

Notwithstanding the various difficulties with notice and comment rulemaking from the agencies' perspective, for practitioners whose clients are affected by an agency's rules,

> [a] notice of proposed rulemaking (NPRM) must be taken seriously. . . . The fact that an idea has publicly appeared as an agency proposal means that it has received close attention from the staff and quite possibly from agency members. Generally, the more important or controversial NPRM's have received even greater internal examination usually involving a "sign-off" by appropriate staff units. . . . Practitioners can reasonably

> conclude that such proposals do in fact represent the current thinking of key decision-makers inside the agency.
>
> . . . .
>
> In our experience, the comment process can (and often does) produce significant modifications, but the chances that comments will create a complete turn-around are not great. This is precisely because the important ideas have generally been deeply
>
> explored before the NPRM appears. . . . [T]he commentator who seeks to persuade the same staff members to scrap the whole idea has a heavy burden.
>
> . . . .
>
> For these reasons, comments which broadly condemn the idea in sweeping terms are generally not helpful. The most useful comments are those which focus on particular problems. These include: comments suggesting weaknesses or difficulties of specific language; comments acquainting the staff with some possibly unforeseen practical consequences arising out of the idea; comments supplying facts and numbers about the industry which may have been overlooked; comments suggesting alternative language; or comments seeking waivers or exception machinery to deal with discrete issues.

Gary J. Edles & Jerome Nelson, *Federal Regulatory Process: Agency Practices and Procedures* 83-84 (2d ed. 1995)(footnote omitted).

E. Informal Adjudication

Most agency adjudication also is informal. Informal agency adjudication is not governed by the APA, with the possible exception of APA § 555(e). Instead, agencies are free to develop their own procedures consistent with the Fifth Amendment's procedural due process clause and any applicable statutory requirements. Typically, informal administrative appeal procedures provide for a hearing and a subsequent review of the hearing officer's decision based on the record developed before the hearing officer. These systems may also provide for discretionary review at a higher level. Some agencies provide for a multi-level appeal process, with *de novo* review at each level.

APA § 555(e) requires agencies to give prompt notice and "a brief statement of the grounds for denial" of a "written application, petition, or other request" if the grounds for denial are not "self-explanatory." 5 U.S.C. § 555(e). In *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990), the Court held that section 555(e) does not require an agency to provide findings or reasons to support a decision made in an informal adjudication. If, however, a reviewing court needs an explanation for the agency's action, it can remand the matter for an explanation.

A recent federal farm program case, *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994), has been criticized for ignoring the Court's ruling in *LTV*:

> The court went astray . . . when it attempted to describe in greater detail the appropriate role of a court in reviewing an agency action taken in an informal adjudication. The court held that an agency must make findings of fact, support its findings with substantial evidence, and provide a detailed explanation of the bases for its action in order to avoid reversal of the action as arbitrary and capricious. The court then applied those requirements to the agency action under review, concluded that the agency action was deficient in all three respects, reversed the agency action as arbitrary and capricious, and instructed the district court to enter judgment for the plaintiffs.

> That part of the opinion is inconsistent with *LTV* and with [the] APA in numerous respects. An agency is never required to provide findings and conclusions to support a decision made in informal adjudication. Nor is it required to support any finding with substantial evidence. An agency is required only to provide "a brief statement of the grounds for denial" if it denies an application, petition, or request. Since the agency did not deny an "application, petition, or request" in *Olenhouse*, it was not required to provide any explanation for its action except in response to a remand based on a reviewing court's determination that it required some explanation in order to determine whether the action was arbitrary or capricious. If a court concludes that the explanation provided by the agency . . . is too terse to allow the court to apply the arbitrary and capricious test, the only remedy authorized by *LTV* is a remand to the agency for further explanation.

1 Davis & Pierce, *supra*, § 8.5 at 116-17 (Supp. 1985).

V. Judicial Review

Judicial review of final agency action is presumptively available under the APA. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *see also* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Moreover, the presumption favoring review is strong. *See, e.g., Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995).

APA review, however, is not a vehicle for recovering monetary damages for APA § 702 excludes relief in the form of "money damages." Following the United States Supreme Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), it is now clear that "money damages" does not include relief of a restitutionary nature. *See* David A. Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 Ohio St. L.J. 725 (1988). *Bowen*, therefore, has been relied upon to support APA actions even when the underlying dispute involved substantial amounts of federal farm program payments. *E.g., Esch v. Yeutter*, 876 F.2d 976, 981-85 (D.C. Cir. 1989). *See generally* Christopher R. Kelley & John S. Harbison, *A Guide to the ASCS Administrative Appeal Process and to the Judicial Review of ASCS Decisions* (pt. 2), 36 S.D. L. Rev. 435, 440-56 (1991)[hereinafter Kelley & Harbison](discussing the applicability of *Bowen v. Massachusetts* to the judicial review of federal farm program determinations under the APA). As noted below, even where monetary sums are at issue when, for example, they would be when the nongovernmental litigant challenged the denial of subsidy or grant-in-aid payments, the relief available is confined to declaratory and injunctive relief.

In addition to being unavailable when "money damages" are sought, the APA's judicial review provisions also do not apply when "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2). The latter exception is a narrow one, for the APA permits courts to review an agency's exercise of discretion under the "abuse of discretion" standard. 5 U.S.C. § 706(2)(A). Judicial review is not available under the APA § 701(a)(2) exception only when the applicable statute "`is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *North Dakota ex rel. Bd. of Univ. & School Lands v. Yeutter*, 914 F.2d 1031, 1034 (8th Cir. 1987)(quoting *Webster v. Doe*, 486 U.S. 592, 599-600 (1988)). Also, the Court has held that an agency's refusal to take enforcement actions is presumptively unreviewable under APA § 701(a)(2), *Heckler v. Chaney*, 470 U.S. 821 (1985). *See generally* Ronald Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 687 (1990).

The concept that there are certain exercises of agency discretion that are unreviewable has drawn criticism. For an example, consider the following:

> [T]here is no place for unreviewable discretion in a system such as ours. Provided that the case is justiciable, all discretionary power should be reviewable to determine that the discretion conferred has not been abused. . . . [T]he reviewing court should always be able to determine that the discretion has not been exercised in a manner in which no reasonable administrator would act. To this extent, there is always "law to apply". . . .

Schwartz, *supra*, § 8.11 at 495; *see also* 2 Davis & Pierce, *supra*, § 11.5 at 203 ("A large proportion of administrative law doctrine is explicable principally as a means of furthering a single goal—limiting agency discretion. . . . Congress has delegated vast power to agencies, frequently with little meaningful substantive limit on the exercise of that authority. Distinguished Justices, judges, and scholars have viewed with alarm the existence of agencies with vast discretionary power.")

Finally, agencies cannot seek judicial review of their own decisions. *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129 (1995). Under APA § 702, an agency is not a "person" who can be "adversely affected" or "aggrieved" by its own actions.

A. Primary Jurisdiction and Exhaustion of Administrative Remedies

Judicial review of agency action raises issues of timing. The timing of judicial review involves two doctrines: (1) primary jurisdiction and (2) exhaustion of administrative remedies. Both doctrines involve the reconciliation of the proper roles of agencies and the courts.

1. Primary Jurisdiction

"Primary jurisdiction is a doctrine used by court to allocate initial decisionmaking responsibility between agencies and courts where such overlaps and the potential for conflict exists." 2 Davis & Pierce, *supra*, § 14.1 at 271. If a dispute or an issue in a dispute that is within the primary jurisdiction of an agency is brought before a court, the court will dismiss the action or defer any decision until the issue is resolved by the agency. In other words, "[*t]he primary jurisdiction doctrine means that once an agency is set up and jurisdiction over cases conferred upon it, the agency is automatically vested with exclusive original jurisdiction over those cases. The courts are divested of whatever original jurisdiction they would otherwise possess; their function in the cases concerned is limited to judicial review.*" Schwartz, *supra*, § 8.27 at 527 (emphasis in original). The doctrine does not apply, however, "when the issue involved is purely a legal question and does not involve fact-based matters requiring agency expertise or experience." *Id*. § 8.27 at 529 (citing *Great Northern Railway v. Merchants Elevator Co.*, 259 U.S. 285 (1922)).

The factors guiding application of the primary jurisdiction doctrine have been summarized as follows:

> (1) "the Court should consider whether it is being called upon to decide factual issues not within the conventional experience of judges, or are instead issues of the sort that a court routinely considers"; (2) "the Court should consider whether Defendants could be subjected to conflicting orders of both the Court and the administrative agency"; (3) the court should consider "whether relevant agency proceedings have actually been initiated"; (4) the court should consider "whether relevant agency proceedings have actually been initiated"; and (5) "the Court should consider the type of relief Plaintiffs

> request. Courts refuse to defer jurisdiction if the plaintiff is seeking damages for injury to property or person, as this is the type of relief courts routinely evaluate; however, if the plaintiff seeks injunctive relief, requiring scientific or technical expertise, the doctrine is more readily applicable.

Bernard Schwartz, *Administrative Law Cases During 1995*, 48 Admin. L. Rev. 399, 410 (1995)(footnotes omitted). "However, the key factor is still what it was when the primary jurisdiction doctrine was first announced early in the century: to give effect to `a desire for uniform outcomes.'" Bernard Schwartz, *Administrative Law Cases During 1996*, 49 Admin. L. Rev. 519, 533 (1997)(footnotes omitted).

2. Exhaustion of Administrative Remedies

The exhaustion of administrative remedies doctrine dictates that judicial review of agency action is unavailable unless the affected party has taken advantage of all the corrective procedures provided by the agency. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). The doctrine's "basic proposition is that the courts should not interfere with the job given to an agency until it has completed its work." Schwartz, *supra*, at 542. In other words, the doctrine accomplishes the following purposes:

> (1) preserving the autonomy of the agency by allowing it to apply its expertise and to correct its own errors and by discouraging the deliberate flouting of administrative processes; (2) aiding judicial review by allowing for the development of a factual record; and (3) promoting judicial and administrative efficiency by prohibiting repeated interruptions of agency proceedings and by decreasing the need for judicial decision.

Jersey Shore Broadcasting Corp. v. FCC, 37 F.3d 1531, 1533 (D.C. Cir. 1994).

The doctrine has several pragmatic exceptions, including inadequacy of the administrative remedy and futility. Under the futility exception, exhaustion is not required when the agency's decision can be stated in advance. *See Atlantic Richfield Corp. v. Department of Energy*, 769 F.2d 771, 781 (D.C. Cir. 1984). Exhaustion may also be excused when constitutional issues are raised, *see McCarty v. Madigan*, 112 S. Ct. 1081 (1992), or when the administrative tribunal is biased, *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962). Relying on an exception is risky. Because the United States Supreme Court's "opinions on exhaustion do not form a consistent and coherent pattern" and "are difficult to reconcile," it is "impossible to describe the law of exhaustion in a manner that is both helpful to lawyers and judges and consistent with *all* of the Supreme Court's many exhaustion decisions." 2 Davis & Pierce, *supra*, § 15.2 at 313 (urging that exceptions be considered in light of three factors: "extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction").

When Congress has statutorily required exhaustion, "courts are not free simply to apply the common law exhaustion doctrine with its pragmatic, judicially defined exceptions. Courts must, of course, apply the terms of the statute." *Id*. § 15.3 at 318. Since 1994, a statutory exhaustion requirement has applied to determinations made by the Secretary of Agriculture. 7 U.S.C. § 6912(e). This statutory provision has been explained and applied in *Bastek v. Federal Crop Insurance Corp.*, 145 F.3d 90 (2d Cir. 1998). In *Bastek*, the court ruled that the statute applied to challenges of rules of general applicability, thus requiring an administrative determination that the administrative appeal authority, specifically, the USDA National Appeals Division, did not have jurisdiction before statutory

exhaustion is satisfied. *Id*. at 94. On the other hand, the Fourth Circuit ruled in *Gold Dollar Warehouse, Inc. v. Glickman*, 211 F.3d 93 (4th Cir. 2000), that the statute did not apply to a facial challenge to a USDA regulation. One court has recognized a constitutional exception under this statute, *Gliechman v. United States Dep't. of Agric.*, 896 F. Supp. 42, 45-47 (D. Me. 1995), while another has refused to recognize a statutory interpretation exception. *Calhoun v. USDA Farm Serv. Agency*, 920 F. Supp. 696 (N.D. Miss. 1996). As to constitutional exceptions to statutory exhaustion requirements, the law is summarized in *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989). Other cases addressing the exhaustion requirement under section 6912(e) include *Branstad v. Veneman*, 145 F. Supp.2d 1011 (N.D. Iowa 2001) and *Gilmer-Glenville, Limited Partnership v. Farmers Home Admin.*, 102 F. Supp.2d 791 (N.D. Ohio 2000).

Courts are also constrained by APA § 704 when applying the exhaustion doctrine. In *Darby v. Cisneros*, 509 U.S. 137 (1993), the Court relied on section 704 to hold that when an agency takes otherwise final agency action, a court cannot require the aggrieved party to exhaust *optional* administrative appeals. *Darby v. Cisneros* held that the federal courts could not make exhaustion of available administrative remedies a prerequisite for judicial review of otherwise final agency action unless a statute mandated exhaustion or the agency had promulgated a legislative rule requiring exhaustion and making the adverse determination inoperative pending the administrative appeal.

The statute mandating exhaustion of administrative appeals of USDA decisions, 7 U.S.C. § 6912(e), was a response to the *Darby* decision. From the agency's perspective, a statutory exhaustion requirement is preferable to one imposed by regulation because the agency does not have to make its decisions inoperative pending completion of the administrative appeal process.

B. Finality and Ripeness

Judicial review is only available for "final agency action." 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). In other words, the agency's action must have "ripened" to finality. While the distinctions between finality and ripeness are often blurred, "ripeness" requires a court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In broad terms, "[t]he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Port of Boston Marine Terminal v. Rederiaktiebolaget*, 400 U.S. 62, 71 (1970). Ripeness issues typically arise in action for pre-enforcement review of agency rules, *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967), and the lack of "ripeness" has been used to deny review of agency "programs." *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

C. Jurisdiction and Scope of Review

The APA does not confer jurisdiction on a court; instead, it waives the government's sovereign immunity. *Califano v. Sanders*, 430 U.S. 99 (1977). Jurisdiction must be found elsewhere. In some instances, jurisdiction is conferred on a circuit court. If a statute provides for review in a circuit court, that grant of jurisdiction is exclusive. *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411 (1965). For example, the Hobbs Administrative Review Act, 28 U.S.C. §§ 2342-2350, confers exclusive jurisdiction on particular courts of appeal to review certain determinations made by several major agencies, including the USDA. With respect to the USDA, however, the Act applies only to

decisions made by the USDA's Judicial Officer; it does not apply to decisions made by the Director of the USDA National Appeals Division.

In the absence of a statute providing for a review in a federal circuit court, the general federal question statute, 28 U.S.C. § 1331, confers on federal district courts the authority to review reviewable agency actions. In some instances, another statute, such as 28 U.S.C. § 1337, may apply.

The APA does not provide a time limit for seeking review. The Hobbs Administrative Review Act, however, requires the filing of the petition for review within sixty days of the agency's final order. 28 U.S.C. § 2344. When actions are brought under general federal question jurisdiction, the time limit is imposed by either the agency's organic legislation or the general federal statutes of limitation.

Venue may be established specifically by statute or by the general venue statutes. Under the Hobbs Administrative Review Act, venue is in the judicial circuit in which the petitioner resides or has its principal office or in the United States Court of Appeals for the District of Columbia. 28 U.S.C. § 2343. Under the general venue statute applicable to the federal district courts, 28 U.S.C. § 1391(e), there may be a choice of venue—either in the District of Columbia, where the agency head resides, in the state where the cause of action arose, or in the state where the plaintiff resides.

Declaratory judgments and injunctions are the most common forms of action in the absence of a specific statutory remedy. *See Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1320 (7th Cir. 1995) ("In the federal system, when no specific method of obtaining judicial review of final orders by administrative agencies is prescribed by statute, an aggrieved party can still obtain judicial review, by bringing a declaratory or injunctive suit against the agency."). However, the Declaratory Judgments Act, 28 U.S.C. § 2201, 2202, "does not itself confer jurisdiction on a federal court where none otherwise exists." *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 822 (10th Cir. 1981) (citations omitted). While the federal courts have the inherent authority to grant injunctive relief, the APA authorizes injunctive relief pending judicial review. 5 U.S.C. § 705; *see Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

The APA provides the applicable scope of review. The text of the APA's standards of review should be reviewed carefully. The pertinent APA provision is 5 U.S.C. § 706:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall —
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

D. Elements of Judicial Review

1. The Agency's Advantage

The APA's scope of review favors the agency. Moreover, agency action is presumed valid on judicial review. *See, e.g., Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976)(*en banc*). Thus, the burden is on the challenger. *Maryland-National Capital Park and Planning Comm'n v. Lynn*, 514 F.2d 829, 834 (D.C. Cir. 1975).

2. Review on the Record

Judicial review of agency action is generally confined to a review of the administrative record. In other words, "[t]he reviewing function is one ordinarily limited to consideration of the decision of the agency . . . and of the evidence on which it was based." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15 (1963). This rule is not absolute, but the exceptions are limited. *See generally* Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record,"* 10 Admin. L.J. 179 (1996); Stephen Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 Admin. L. Rev. 333 (1984). "Evidence may not be received by the reviewing court even if it was wrongfully excluded by the agency or is newly discovered evidence. If the court feels that such evidence should be heard, it should remand the case for it to be received before the agency." Schwartz, *supra*, § 10.2 at 628.

Review is not confined to the record evidence supporting the agency's decision. Instead, the court must review the "whole record." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). This does not mean that the entire record must be submitted to the reviewing court. APA § 706 expressly provides that "the court shall review the whole record or *those parts of it cited by a party*. . . ." 5 U.S.C. § 706 (emphasis supplied).

Review is limited to the issues raised before the agency, however. *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961). *But see Sims v. Apfel*, 530 U.S. 103, 111-12 (2000)(ruling that under existing Social Security regulations and instructions, claimants need not raise an issue before the Appeals Council to raise it on judicial review). This means that the practitioner must develop every factual and legal issue in the record made before the administrative agency with a view toward ultimately arguing, if the administrative appeal is unsuccessful, that the agency's decision was unlawful under one or more of the standards established by APA § 706.

The obligation to raise all issues before the agency is related to the exhaustion of administrative remedies doctrine and may also apply to agency rulemaking. *See National Resources Defense Council, inc. v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987). The availability of the rulemaking petition under APA § 553(e) has been used defensively by the government. *Gage v. Atomic Energy Comm'n*, 479 F.2d 1214 (D.C. Cir. 1973).

Under *SEC v. Chenery*, 318 U.S. 80, 87 (1943), "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." "Even if

the court can uphold the agency on other grounds, it may not do so. The rationale of the *Chenery* rule is that a reviewing court cannot be sure that the agency would have acted for any other reason than on which it relied." Schwartz, *supra*, § 10.4 at 631 (citing *Time, Inc. v. Postal Serv.*, 667 F.2d 329, 335 (2d Cir. 1981).

3. "Arbitrary or Capricious"

The "arbitrary or capricious" standard applies to judicial review of informal rulemaking and adjudication. Formal rulemaking and adjudication is subject to review under the "substantial evidence" standard. 5 U.S.C. § 706(2)(E).

Under the "arbitrary or capricious" standard, the judicial review of agency action is for "reasonableness," not "correctness." So long as the agency's determination is reasonable, it must stand. The court cannot substitute its judgment for that of the agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S.402, 416 (1971). The court, however, cannot supply a reasoned basis where the agency has failed to do so, *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983), and government counsel is not permitted to do so through post hoc rationalizations, *id*. at 50.

At an early point in the development of administrative law, review for "reasonableness" under the "arbitrary or capricious" standard was essentially the same as review for a "rational relation" under the Fourteenth Amendment. 2 Davis & Pierce, *supra*, § 11.4 at 200 (citing *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935)). When equated with the "rational relation" test, "the arbitrary and capricious test demands virtually nothing of an agency except a lawyer with enough creativity to identify a plausible justification for a rule based on a plausible pattern of facts." 1 *id*. § 7.4 at 311. The two tests are no longer the same, for "[t]he court explicitly rejected use of this version of the [arbitrary or capricious] test in 1983 in the context of statutory review of agency findings of fact." 2 *id*. § 11.4 at 201 (citing *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Court's decision in *State Farm* essentially reformulated the "hard look" doctrine that lower courts had developed and applied in varying degrees in the late 1970s. The "hard look" doctrine has two components. "First, the court insures that *the agency* has taken a "hard look" at the problem. . . . Second, the court takes a "hard look" at the substance of the decision under review. . . ." Bonfield & Asimow, *supra*, at 621-22.

Under the first component, the court must hold agency action arbitrary and capricious if:

> the agency has relied on factors which the Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, 463 U.S. at 43. Under the second component, "[t]he court's scrutiny is more exacting if it detects `danger signals' that something may be amiss: for example, if the court suspects undue bias toward a private interest, the agency has a history of ad hoc and inconsistent judgments on the question, or the agency's result departs without explanation from its long-standing precedents." Bonfield & Asimow, *supra*, at 622 (citing *Natural Resources Defense Council, Inc. v. SEC,* 606 F.2d 1031, 1050 (D.C. Cir. 1979)).

Review under the "arbitrary or capricious" standard, even under the "hard look" doctrine, remains a review for reasonableness. The agency's action must be reasonable in two respects:

- First, the reasonableness standard measures the adequacy of the agency's evidentiary support for its findings. *See* 2 Davis & Pierce, *supra*, § 11.4 at 203. "The agency, not the court, is the trier of fact; and the review function is exhausted when it is determined that the agency could reasonably find the facts as it did." Schwartz, *supra*, § 10.8 at 642 (footnote omitted). The reasonableness standard also applies to inferences drawn from facts. If the inference is has a reasonable evidentiary basis, the inferred fact must be accepted. On the other hand, where an inference has no evidentiary basis, it is arbitrary and capricious. *Doty v. United States*, 53 F.3d 1244, 1252 (Fed. Cir. 1995).

- Second, "an agency must engage in `reasoned decisionmaking,' defined to include an explanation of how the agency of how the agency proceeded from its findings to the action it has taken." 2 Davis & Pierce, *supra*, § 11.4 at 203 (relying on *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974)).

With respect to the "arbitrary or capricious" standard's role in the review of findings of fact, confusion over the distinctions between the "substantial evidence" standard and the "arbitrary or capricious" standard has resulted in differing expressions of the required evidentiary basis for findings of fact. The Court has characterized the "arbitrary or capricious" standard as "more lenient" than the "substantial evidence" standard. *American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 413 n.7 (1983). Recognition of this distinction produced the following explanation of the required evidentiary basis for findings of fact:

> To be sure, an agency determination must have *some* evidentiary basis to avoid being held "arbitrary and capricious." The difference between "some" and "substantial" probably cannot be precisely stated except in the context of particular cases. . . . The difference may go more to atmospherics than to the patently demonstrable although, as indicated, certain cases may show the difference more palpably than others.

2 Davis & Pierce, *supra*, § 11.4 at 202 (quoting *Aman v. FAA*, 856 F.2d 946, 950 n.3 (7th Cir. 1983)).

The Tenth Circuit in *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994), explained the application of the APA's "arbitrary or capricious" standard somewhat differently. Relying on an opinion by then-Judge Scalia, it described a convergence between the two standards:

> In addition to requiring a reasoned basis for agency action, the "arbitrary or capricious" standard requires an agency's action to be supported by the facts in the record. In reviewing the administrative record for factual support, we adopt the analysis articulated by then-Judge Scalia in *Ass'n of Data Processing v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984), and rule informal agency action will be set aside as arbitrary if it is unsupported by "substantial evidence." This is not to substitute the "arbitrary or capricious" standard applicable to informal agency action under § 706(A)(2) with the arguably more stringent standard of review applicable to formal agency action under § 706(2)(E). It is simply an acknowledgment that
>
> > "[w]hen the arbitrary or capricious standard is performing the function of assuring factual support, there is no *substantive* difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a `nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense."

> *Id*. at 684 (emphasis in original). Evidence is substantial in the APA sense if it is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn is one of fact." *Id.* (quoting *Illinois Central R.R. v. Norfolk & Western Ry.*, 385 U.S. 57, 66 (1966)).

Id. at 1575 (footnote omitted).

Testing the lawfulness of agency behavior under a "reasonableness" standard is deferential to agencies. "Reasonableness" as a standard extends to mixed questions of law and fact, including the application of a statutory term such as "employee" to a particular individual. *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944). Statutory interpretations are now measured by a reasonableness standard under the *Chevron* doctrine discussed below.

4. "Substantial Evidence"

Under APA § 706(2)(E) findings of fact made in formal rulemaking and adjudication are tested under the "substantial evidence" standard. Given the overall theme of "reasonableness" in the judicial review of agency action, it should not be surprising to see the "substantial" evidence standard defined as follows: "The substantial evidence rule under the Administrative Procedure Act tests the rationality of agency findings of fact, taking into account all of the evidence on both sides." Schwartz, *supra*, § 10.8 at 640-41. "The substantial evidence test presupposes that there is a zone of choice for the agency decisionmaker; it is a test of *reasonableness*, not of the *rightness*, of agency findings of fact. The question under it is whether the evidence is such that reasonable minds could have reached the agency's conclusion." *Id*. § 10.8 at 641 (footnotes omitted). Stated somewhat more fully, the test is as follows:

> if the evidence is overwhelmingly against the agency finding, it should not be upheld. In such a case, the finding is not only not *right*; it is not *reasonable*. But if the case is a close one, with strong evidence on both sides, there is room for a reasonable difference of opinion. A finding either way would be reasonable, and the agency must be upheld even if the judge would have found the other way.

Id. § 10.9 at 643.

In *American Paper Institute v. American Electric Power Serv. Corp.*, 461 U.S. 402, 412 n.7 (1983), a unanimous Court characterized the arbitrary or capricious test as "more lenient" than the "substantial evidence" test. If there is a difference between the "arbitrary or capricious" and the "substantial evidence" tests, however, the Court has never explained what that difference is. 2 Davis & Pierce, *supra*, § 11.4 at 202. Therefore, "[c]ircuit courts frequently treat the two tests as identical, referring to their `tendency to converge' and to the distinction between the two as `largely semantic.'" *Id*. (citations omitted). Professors Davis and Pierce rely on *Aman v. FAA*, 856 F.2d 946, 950 n.3 (7th Cir. 1983) as "describ[ing] the effect of the putative distinction between the two tests as well as anyone. . .":

> To be sure, an agency determination must have *some* evidentiary basis to avoid being held "arbitrary and capricious." The difference between "some" and "substantial" probably cannot be precisely stated except in the context of particular cases. . . . The difference may go more to atmospherics than to the patently demonstrable although, as indicated, certain cases may show the difference more palpably than others.

Id. Notwithstanding the Court's decade-old assertion that the "arbitrary or capricious" test is somehow "more lenient" than the "substantial evidence" test, Professors Davis and Pierce conclude that "[i]f a difference exists, it is too subtle to explain in a manner that is useful to agencies, courts, or practitioners." *Id*. § 11.4 at 200.

Since the "substantial evidence" test applies to judicial review of formal agency adjudications and rulemaking, the issue of the weight to be given to ALJ findings of fact occasionally arises. The issue arises because formal agency decisions are often preceded by hearings before an ALJ. The agency may or may not accept the ALJ's findings of fact. If the agency's decision rejects the ALJ's findings of fact and adopts its own findings, it is the agency's findings that are due deference on judicial review. 2 Davis & Pierce, *supra*, § 11.2 at 178 (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), and *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955)). The ALJ's findings cannot bind the agency because APA § 557(b) provides that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision. . . ." 5 U.S.C. § 557(b). The reviewing court is permitted to take into account the ALJ's contrary findings for it must consider the whole record, not just those portions of the record supporting the agency's decision. Also, when credibility is at issue, the ALJ's findings may be given special weight because the ALJ conducted the hearing and observed the demeanor of the witness. *Butler-Johnson Corp. v. NLRB*, 608 F.2d 1303, 1305 (9th Cir. 1979). These principles are summarized as follows:

> The final distillation is that the primary factfinder is the agency, not the ALJ; that the agency retains "the power of ruling on facts . . . in the first instance"; that the agency still has "all the powers which it would have in making the initial decision"; that the ALJ is a subordinate whose findings do not have the weight of the findings of a district judge; that the relation between the ALJ and agency is not the same as or even closely similar to the relation between agency and reviewing court; and that the ALJ's findings are nevertheless to be taken into account by the reviewing court and given special weight when they depend upon demeanor of witnesses. The court reviews the agency's determination, not that of the ALJ. But in reviewing the agency's determination, the court may take into account the ALJ's determination, giving special weight to the ALJ's report on the demeanor of witnesses.

2 Davis & Pierce, *supra*, § 11.2 at 181.

5. "Abuse of Discretion"

The APA provides that reviewable exercises of discretion are review under the "abuse of discretion" standard. 5 U.S.C. § 706(2)(A). Discretion can be abused in many ways. For example, an explained departure from agency precedent is an abuse of discretion. "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Similarly, "[t]here may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964), *rev'd on other grounds*, 382 U.S. 46 (1965).

Other forms of agency inconsistency may be either an abuse of discretion, including treating similarly situated parties differently without a reasonable basis for doing so. *Golightly v. Yeutter,* 780 F. Supp. 672 (D. Ariz. 1991). Actions based on an improper purpose, erroneous and extraneous

considerations, and inaction or delay may also be an abuse of discretion. Schwartz, *supra*, § 10.6 at 656. The standard is "reasonableness."

6. *Chevron* Deference

The "*Chevron* deference doctrine" is problematic for the nongovernmental litigant. Deference is problematic because Congress rarely enacts unambiguous statutes, and, under the doctrine, the "rule" is that reasonable agency interpretations of ambiguous statutes prevail:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

The *Chevron* deference doctrine runs counter to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803), where the Court announced that “[i]t is emphatically the province and duty of the judicial department to say what the law is." Moreover, the APA provides that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The Court, however, justified the doctrine on democratic principles. According to the Court, if Congress left "gaps" in its statutes, the executive branch with an elected President overseeing its actions was more "accountable to the people" than the unelected judiciary. *Chevron*, 467 U.S. at 865-66.

Not surprisingly, the *Chevron* deference doctrine has been widely criticized. For many years, Senator Dale Bumpers (D. AR) has tried unsuccessfully to amend the APA to prohibit judicial deference to agency interpretations of law. *See generally* James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. Cin. L. Rev. 739 (1980). Apart from the doctrine's merits or demerits from a jurisprudence perspective, the doctrine has political utility. When Congress is controlled by one political party and the executive branch is controlled by another party, the executive branch can use the doctrine to diminish the impact of legislation for the doctrine allows the executive branch to put its own "spin" on ambiguous legislation.

Arguably the deference doctrine was tempered somewhat in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987), where the Court implied that deference did not apply to "a pure question of statutory construction." Yet *Chevron* appears to remain alive and well, and the vitality of *Cardoza-Fonseca* is questionable. Schwartz, *supra*, § 10.35 at 705 (citing a later decision, *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112 (1987), for the proposition that *Chevron* deference must be applied to "`a pure question of statutory interpretation,' as well as to `the application of a `standar[d] . . . to a particular set of facts'" (footnote omitted)).

As discussed earlier in this outline with regard to interpretive rules, deference must also be given to an agency's interpretation of its ambiguous regulations. *Udall v. Tallman*, 380 U.S. 1, 16-17

(1965). The following expression of the standard is typical: "We accord an agency's interpretation of its own regulations a `high level of deference,' accepting it `unless it is plainly wrong.'. . . Under this standard, we must defer to an agency interpretation so long as it is `logically consistent with the language of the regulations and . . . serves a permissable regulatory function.'" *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995)(quoting *General Carbon Co. v. OSHRC*, 860 F.2d 479, 483 (D.C. Cir. 1991), and *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991))(other citations omitted).

Scores of law review and other articles have addressed the deference doctrine. Because the deference doctrine is not consistently applied by the Court and lower courts, a few articles have focused on the "exceptions" to the *Chevron* doctrine. *E.g.,* Timothy B. Dyk & David Schenck, *Exceptions to Chevron*, Admin. L. News, Winter 1993, at 1, 16 (concluding that the "exceptions" "reflect a desire to limit *Chevron* in accordance with its original justifications to those situations in which the agency has legitimate expertise, where congressional delegation may be appropriately inferred, and where the agency interpretation is likely to constitute a good faith effort to implement the overall congressional design").

Because the deference doctrine arises frequently in actions for judicial review of agency action, a careful reading of Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992)[hereinafter Merrill], and Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 Ariz. St. L.J. 109 (1991), is highly recommended. Professor Merrill's article examines the nuances of the "*Chevron* doctrine" and the United States Supreme Court's inconsistent application of it. Among other points made by Professor Merrill, his article observes:

> Although the *Chevron* opinion purports to describe a universal standard by which to determine whether to follow an administrative interpretation of a statute, the two-step framework has been used in only about one-third of the total post-*Chevron* cases in which one or more Justices recognized that a deference question was presented. Although *Chevron* began to be used more frequently after the 1987 Term, it is still far from the monolithic norm the opinion seems to describe. If we look solely at the 1987-90 period, the two-step framework was still applied in only half of the deference decisions.

Merrill, *supra*, at 982-83 (footnotes omitted).

Of course, even if the Supreme Court appears at times to be unconstrained by *Chevron*, the lower courts do not have that option. When faced with a legislative rule interpreting an ambigous statute that adversely affects the nongovernmental litigant, counsel for the nongovernmental litigant is not likely to convince a lower court to ignore *Chevron*. Instead, once the court has reached the second step in the two-step *Chevron* process, the nongovernmental litigant is essentially confined to arguing that the interpretation is unreasonable or, more precisely, that the interpretation is an impermissible construction of the statute.

Professor Weaver's article catalogs multiple ways in which deference to regulatory interpretations might be avoided. These include (1) challenging the substantive or procedural validity of the regulation; (2) questioning the need for interpretation; (3) questioning the propriety of deference (i.e., the matter is properly within the province of the courts); (4) arguing that the "interpretation" is, in effect, an attempt to amend the regulation without complying with APA rulemaking procedures; (5) arguing that the interpretation was not rendered by an official deserving of deference; (6) challenging the interpretation as being one that is inconsistently applied; and (7) arguing that the interpretation is

being retroactively applied. Because of its exhaustive treatment of possible ways to avoid application of the deference doctrine, Professor Weaver's article should be a part of every nongovernmental litigant's law library. *See also* Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. Cin. L. Rev. 682 (1984).

One of the foregoing grounds offered by Professor Weaver for seeking to avoid deference to a regulatory interpretation is inconsistency. The basic principle is that agencies must apply their rules consistently. *See, e.g., Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964)("There may not be a rule for Monday, another for Tuesday, a rule of general application, but denied outright in a specific case."), *rev'd on other grounds*, 382 U.S. 46 (1965). This principle, however, must not be confused with the right of agencies to change their minds when they have a reasonable basis for doing so:

> [T]he fact that the Secretary is now advocating a position that is inconsistent with his past interpretation does not allow this Court simply to discount his current position. Quite the contrary, in *Rust v. Sullivan*, 500 U.S. 173, 186-87, 111 S.Ct. 1759, 1768-69, 114 L.Ed.2d 233 (1991), the Supreme Court held that an agency may change its interpretation of a statute so long as its position is reasonable and does not conflict with congressional intent. Specifically, the Court rejected the argument that "an agency's interpretation `is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." *Id*. at 186, 111 S. Ct. at 1769 (quoting *Chevron*, 467 U.S. at 862, 104 S. Ct. at 2791). The Court went on to hold "that a revised interpretation deserves deference because `[a]n initial agency interpretation is not instantly carved in stone' and `the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.'" *Id*. (quoting *Chevron*, 467 U.S. at 863-64, 104 S. Ct. at 2792); *see also Garrett v. Lyng*, 877 F.2d 472, 476 (6th Cir. 1989)(so long as agency remains within the bounds established by Congress, it may reformulate its interpretations in light of political philosophy of the current administration). Therefore, the fact that the Secretary's interpretation may be different from that followed in the past is irrelevant so long as the current interpretation is reasonable and does not conflict with the unambiguously expressed intent of Congress.

Lansing Dairy, Inc. v. Espy, 39 F.3d 1339, 1354 (6th Cir. 1994), *cert. denied*, 516 U.S. 806 (1995) (footnote omitted). According to the Sixth Circuit in *Lansing Dairy*,

> Justice Scalia aptly summed up this principle in a lecture he gave at the Duke University School of Law.
>
> > The theory that judicial acquiescence in reasonable agency determinations of law rests upon real or presumed legislative intent to confer discretion has certain consequences which the courts do not yet seem to have grasped. For one thing, there is no longer any justification for giving "special" deference to "long-standing and consistent" agency interpretations of law. That venerable principle made a lot of sense when we assumed that both court and agency were searching for the one, permanent, "correct" meaning of the statute; it makes no sense when we acknowledge that the agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose. Under the latter regime, there is no apparent justification for holding the agency to its first answer, or penalizing it for

> a change of mind. Indeed, it seems to me that such an approach would deprive *Chevron* of one of its major advantages from the standpoint of governmental theory, which is to permit needed flexibility, and appropriate political participation, in the administrative process. One of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change.

Id. at 1354 n.3 (quoting Antoin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 517 (1989)).

Finally, note should be made about the distinctions and the relationships among "outcome," "procedure," and "process" in the application of the *Chevron* doctrine. Indeed, courts and commentators are recognizing the linkages. For example, Professor Gary Lawson asserts:

> A court reviewing an agency decision can evaluate at least three aspects of the decision: the agency's decisionmaking *outcome*, the agency's decisionmaking *procedure*, and the agency's decisionmaking *process*. A defect in the outcome, the procedure or the process can be an independently sufficient ground to prevent affirmance of the agency decision.

Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 Rutgers L. Rev. 313, 316 (1996).

According to Professor Lawson, a legal test for evaluating an agency decision's "outcome" focuses on *what* the agency concluded. He invokes the "substantial evidence" standard of APA § 706(2)(E) as an example of an outcome test. Under that standard, the only inquiry is whether the quantity of factual support needed to satisfy the standard appears in the formal record. No inquiry is made into how or why the agency's decision was made. *Id*. at 316-18.

Procedural tests, on the other hand, focus on *how* the agency reached its decision, not on the substantive merits of the decision. If an agency fails to follow a required procedure, that failure can be an independent ground for setting aside the decision. *Id*. at 318.

Process tests focus on *why* the agency reached the conclusion it did. Such tests are distinguished from procedure tests because the focus on the reasoning process on which the decision was based. *Id*.

Professor Lawson offers the "arbitrary or capricious" standard under APA § 706(2)(A) as an example of a process test. Indeed, the "arbitrary or capricious" standard has at least two functions; accordingly, it can be both an outcome test and a process test:

1. "In some contexts, this provision serves as an outcome test, it requires, for example, that an adequate quantum of evidence support factual conclusions in informal proceedings, to which the substantial evidence test generally does not apply"; and

2. "[T]he `arbitrary or capricious' test regulates an agency's *decisionmaking process* by ensuring that the agency reaches its conclusions through a rational decisionmaking mechanism," thus making it a process test.

Id. at 318-19 (footnotes omitted)(Professor Lawson also contends that the "arbitrary or capricious" standard can be a procedural test when used to test the procedures used by an agency that were not required by law, but he concedes this use will be rare in light of the Court's ruling in *Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978) that agencies are free to fashion their own procedures "[a]bsent . . . extremely compelling circumstances." *Id*. at n.19).

Professor Lawson characterizes *Chevron* as an outcome test analogous to the "substantial evidence" standard. *Id*. at 325-26. He states that "*Chevron* review judges the relationship between an agency's interpretation of a statute and the court's understanding of the statute's meaning. The agency interpretation must stand if it is a reasonable fit with the statute, even if it is not, in the court's judgment, an ideal fit." *Id*. (footnote omitted). Under *Chevron*, the court need not examine how or why the agency reached its interpretation.

According Professor Lawson, the fact that the *Chevron* test is an outcome test does not mean that *how* or *why* the agency reached its interpretation is irrelevant. To the contrary, the agency must still show, under the APA, that its decision was not arbitrary or capricious:

> A moment's reflection will indicate how arbitrary or capricious review supplements *Chevron* review. *Chevron* review does not require the agency to select the best possible interpretation of a statute, but only an interpretation that is within a zone of reasonableness. Consequently, many interpretations of a single statute often will pass the *Chevron* test. The agency can choose any of those permissible interpretations and survive *Chevron* review. The agency's selection of one of the permissible interpretations, however, does not end the judicial review process. The parties are still entitled to ask the agency why it chose that interpretation rather than one of the other permissible interpretations. The agency is not entitled to choose a substantively permissible interpretation for an impermissible—that is, arbitrary or capricious—reason. Under the general requirement that agencies justify their exercises of discretion, the agency must explain how it made its choice from among permissible alternatives. The agency's interpretation must actually be reasonable to survive *Chevron's* outcome test and must have been chosen by reasonable means to satisfy the arbitrary or capricious standard's process test.

Id. at 327.

Since an agency's decision is subject to challenge under any available outcome test, procedure test, and process test, Professor Lawson argues that it must survive under any and all such tests to be upheld, even where *Chevron* review applies. Moreover, the "hard look" doctrine of judicial review applies. In this regard, Professor Lawson offers the following summary of what is required from a court reviewing an agency interpretation of a statute that it administers:

> Ensure that the agency provided all *procedures* required by law. Then ask, pursuant to *Chevron*, if the agency's *outcome* is a reasonable "fit" with the statute. Do not require the agency's interpretation of the statute to be *correct* (as determined by whatever theory of statutory interpretation the court employs), but rather require that the conclusion be one that a reasonable person could reach. If the agency's interpretation satisfies this deferential outcome test, then ask whether the *process* by which the agency reached that conclusion was "arbitrary" or "capricious." A nonarbitrary, noncapricious process must at least attempt to determine the correct interpretation of

> the statute. Require the agency to explain how it tried to reach a conclusion using traditional tools of statutory interpretation. Generously defer to the agency's indentification and application of the relevant interpretative tools, but ensure that the agency sincerely attempted to use actual interpretative tools. If, but *only* if, the agency genuinely and reasonably concludes that traditional tools of statutory interpretation are ineffective in this case, allow the agency to employ considerations of policy in resolving the matter. Review of these considerations should follow the traditional "hard look" approach: ensure that the agency identifies and articulates the factors that it considers and the assumptions that it makes; determine (with an appropriately deferential attitude) if those factors and assumptions are substantively rational; and ensure that the agency applied its articulated considerations reasonably, logically and consistently.

Id. at 331.

In their 2000 Supplement to their treatise, Professors Davis and Pierce point out the relationship between *Chevron* and the requirement of "reasoned decisionmaking" imposed by the Court in *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983), and describe that relationship in a manner that bears a marked resemblance to Professor Lawson's assessment. While Professor Lawson sees the "reasoned decisionmaking" requirement as separate from step two in *Chevron*, Professors Davis and Pierce see a complete overlap between step two in *Chevron* and *State Farm*:

> In both cases the issue is the reasonableness of an agency's interpretation of ambiguous language in a statute. In both cases, the criteria relevant to answering the question are the same: (1) whether the agency adequately discussed the plausible alternatives, (2) whether the agency adequately discussed the relationship between the interpretation and pursuit of the goals of the statute, (3) whether the agency adequately discussed the relationship between the interpretation and the structure of the statute, including the context in which the language appears in the statute, and (4) whether the agency adequately discussed the relationship between the interpretation and any data available with respect to the factual predicates for the interpretation. The tests are the same whether the analysis is stated with reference to *Chevron* or *State Farm*.

1 Davis & Pierce, *supra*, § 7.4 at 264 (Supp. 2000).

Much more could be said about *Chevron* — after all, it "is still the administrative law doctrine of the hour." Bernard Schwartz, *Administrative Law Cases During 1996*, 49 Admin. L. Rev. 519, 541 (1997). For the nongovernmental litigant facing the need to challenge an agency's interpretation of a statute that the agency administers, prevailing at step one in the two-step *Chevron* analysis is almost always going to be the goal. That is, the party challenging the interpretation will strive to establish that the statute addresses the precise matter at issue in that party's favor, thus there is no need for an interpretation. Otherwise, as Professor Schwartz bemoans, *Chevron* deference presents the risk that if an agency "calls a tail a leg, the tail apparently *does* become a leg." *Id*. at 544 (criticizing the application of *Chevron* deference in *Smiley v. Citibank*, 517 U.S. 735 (1996)).

7. Relief

Also problematic for the nongovernmental litigant is the relief the court can ordered. The nongovernmental litigant's goal is to obtain a "closed" remand, i.e., a remand instructing the agency

how to decide the matter. The alternative is an "open" remand that permits the agency to fully reconsider the matter.

> A reviewing court can order an agency to provide the relief it denied only in the unusual case where the court concludes that the underlying law and facts are such that the agency has no discretion to act in any other manner, and then only when the court concludes that a remand to the agency would produce substantial injustice in the form of further delay of the action to which the petitioner is clearly entitled. This extreme judicial reluctance to order an agency to award substantive relief it previously denied is based on the same considerations that underlie the doctrines of primary jurisdiction, exhaustion, ripeness, and finality. . . .

3 Davis & Pierce, *supra*, § 18.1 at 163-64. *See also Faucher v. Secretary of Health & Human Services*, 17 F.3d 171, 176 (6th Cir. 1994).

In either case, "money damages" are not available under the APA's waiver of sovereign immunity. For this reason, care must be taken in the drafting of the complaint. A complaint that seeks a monetary sum instead of a declaration that the agency's action was unlawful runs the risk of being treated as an action under the "Little" Tucker Act, 28 U.S.C. § 1346(a)(2), or the "Big" Tucker Act, 28 U.S.C. § 1491(a)(2). Under the Tucker Act, the federal district courts and the United States Court of Federal Claims have concurrent jurisdiction over contract claims not subject to the Contract Disputes Act seeking sums up to $10,000. Claims seeking more than $10,000 must be brought in the Court of Federal Claims. For a more detailed discussion of the Tucker Act and its applications to USDA determinations, see Kelley & Harbison, *supra*, at 439-60.

If the Secretary is ultimately obligated to pay commodity program benefits that had been denied or paid and offset, the Prompt Pay Act, 31 U.S.C. §§ 3901 - 3907, may require the payment of interest. For a discussion of the Prompt Pay Act's requirements with respect to denied farm program payments, see *Doty v. United States*, 109 F.3d 746 (Fed. Cir. 1997).

8. Attorney Fees

Attorney fees and litigation expenses may be awarded to the prevailing nongovernmental litigant under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. An individual applicant's net worth cannot exceed $2,000,000, and the government's position cannot have been "substantially justified." The "substantially justified" standard is essentially a "reasonableness" standard. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Attorney fees may also be denied if "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Prevailing parties in formal adjudications are also entitled to attorney fees under substantially similar provisions. 5 U.S.C. § 504. Helpful discussions on the EAJA and other fee-shifting statutes can be found in Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct*, 56 La L. Rev. 1 (1995)(pt. 1), 55 La. L. Rev. 217 (1994)(pt. 2); Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 Ariz. St. L.J. 733 (1993).

In 1996, Congress amended the EAJA to require the award of attorney fees to certain nonprevailing "small entities" if the demand by the agency is substantially in excess of, and is unreasonable when compared with, the decision of the adjudicative officer or the court. The new provisions are complex, but an excellent discussion of them is found in James M. McElfish, Jr., *Fee Simple? The 1996 Equal Access to Justice Act Amendments*, 26 Envtl. L. Rep. 10569 (1996).

9. Unintended Consequences

Sometimes an action for judicial review of an agency decision will prompt the government to take action that it might not otherwise have taken against the plaintiff. For example, in actions for the judicial review of federal farm program determinations, the government has counterclaimed under the False Claims Act, 31 U.S.C. §§ 3729-3732 (1994). *See, e.g., Baldridge v. Hadley*, 491 F.2d 859 (10th Cir. 1974). The False Claims Act permits the recovery of treble damages and statutory penalties of not less than $5,000 nor more than $10,000 for each false claim for government benefits. 31 U.S.C. § 3729. Such a counterclaim greatly increases the stakes for the plaintiff.

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