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Administrative Law: Judicial Review - Reflections on the Proper Relationship between Courts and Agencies

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ADMINISTRATIVE LAW: JUDICIAL REVIEW—REFLECTIONS ON THE PROPER RELATIONSHIP BETWEEN COURTS AND AGENCIES

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Since the inception of the nation, the legislative and executive branches of government in this country have found it necessary to delegate substantial power to administrative agencies in order to solve a wide range of problems.[1] Throughout this period, the courts have played an important role in insuring that these delegates of administrative authority perform their functions as envisioned by the creating entity without straying beyond the limits of their authority or abusing the sometimes broad discretion afforded them.[2] The relationship between the judiciary and the agencies has been a changing one, and recently the courts have exhibited an inclination to assume a more active role in reviewing the substance of agency decisions.[3] This changing relationship and the judicial attitudes effecting it constitute the major focus of this survey of administrative law cases issued by the United States Court of Appeals for the Seventh Circuit during its 1980-81 term.

A variety of reasons have been offered for the creation of administrative agencies.[4] In the case of some quasi-adjudicatory agencies, such as the Social Security Administration, the agency is created in part to relieve the courts of the overwhelming workload caused by burgeoning litigation in a specific area.[5] In addition, an agency may be given responsibility to pursue and foster policies which the legislature believes

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1. K. DAVIS, ADMINISTRATIVE LAW TEXT 26 (3d ed. 1972).

2. *See generally* Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

3. *See, e.g.*, Weyerhaeuser Corp. v. Costle, 590 F.2d 1011 (D.C.Cir. 1978); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); Industrial Union Dep't v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973). *See also* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.01-2 (Cum. Supp. 1980).

4. *See* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 2-7 (6th ed. 1974).

5. *See id.* at 7.

would receive less favorable treatment from the judiciary.[6] In some cases, the legislature delegates responsibility for a given area of public concern to a body of experts whose specialization, experience and training better enable them to deal with complex or technical problems.[7] In many cases, treatment of a problem is necessary but not possible if left to the traditional branches of government.[8] Similarly, some areas of regulation require continuous, daily attention for which the legislatures and courts are ill-equipped.[9] Regardless of the specific reason or reasons in a given case, agencies are created to deal with problems of public concern which cannot be handled effectively by our traditional branches of government.[10]

Although the administrative entity is a practical necessity in many situations, it is not free to operate without limitation. In addition to the strictures imposed by our federal and state constitutions, most enabling statutes confine the agency to a given area of activity. Although the agency's authority to act within that area might appear to be quite broad, the exercise of agency discretion is often subject to judicial review as provided in the enabling legislation.[11] In some situations, the courts have accorded agency decisions great deference, while in others the courts have been inclined to scrutinize closely agency action.

In recent years, the judiciary has exhibited a growing willingness to engage in a thorough and searching analysis of the substance of agency decisions, even those involving technical and complex matters previously believed best left to the agency experts.[12] This trend is due in some measure to the impact of certain decisions of the United States Supreme Court.[13] Nevertheless, increasing judicial willingness to question agency decisions has undermined the precedential value of older, previously unassailed Supreme Court decisions[14] and has caused a growing tension between the agencies and the courts.[15] A large portion of this article is devoted to a survey of cases issued by the Seventh

6. *See id.*
7. *See id.* at 5.
8. *See id.* at 3.
9. *See id.* at 5.
10. *See id.* at 3.
11. *See, e.g.*, 29 U.S.C. § 160(e)-(f) (1976), providing for judicial review of final orders of the National Labor Relations Board.
12. *See, e.g.*, Industrial Union Dep't v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974).
13. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).
14. *E.g.* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).
15. Greanis & Windsor, *Is Judicial Restraint Possible in an Administrative Society?*, 64 JUDICATURE 400 (1981).

Circuit which illustrate this trend and its exceptions. The opinions exhibit a lack of consistency due probably to uncertainty as to the proper principles to be applied in determining the intensity of judicial review of agency decisions. A reevaluation of the respective roles of agencies and judiciary is needed; in large measure, the problem can be solved by the legislative branch providing specific guidelines as to substantive standards, procedural requirements and scope of review to be applied by the courts.

STANDARDS OF JUDICIAL REVIEW

In the course of administrative decisionmaking, whether quasi-adjudicatory or less formal, agencies make findings of fact and conclusions of law. Traditionally, it has been maintained that a reviewing court is free to question agency conclusions of law but may not reopen factual issues resolved by the agency.[16] Although the distinction between questions of law and questions of fact remains fundamental to the proper exercise of judicial review, the complete separation of questions of law and fact suggested by the traditional approach is not possible in all cases and would, in any event, be overly simplistic and undesirable.

To the extent they can be identified in a given case, questions of law include matters relating to the common law, statutory interpretation, constitutional law, administrative jurisdiction, administrative procedure, and protection against arbitrary or capricious action or abuse of agency discretion.[17] Although a reviewing court is generally free to substitute its views with respect to such questions of law for those of the agency, such de novo review is not always appropriate. When an agency applies a broad statutory term to a given set of facts, it decides a "mixed question," but it is surely interpreting the statutory term in the process. In *NLRB v. Hearst Publications, Inc.*,[18] the Supreme Court instructed that in such a situation the reviewing court's jurisdiction is limited and that the agency's determination is to be accepted if it has " 'warrant in the record' and a *reasonable basis in the law*."[19] Under this "rational basis" test, a reviewing court is not free to decide the legal issue de novo, but must narrow the scope of its review to determine whether the agency's application of the law was reasonable. If it was reasonable, the court must defer to the agency. The *Hearst* test recog-

16. C. CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW 108 (1941).
17. K. DAVIS, ADMINISTRATIVE LAW TEXT 525 (3d ed. 1972).
18. 322 U.S. 111 (1944).
19. *Id.* at 131 (emphasis added).

nizes that, in some situations, Congress intended that specialized and experienced experts define the law within broad statutory parameters without excessive judicial second guessing.[20] Accordingly, agency resolutions of legal issues are generally subject to broad, de novo review when reviewable, but the judicial review may be narrowed considerably where the agency has decided a mixed question (law applied to facts) or where a purely legal issue requires the attention of the agency's specialized experts.

Although the simple distinction of the traditional appoach would leave issues of fact resolved by the agency undisturbed by judicial review, such has not been the case in our federal system. The Administrative Procedure Act[21] sets forth the standards courts are to apply when reviewing both agency factfinding and conclusions of law. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Supreme Court explained the application of these standards:

> In all cases agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the action failed to meet statutory, procedural or constitutional requirements. In certain narrow, specifically limited situations, the agency action is to be set aside if the action was not supported by "substantial evidence." And in equally narrow circumstances the reviewing court is to engage in de novo review of the action and set it aside if it was "unwarranted by the facts."[22]

The Court explained further that the substantial evidence standard is applied only "when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, or when the

20. *See, e.g.*, Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 87 (1975).

21. Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706 (1976), provides:

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 an 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, authorization, or limitations, or short of statutory right;

(D) without observation 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.

22. 401 U.S. 402, 413-14 (1971) (citations omitted).

agency action is based on a public adjudicatory hearing."[23] Thus if agency findings of fact are drawn from a record of an agency hearing provided for by statute, those findings must be supported by substantial evidence from that record taken as a whole.[24] De novo review[25] "is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions."[26] In cases where agency findings are not made on a hearing record and in which there is no deficiency in factfinding procedures, the appropriate standard for review is whether the adjudication is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[27]

During the period covered by this survey, the Seventh Circuit issued several noteworthy decisions which raise the question of the judiciary's role in reviewing agency action. In some cases, the court reviewed agency action with little or no discussion of the intensity of its scrutiny,[28] while in others it directly addressed this vexing problem.[29] In one case, *Bethlehem Steel Corp. v. EPA*,[30] the court noted that the parties had not directly addressed the question of what standard of review was appropriate and that the statute in question did not resolve the issue.[31] In other words, the court was called upon to determine the proper standard of review without guidance from the parties or from Congress. This situation is typical of the confusion that prevails with respect to the determination of a proper standard of judicial review of agency actions.

Bethlehem Steel Corp. v. EPA

The essential facts in *Bethlehem Steel* were not in dispute.[32] The Federal Clean Air Act[33] authorizes the United States Environmental

23. *Id.* at 414 (citations omitted).
24. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
25. 5 U.S.C. § 706(2)(F) (1976).
26. Camp v. Pitts, 411 U.S. 138, 142 (1973).
27. *Id.*
28. *E.g.*, Green Bay & W. R.R. Co. v. ICC, 644 F.2d 1217 (7th Cir. 1981); Dodson v. National Transp. Safety Bd., 644 F.2d 647 (7th Cir. 1981); Carver v. Harris, 634 F.2d 363 (7th Cir. 1980); NLRB v. Pfizer, Inc., 629 F.2d 1272 (7th Cir. 1980); Assure Competitive Transp., Inc. v. ICC, 629 F.2d 467 (7th Cir. 1980); Featherston v. Stanton, 626 F.2d 591 (7th Cir. 1980); Harvey v. Seevers, 626 F.2d 27 (7th Cir. 1980).
29. Illinois v. United States, 666 F.2d 1066 (7th Cir. 1981); Stein's Inc. v. Blumenthal, 649 F.2d 463 (7th Cir. 1980); Bethlehem Steel Corp. v. EPA, 638 F.2d 994 (7th Cir. 1980).
30. 638 F.2d 994 (7th Cir. 1980).
31. *Id.* at 1003.
32. *Id.* at 996.
33. 42 U.S.C. §§ 7401-7626 (Supp. III 1979).

Protection Agency (EPA) to establish nationwide air quality standards, but leaves to the states the responsibility for taking steps necessary to achieve those standards.[34] Once the EPA approves a state's implementation plan, the state may issue orders delaying the dates by which particular regulated entities are required to comply with the implementation plan.[35]

In 1972, Indiana submitted to the EPA an implementation plan which included a 1968 air pollution control regulation limiting visible emissions from "combustion" operations.[36] In 1974, Indiana amended the regulation to extend its prescriptions to "any" operations, including batteries of coke ovens such as those operated by Bethlehem Steel in Burns Harbor, Indiana.[37] In 1975, the EPA Administrator issued his final determination, expressing dissatisfaction with several aspects of the 1974 revision, including its allowance of a fifteen-minute exemption from compliance in each twenty-four hour period for certain operations, including coke batteries.[38] The Administrator disapproved the state air pollution control regulation "to the extent that the fifteen-minute exemption provision . . . fails to meet the requirements" of the EPA regulations, but he specifically noted that otherwise "the proposed revisions meet the [agency's] substantive and procedural requirements."[39]

On November 15, 1978, the Indiana Air Pollution Control Board issued a Delayed Compliance Order.[40] The order indicated that Bethlehem Steel was possibly violating the state's visible emissions regulation, but granted the steel company an extension of time within which to bring its operations into full compliance with the regulation.[41] The Indiana Board asserted that it notified the federal EPA of its intent to enforce this Delayed Compliance Order on November 15, 1978, but the EPA maintained it did not receive adequate notice until December 26, 1978. Since the Clean Air Act requires the EPA to approve or disapprove such orders within ninety days of their receipt of notice of the issuance,[42] the correct date was crucial in this case, as the EPA released

34. *Id.* §§ 7401(a)(3), 7410(a).
35. *Id.* § 7413(d).
36. Indiana Air Pollution Control Regulation (1968 APC-3) (current version codified at 325 IND. ADMIN. CODE 1-3-1 to 1-3-4 (1979)).
37. 638 F.2d at 997.
38. 40 Fed. Reg. 50,032-33 (1975).
39. *Id.*
40. 638 F.2d at 998.
41. *Id.* Under the Delayed Compliance Order, Bethlehem was to bring its coke operations into full compliance with the state implementation plan by July 1, 1979.
42. 42 U.S.C. § 7413(d)(2) (1976).

its proposed disapproval on March 17, 1979.[43]

The EPA Administrator's final disapproval[44] of the Delayed Compliance Order cited several deficiencies in that order, including the Administrator's impression that the order only called for Bethlehem's "best effort," that the state agency had in essence agreed not to enforce if there were violations, and that the program proposed in the order was not sufficient to control emissions. The Administrator also noted that the state regulation cited in the order was not the regulation approved by the EPA in 1975, but the less stringent version promulgated by the state agency in 1968.[45]

On December 21, 1978, the EPA instituted an enforcement proceeding against Bethlehem Steel for noncompliance with the state's implementation plan. Thereafter, Bethlehem Steel petitioned the Seventh Circuit for review of the EPA Administrator's disapproval of the state's Delayed Compliance Order. Bethlehem maintained that the Administrator was without statutory authority to issue partial approvals of state implementation plans. Thus, the EPA's 1975 determination must be interpreted as a complete disapproval of the pollution control regulation revision proposed by the state, leaving the less stringent 1968 regulation as the only enforceable standard governing visible emissions. Bethlehem Steel asserted, therefore, that the Administrator's disapproval of the Delayed Compliance Order was incorrect. In addition, the company argued that the EPA improperly instituted its civil action since the statute provides that no federal enforcement action may be pursued during the period a Delayed Compliance Order is in effect and the operator is in compliance with the order.[46] Finally, Bethlehem maintained that EPA procedure in reviewing the state order failed to comply with provisions of the Administrative Procedure Act[47] and due process requirements because the EPA attorneys in charge of the enforcement action were the same attorneys who reviewed the order pending the enforcement action. According to the company, this was an improper commingling of adjudicative and prosecutorial functions.[48]

In addressing these issues, the court first considered the question of

43. 638 F.2d at 998. The final disapproval of the Delayed Compliance Order was not issued until September 17, 1979, two and one-half months after the date by which Bethlehem was required to be in full compliance with the state implementation plan. *Id.*

44. 44 Fed. Reg. 53,746-48 (1979).

45. 638 F.2d at 1007.

46. 42 U.S.C. § 7413(d)(10) (1976).

47. 5 U.S.C. §§ 553, 554, 556 (1976).

48. *See* Withrow v. Larkin, 421 U.S. 35 (1975); Gibson v. Berryhill, 411 U.S. 564 (1973).

whether the EPA Administrator disapproved the Delayed Compliance Order within the ninety day period prescribed in the Clean Air Act. The Court rejected the Administrator's contention that he had satisfied the statutory mandate when he issued his proposed disapproval, thereby notifying the parties of his rejection of the Delayed Compliance Order.[49] The court noted that the statute clearly states: "The Administrator *shall determine*, not later than 90 days after receipt of notice of the issuance of the [order] . . . whether or not the [order] is in accordance with the requirements of this section."[50] The court commented that the Administrator's proffered interpretation of the statute manifested "poor policy considerations" in addition to lacking support in the statute itself, since such an interpretation would undermine delayed compliance orders by permitting the Administrator to delay final approval or disapproval indefinitely.[51] Having resolved that issue, the court turned to the merits of the EPA's disapproval.[52]

The court prefaced its review of the merits of the Administrator's action by considering the proper standard of judicial review and remarked that neither the parties nor the statute addressed this issue.[53] Drawing upon judicial interpretations of related sections of the Clean Air Act,[54] the Seventh Circuit reached the conclusion that the Administrator's decision to disapprove the Delayed Compliance Order should be vacated only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[55] Although it referred to this test as a "relatively liberal standard of review,"[56] the court warned that the Administrator must "publish a statement of reasons that will be sufficiently detailed to permit judicial review, and even under the 'arbi-

49. The agency argued that its actions in filing the civil enforcement action and in publishing its proposed disapproval of the Delayed Compliance Order put Bethlehem on notice of the agency's intention to disapprove the order, thus fulfilling the purpose and intent of the statutory requirement. 638 F.2d at 1001.

50. *Id.* (quoting 42 U.S.C. § 7413(d) (1976)) (emphasis supplied by the court).

51. 638 F.2d at 1001.

52. *Id.* at 1002.

53. *Id.* at 1003.

54. 42 U.S.C. § 7410(a)(2)-(3) (1976).

55. This standard of review is found at 5 U.S.C. § 706(2)(A) (1976) and applies to review of all agency actions. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971). The court declined to accept Bethlehem's characterization of the agency's action as adjudicatory, noting that the statute fails to require a public hearing prior to the action. Thus, the "supported by substantial evidence" standard set forth in 5 U.S.C. § 706(2)(E) is inapplicable. *See* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973). *See generally* Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 729-33 (1977); Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975).

56. 638 F.2d at 1004.

trary, capricious' standard agency action will not be upheld where inadequacy of explanation frustrates review."[57]

Elaborating on the agency's responsibility to set forth clearly the basis of its action, the court observed that secrecy, intentional or inadvertent, was not consistent with the proper execution of administrative responsibility and declared that "[t]he record of agency decision must demonstrate and reflect the exercise by the Administrator of 'reasoned discretion' and not simply manifest a 'crystal ball inquiry.' "[58] The court concluded that two of the Administrator's published bases for rejecting the state agency's Delayed Compliance Order failed to meet this test. The court found no explanation for the Administrator's rejection of the state's finding that technological controls do not exist,[59] and it deemed "inadequate" the administrator's "summary explanation" that he was simply "not satisfied" with parts of the state order.[60] Referring to the "unknown basis for the Agency's action," the court stated, "Courts require that administrative agencies 'articulate the criteria' employed in reaching their result and are no longer content with bare administrative *ipse dixit* based upon supposed administrative expertise."[61]

Another of the bases offered by the Administrator for rejecting the state order was that the order failed to require compliance because it permitted Bethlehem to challenge the technological feasibility of the state regulations in an enforcement proceeding.[62] The court rejected this objection on the ground that the agency could not require Bethlehem to waive this defense in order to obtain EPA approval of the order.[63] The court rejected other reasons given by the Administrator on the ground that the Administrator was "second-guessing the state's chosen mix of enforcement tools," thereby abusing his discretion by interfering with the state's primary role as envisioned in the statute.[64]

The court also rejected the last of the Administrator's objections: that the state had cited the less stringent 1968 pollution control regulation rather than the partially-approved 1974 version.[65] Assuming *arguendo* that the Administrator had authority to approve revisions

57. *Id.* (quoting National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 701 (2d Cir. 1975)) (citations omitted).
58. 638 F.2d at 1004.
59. *Id.*
60. *Id.* at 1005.
61. *Id.* (quoting Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973)). *See also* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1973).
62. 638 F.2d at 1005.
63. *Id.*
64. *Id.* at 1006.
65. *Id.* at 1008.

partially, the court concluded that the record did not support his contention that he did so in this case. In addition, even if he did partially approve the 1974 revisions, the record did not establish that the state actually applied the wrong regulation.[66] The court concluded:

> [I]n short, the record is inadequate to allow this court effectively to review the Administrator's action. . . . It would seem the state intended to apply the [regulation] the Administrator wishes enforced, yet he has boldly concluded otherwise. Without some support in the record, we cannot accept this as an adequate basis for the Administrator's decision.[67]

Finally, the court considered Bethlehem's contention that the EPA's internal procedures impermissibly combined investigative and adjudicative functions in the same attorneys. Although it concluded that the agency's procedures did not violate the Administrative Procedure Act,[68] the court noted that the due process clause of the United States Constitution "requires fundamental fairness to be respected in agency proceedings."[69] The court acknowledged that the agency enjoys "certain presumptions of regularity,"[70] but concluded that in this case sufficient questions of propriety had been raised to require a remand. Accordingly, the court vacated the Administrator's decision and remanded to the agency for further proceedings.[71]

The court's opinion in *Bethlehem Steel* is an example of the growing judicial inclination to scrutinize more closely agency action reviewed under the "arbitrary and capricious" standard.[72] Although the court referred to this standard of review as "relatively liberal,"[73] its application of this standard was certainly "a thorough, probing, in depth review" such as that envisioned by the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*.[74] Moreover, the court's characterization of the "arbitrary and capricious" standard as "relatively liberal," presumably when compared with the substantial evidence test,[75] seemingly differs from the view of other members of the court who sat on the panel which decided *Illinois v. United States*[76] during the period of this survey. In the latter case, the majority consisting of Judge

66. *Id.*
67. *Id.*
68. 5 U.S.C. §§ 553, 554, 556 (1976).
69. 638 F.2d at 1009 (citing Withrow v. Larkin, 421 U.S. 35, 46-47 (1975)).
70. 638 F.2d at 1010.
71. *Id.*
72. *See, e.g.*, cases cited note 3 *supra*.
73. 638 F.2d at 1004.
74. 401 U.S. 402, 415 (1972).
75. *See* note 55 *supra*.
76. 666 F.2d 1066 (7th Cir. 1981).

Sprecher and Chief Judge Fairchild suggested that the difference in the review standards may be primarily semantic.[77]

Illinois v. United States

In *Illinois v. United States*,[78] the Seventh Circuit reviewed a decision of the Federal Interstate Commerce Commission (ICC) allowing the Baltimore & Ohio Railroad to abandon a railroad line. The panel majority concluded that the ICC decision was arbitrary and capricious.[79]

Before reviewing the merits of the ICC's final decision, the court considered which standard of review was appropriate. Noting that the "arbitrary and capricious" standard applies in all cases, the court found it less clear whether the substantial evidence test should also be applied. The latter standard governs cases "reviewed on the record of an agency hearing provided by statute."[80] The court's inspection of the railroad abandonment statutes[81] revealed that the ICC was not *required* to hold hearings in abandonment cases, and thus the court concluded that application of the substantial evidence test was not required.[82] In a footnote, the court suggested, "[I]t may be that the difference in review standards is primarily semantic."[83] The court then explained the requirements of the "arbitrary and capricious" standard. The court emphasized that the agency must clearly set forth its grounds for acting,

77. *Id.* at 1072 n.6. This view is apparently shared by the United States Court of Appeals for the District of Columbia Circuit. *See* Doe v. Hampton, 566 F.2d 265, 271-72 n.15 (D.C. Cir. 1977).

78. 666 F.2d 1066 (7th Cir. 1981).

79. *Id.* at 1077-80.

80. 5 U.S.C. § 706(2)(E) (1976). Section 706 is quoted in full at note 21 *supra*. *See also* text accompanying notes 16-27 *supra*.

81. 49 U.S.C. §§ 10903-10904 (1976).

82. 666 F.2d at 1072. The petitioners had argued that, in addition to being arbitrary and capricious, the ICC's final decision was unsupported by substantial evidence. *Id.* at 1071. The ICC did not contest the applicability of that standard. *Id.* at 1072. The court noted that in a recent railroad abandonment case, the reviewing court had applied the substantial evidence test without any explanation, *see* Concord Township v. United States, 625 F.2d 1068, 1072-73 (3d Cir. 1980), but concluded on the basis of its own analysis that the applicability of that standard was doubtful and declined to use it. 666 F.2d at 1072.

83. *Id.* at 1072 n.6. The court stated further:

> As a matter of practicability, it may not much matter how reviewing courts choose to label the tests they apply. Labels, experience tells us, seldom have much analytical utility and just as often may lead judges into a semantic Serbonian Bog. While an adverse action supported by substantial evidence of record may still be arbitrary or capricious . . . an action that is not arbitrary or capricious logically must have some if not substantial evidentiary support in the record.

Id. (quoting Doe v. Hampton, 566 F.2d 265, 271 n.15 (D.C. Cir. 1979)) (citations omitted). The allusion is to *Paradise Lost* where John Milton referred to "a gulf profound as that Serbonian Bog Betwixt Damiata and mount Casius old, where armies whole have sunk."

that any judicial deference for administrative expertise and presumptions favorable to the agency will not prevent "a thorough, probing, in-depth review,"[84] and that the court will "take into account all relevant factors."[85] The court elaborated that the scope of review is relatively narrow, though nonetheless "searching and careful."[86] While the court is not free to substitute its judgment for the agency's, it "must consider whether the ICC's decision 'was based on a consideration of the relevant factors and whether there were any clear errors of judgment.' "[87] The court indicated that when the agency's decision is adjudicative, it "must clearly address the specific legal and factual issues raised."[88] In addition, the agency must "clearly explain the nature and rationale of its differing conclusion"[89] if its final decision differs from its factfinder's decision.

In applying the standard of review it described as appropriate, the court was highly critical of the ICC's decision on two principal grounds. First, the ICC opinion gave no explanation for its reversal of the agency factfinder's decision.[90] Second, the court found the ICC's failure to address the issues raised by the parties opposing the railway abandonment application rendered the decision arbitrary and capricious.[91] For these reasons, the panel majority vacated the final ICC decision and remanded the proceeding to the ICC for further proceedings.[92]

In a separate concurring opinion, Chief Judge Fairchild indicated that even in the absence of other factors he would conclude the decision was "an inadequate demonstration that factual material was properly addressed and choices rationally made within the range of

84. 666 F.2d at 1073 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971)).

85. 666 F.2d at 1073 (quoting National Crushed Stone Ass'n v. EPA, 601 F.2d 111, 116 (4th Cir. 1979), *rev'd*, 449 U.S. 64 (1980)).

86. 666 F.2d at 1073 (quoting Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974)).

87. 666 F.2d at 1073.

88. *Id.* (citing Harborlite Corp. v. ICC, 613 F.2d 1088 (D.C. Cir. 1979)).

89. 666 F.2d at 1073 (citing NLRB v. P.P.G. Indus., Inc., 579 F.2d 1057, 1058 (7th Cir. 1978)). In this case, the initial hearing had been held before an administrative law judge who had denied the railroad's abandonment application. When the railroad appealed, the ICC accepted the law judge's factual determination, but rejected his conclusion that the railroad's financial burden in operating the line was less substantial than the impairment to public convenience that would result from the line's abandonment. 666 F.2d at 1075-76.

90. *Id.* at 1076-77.

91. *Id.* at 1076-80. Additionally, the court concluded that supplementary evidence which the ICC had received and considered should have been subject to cross-examination. The court emphasized the "narrowness" of this conclusion since it resulted from the particular factors of the case. *Id.* at 1083.

92. *Id.*

administrative discretion."[93] Any presumption of administrative propriety was overcome by "the several stage history of this proceeding"[94] and significant gaps in the ICC's decision.

In his dissenting opinion, Judge Swygert expressed his satisfaction that the ICC had provided a sufficient explanation for its decision. Referring to the court's responsibility to review the decision, he submitted:

> Our task, however, is not to require that agencies always write lengthy opinions which explain every finding or rebut every argument made by the losing side. Particularly in a case such as this in which the final determination involves a balancing of interests, our purpose should be to ensure that the findings—and the ultimate conclusion—are justified by a sufficient basis in the record.[95]

Judge Swygert took issue with the majority's view that the ICC's explanation was conclusory and failed to respond to specific arguments made by those who opposed the abandonment. He maintained that "[i]t is not the Commission's responsibility to counter every argument put forward by the parties in each case, particularly where, as here, there is more than adequate support for the finding in the record."[96] Judge Swygert noted that the majority's expectation that the agency specifically address all issues raised by the parties places too large a burden on the ICC:

> Where the Commission, as here, explains the reasons for its action, and where there is sufficient evidence in the record to support those reasons, no more should be necessary. The Commission should not have to respond to all the contentions normally raised in a shotgun approach under such circumstances. . . . The Commission *has* presented a reasoned decision that fairly addresses the issues in this case. Its reasons for the decision are clear, and they are amply supported by the record. It has articulated a "rational connection between the facts found and the choice made." The mere fact that the Commission did not counter every argument raised by the contestants is not sufficient ground to reverse its decision. The Commission's authority in determining issues of public convenience and necessity is broad, and the scope of judicial review is correspondingly narrow.[97]

Judge Swygert concluded that those who opposed the ICC's decision had not met their burden of showing that the decision was "unjust and

93. *Id.* at 1083 (Fairchild, C.J., concurring).

94. *Id.* at 1084.

95. *Id.* (Swygert, J., dissenting).

96. *Id.* (footnote omitted).

97. *Id.* at 1086-87 (citations and footnotes omitted). Judge Swygert also commented that the agency should not be required to rebut every contrary finding made by its factfinder. *Id.* at 1086 n.12.

unreasonable in its consequences."[98]

The wide divergence of views as to the appropriate intensity of scrutiny between the majority and Judge Swygert further points out the confusion among the judiciary concerning proper standards of judicial review in given cases. The judges have differed over characterization of issues, choice of standards of review, the definition of particular standards, and the intensity of scrutiny when applying a given standard. A consensus should be reached, although it is unlikely that the judiciary will do so. Accordingly, these are matters properly within the responsibility of the legislature which should consider the many insightful judicial opinions on these questions. Apparently, the courts are ready for such direction. In sum, the judiciary, litigants, and most important the public, are entitled to clarification as to the court's proper function in reviewing agency action.

Other Standards of Review

During the period of the survey, the Seventh Circuit issued several other decisions dealing with problems of determining the proper scope of judicial review.[99] In *Stein's Inc. v. Blumenthal*,[100] the plaintiff, a pawnbroker, appealed the Secretary of the Treasury's denial of his application to renew a license to deal in firearms. The federal district court affirmed the denial, and the plaintiff appealed on the ground that the Gun Control Act of 1968[101] required the district court to try the case de novo rather than rely upon the administrative record. The court of appeals affirmed the district court declaring "we do not understand [the legislative] history to require the district court to hold a hearing and receive evidence beyond that contained in the administrative record in every case."[102] The court concluded that the district court has the discretion to receive additional evidence if it believes there is good reason to do so. The Seventh Circuit held that although the statute requires "de novo review," it does not require a "trial de novo" in every case. A new trial would only be appropriate where "substantial

98. *Id.* at 1087 (quoting ICC v. Jersey City, 322 U.S. 503, 512 (1950)).

99. Garvey Grain Co. v. Director of Workers' Compensation Programs, 639 F.2d 366 (7th Cir. 1981); Midwest Stock Exch., Inc. v. NLRB, 635 F.2d 1255 (7th Cir. 1980); NLRB v. Mars Sales & Equip. Co., 626 F.2d 567 (7th Cir. 1980); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980); Stein's Inc. v. Blumenthal, 649 F.2d 463 (7th Cir. 1980).

100. 649 F.2d 463 (7th Cir. 1980).

101. 18 U.S.C. § 923(f)(3) (1976).

102. 649 F.2d at 466.

doubt infects the agency's findings of fact."[103] In reaching this conclusion, the court emphasized the lack of congressional guidelines and considerations of judicial economy and fairness. Convinced that the district court engaged in a de novo review of the Secretary's determination, the court majority upheld the district court's affirmance of that decision.[104]

In dissent, Judge Swygert maintained that the district court should have conducted an evidentiary hearing in order to satisfy the statutory requirement that it exercise a de novo review. He submitted that the district court applied the wrong test, the substantial evidence test, when it decided to grant summary judgment for the Secretary. Had the substantial evidence test been the proper standard, the district court's issuance of summary judgment would have been correct, but since the proper standard was de novo review and since issues calling for credibility determinations were raised, the district court should have heard live witnesses on these issues. Thus, Judge Swygert would have reversed the district court's grant of summary judgment and directed a de novo review including an evidentiary hearing.[105]

If the Secretary of the Treasury's action in *Stein's Inc.* was indeed based in part on a credibility resolution, the district court erred by granting summary judgment since the evidence in the administrative record was not "uncontroverted." To satisfy the statutory requirement of de novo review, the district court should have made independent credibility determinations which would have required that the plaintiff be afforded an opportunity to testify before the district court. Accordingly, Judge Swygert was probably correct in observing that the majority permitted considerations of judicial economy to displace the requirement of de novo judicial review.

Another case, *American Diversified Foods v. NLRB*,[106] raised fundamental questions concerning proper standards of judicial review. Although the substantial evidence test is the proper standard of judicial review of agency findings of fact when a public hearing is required by the enabling statute,[107] the United States Supreme Court has author-

103. *Id.* (citing Guilday v. United States Dep't of Justice, 385 F. Supp. 1096, 1098-99 (D. Del. 1974)).

104. 649 F.2d at 467. In the court's view, the district court's decision constituted a de novo review without the introduction of additional evidence, since no presumptions of correctness were necessarily afforded the agency's action. The district court was free in its review of the record to give the agency's findings the weight it believed they deserved. *Id.* at 466-67.

105. *Id.* at 471.

106. 640 F.2d 893 (7th Cir. 1981).

107. 5 U.S.C. § 706(2)(E) (1976). *See* United States v. Florida E. Coast Ry., 410 U.S. 224 (1973).

ized use of another test when the courts review agency application of law to facts in a given case. This later test, known as the "rational basis" test, was announced by the Court in *NLRB v. Hearst Publications, Inc.*[108] There, the Labor Board had determined that newsboys were "employees" within the meaning of the National Labor Relations Act, but a court of appeals, after an independent analysis of the issue, had held the newsboys were not employees. The Supreme Court reinstated the Labor Board's decision, stating in relevant part:

> [W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [T]he Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.[109]

This "rational basis" test is applicable to so-called mixed questions of law and fact and is presumably different from the substantial evidence test which is applied to purely factual questions.[110]

In *American Diversified Foods, Inc. v. NLRB*,[111] the court reviewed a Labor Board determination that two shift managers, who were admittedly discharged for union activity, were "employees" within the meaning of the National Labor Relations Act.[112] Apparently, there was no dispute as to the essential facts. Nevertheless, the court applied the substantial evidence test, drew its own inferences from the uncontested facts, and substituted its viewpoint for that of the Labor Board, concluding that the shift managers were "supervisors" rather than employees and thus not protected by the statute.[113]

In *American Diversified Foods*, the court failed to properly characterize the issue. Like the issue in *Hearst*, the issue in this case was mixed, that is, calling for the application of a broad statutory term (here, as in *Hearst*, "employee") to given facts. Accordingly, the court should have applied the rational basis test rather than the substantial evidence test which is appropriate where the issue is purely factual. Instead, it failed to accord proper deference to the Labor Board's experience in administering the statute and ignored the reminder in *Hearst*

108. 322 U.S. 111 (1944). *See also* Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

109. 322 U.S. at 131.

110. *See* B. SCHWARTZ, ADMINISTRATIVE LAW 643-44 (1976).

111. 640 F.2d 893 (7th Cir. 1981).

112. 29 U.S.C. § 152(3) (1976).

113. 640 F.2d at 897. *See* 29 U.S.C. § 152(11) (1976). Even under the substantial evidence test, the court may not reject reasonable inferences drawn by the agency from uncontested facts. K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.05 (3d ed. 1972).

that the responsibility of defining the term "employee" was delegated primarily to the agency experts with whom Congress had entrusted the administration of the statute.

Judicial Deference to Agency Factfinding

Many of the remaining cases in which the court reviewed agency action raised questions of the proper deference the court should afford the factual findings of an administrative law judge (ALJ) in applying the substantial evidence test. In the landmark decision of *Universal Camera Corp. v. NLRB*,[114] the Supreme Court explained the duty of the courts of appeals when reviewing orders issued by the Labor Board. In its discussion, the Court indicated that a reviewing court should consider the trial examiner's (*i.e.*, the factfinder's) report in determining whether or not the agency is supported by substantial evidence on the record taken as a whole. Justice Frankfurter, speaking for the Court, emphasized that "[n]othing in the statutes suggests the Labor Board should not be influenced by the examiner's opportunity to observe the witnesses he hears and sees and the Board does not. Nothing suggests that reviewing courts should not give to the examiner's report such probative force as it intrinsically commands."[115] Later in the opinion, Justice Frankfurter added: "The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case."[116]

In most cases decided by the Seventh Circuit, the court deferred to the factfinder where his findings were based in part on credibility resolutions.[117] In *NLRB v. Mars Sales & Equipment Co.*,[118] the court rejected a challenge to an ALJ's findings of fact, stating, "Credibility determinations, including assessments of demeanor, are for the ALJ and the Board, not for a reviewing court."[119] And in *Bibbs v. Secretary of Health, Education and Welfare*,[120] the court upheld an ALJ's credibility resolution as to the claimant's representations about his pain. In the latter case, the court indicated that "there is nothing improper in

114. 340 U.S. 474 (1951).
115. *Id.* at 495.
116. *Id.* at 496.
117. Bibbs v. Secretary of HEW, 626 F.2d 526 (7th Cir. 1980); NLRB v. Mars Sales & Equip. Co., 626 F.2d 567 (7th Cir. 1980).
118. 626 F.2d 567 (7th Cir. 1980).
119. *Id.* at 571-72.
120. 626 F.2d 526 (7th Cir. 1980).

the ALJ's reliance upon his own observations during the hearing."[121]

However, in one case, *Midwest Stock Exchange, Inc. v. NLRB*,[122] an ALJ did not fare as well at the hands of the Seventh Circuit. Deviating from its deferential approach in the preceding cases, the court downgraded the significance of a factfinder's observations of demeanor and freely substituted its viewpoint for that of the ALJ. In that case, the court's treatment of a Labor Board ALJ bordered on outright hostility. For example, the court quipped that the ALJ's use of the word "whopping" to describe a number of overtime hours was "more often found in journalism than in legal writing,"[123] and "[t]he word 'whopping' thus has become a meaningless cliche . . . ."[124] The court also rejected the ALJ's pivotal credibility resolutions which led to his findings that several employees were targeted for dismissal by the company because they had placed their names on a list of union adherents. In a rare reference to an ALJ by name, the court stated that he "appears to have followed his penchant for crediting testimony like that a sister court has characterized as incredible."[125] Inexplicably, the court later upheld another of the same ALJ's findings, based on a credibility resolution, that a supervisor had congratulated another employee for being on a "hit list" and that the supervisor then agreed with the employee that management would try to discharge all employees on the union list although it would take time to do so.[126] In another portion of its opinion, the court remarked, "We find that the evidence and testimony in the record supporting the above findings are substantial, although weak."[127] The correctness of this approach is doubtful.

The opinion in *Midwest Stock Exchange* is open to serious criticism. It appears to be inconsistent with the Seventh Circuit's approach in other recent cases, such as *Mars Sales & Equipment Co.* and *Bibbs*, in which the court relied heavily on the ALJ's observations of witness demeanor. This decision also seems internally inconsistent, adopting some of the ALJ's findings without explaining why those findings were more acceptable than those rejected by the court. But the most distressing feature of this opinion is the court's resort to *argumentum ad hominem* when reviewing the ALJ's credibility resolutions. In sum, the

121. *Id.* at 528.
122. 635 F.2d 1255 (7th Cir. 1980).
123. *Id.* at 1260.
124. *Id.*
125. *Id.* at 1263 (citing Delco Remy Div. v. NLRB, 596 F.2d 1295, 1303 (5th Cir. 1979)).
126. 635 F.2d at 1266.
127. *Id.*

tone and substance of this opinion stray from the usually thoughtful and temperate approach of the Seventh Circuit.

Other Difficulties with Judicial Review

Further complexities associated with judicial review are illustrated by two cases reviewing actions of the Interstate Commerce Commission, *Farmland Industries Inc. v. United States*,[128] and *Assure Competitive Transportation, Inc. v. United States*.[129] In *Farmland*, the ICC published a new policy modifying its criteria for deciding railroad abandonment applications, and in *Assure*, the ICC published modified criteria for deciding motor carrier applications. Both cases address the question of proper characterization of an ICC promulgation, that is, whether it is a statement of policy or a rule.[130] The opinions seem to conclude that the proper scope of judicial review for policy statements is different from the scope of review for rules. In the court's view, the proper judicial role in reviewing a policy statement is to determine that the policy is not arbitrary and capricious, but when reviewing a rule, the proper judicial role is to determine whether the rule is supported by substantial evidence.[131]

The proper scope of judicial review of a rule which is the product of the informal rulemaking process is to determine whether the agency action is arbitrary and capricious. The Court of Appeals for the District of Columbia Circuit has pointed out: "This standard of review is a highly deferential one. It presumes agency action to be valid. Moreover, it forbids the court's substituting its judgment for that of the agency and requires affirmance if a rational basis exists for the agency's decision."[132] While the content of the arbitrary and capricious formula has changed over time[133] and today has variant meanings,[134] there is no

128. 642 F.2d 208 (7th Cir. 1981).

129. 635 F.2d 1301 (7th Cir. 1980).

130. *See* 642 F.2d at 210; 635 F.2d at 1307.

131. 642 F.2d at 210; 635 F.2d at 1307.

132. Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 941 (1976) (footnotes omitted). *See also* National Tire Dealers & Retread Ass'n v. Brinegar, 491 F.2d 31, 35 n.13 (D.C. Cir. 1974).

Review of informal agency rulemaking is governed by the provisions of 5 U.S.C. § 706(2)(B)-(D) (1976), as well as by the arbitrary and capricious standard found in § 706(2)(A). Thus the agency action will be scrutinized for constitutionality, statutory authority, and procedural regularity. Ethyl Corp. v. EPA, 541 F.2d at 33-34.

133. *Compare* Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935) (presumption of regularity in agency action), *with* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) ("thorough, probing, in-depth review").

134. *See generally* Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

basis in the cases for concluding that the substantial evidence test is the proper standard of review, absent express statutory directive.[135] The substantial evidence test should only be applied in those cases where the regulatory statute expressly requires it, or where agency action is based on adjudicatory procedures.[136]

It may be that the Seventh Circuit's uncertainty stems from the Supreme Court's opinion in *Citizens to Preserve Overton Park, Inc. v. Volpe*,[137] and a misreading of the leading case on the proper scope of review of ICC decisions.[138] In *Overton Park*, the Court did say that the substantial evidence test was the proper standard of review for *rules*.[139] However, it is clear that the Court meant rules developed through formal, on-the-record rulemaking,[140] and not through the more common notice and comment rulemaking procedures.[141] In *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*,[142] cited in *Assure*, the Seventh Circuit said that in determining the legality of newly developed standards a court must find that the standards were not an arbitrary and capricious interpretation of the statutory mandate of the agency.[143] There was no issue in that case as to the proper characterization of the ICC promulgation as a policy or rule, and the use of the substantial evidence test was limited to a stipulation that the factual support for the rule was substantial.[144] In *Farmland* and *Assure*, the Seventh Circuit treated the issue as one of characterization and not as one requiring a determination of how much deference to give to an agency's choice of competing interpretations of its statute. To properly analyze the issue, the court should have broken it into three separate questions: (1) does the agency have authority to act in this general area?[145] (2) if the agency has "area authority", is the choice it made a reasoned choice based on a consideration of available options and counterproposals?[146] and (3) how much factual support is needed to

135. *See, e.g.*, Mobil Oil Corp. v. Federal Power Comm'n, 483 F.2d 1238 (D.C. Cir. 1973).
136. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).
137. *Id.*
138. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281 (1974).
139. 401 U.S. at 415.
140. 5 U.S.C. §§ 556-557 (1976).
141. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 133 (2d ed. 1980).
142. 419 U.S. 281 (1974).
143. *Id.* at 284.
144. *Id.* at 288.
145. *See, e.g.*, NAACP v. Federal Power Comm'n, 425 U.S. 662 (1976).
146. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973).

sustain the agency determinations?[147]

BARRIERS TO JUDICIAL REVIEW

Separation of powers requires that in certain circumstances the courts forego judicial review altogether.[148] When the request for review is premature,[149] the person requesting review is not sufficiently affected to warrant review,[150] or it appears that Congress has given the agency broad discretion,[151] courts often refrain from review. The remainder of this survey will review cases discussing these barriers to judicial review.

Ripeness for Review

In *Farmland* and *Assure*, discussed in the preceding section, the Seventh Circuit ignored the question of the timing of judicial review. In both cases no enforcement action had been taken by the ICC, and if the promulgations were only statements of policy, they had no immediate legal effect.[152] Thus, a question of timeliness or ripeness for review was present. The concept of ripeness for judicial review has been developed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[153] Statements of policy, however, often have a significant practical effect on regulated entities, even though the policy statements do not have the force and effect of law. Such statements of policy may be reviewed prior to enforcement action when a court is persuaded that the policy is ripe for judicial review. To determine ripeness for review the courts evaluate the fitness of the issues for judicial determination and the hardship to the parties of withholding court consideration.[154] When dealing with policy statements, the courts will find the policy statement ripe for review if there is an immediate and substantial effect on the

147. *See, e.g., id.*
148. *See generally* Baker v. Carr, 369 U.S. 186 (1962).
149. National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971).
150. Sierra Club v. Morton, 405 U.S. 727 (1972).
151. Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970).
152. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 76-78 (2d ed. 1979).
153. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).
154. *Id.* at 148.

regulated entities.[155] In *Farmland* and *Assure*, the court did not even discuss the question of ripeness which is usually considered jurisdictional as an element of a "case or controversy."

Primary Jurisdiction

During the period of this survey, primary jurisdiction was the subject of two cases decided by the Seventh Circuit. The issue of primary jurisdiction usually arises in a suit by one private litigant against another. When both a court and an agency have jurisdiction over a matter, the doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision. The court will usually defer to agency jurisdiction if enforcement of the private claim involves a factual question that requires expertise that the courts do not have or involves an area where a uniform determination is desirable.[156]

In *United States v. Elrod*,[157] the federal government sued a local grantee of Law Enforcement Assistance Administration (LEAA) funds for failure to comply with the contractual terms and conditions of a grant. The original complaint alleged only violations of prisoners' eighth and fourteenth amendment rights. In *United States v. Solomon*,[158] the Fourth Circuit had held that the United States was without standing to bring a fourteenth amendment action on behalf of patients in a mental institution.[159] Relying on *Solomon*, the district court in *Elrod* held that the United States was without standing to bring the fourteenth amendment action on behalf of prisoners. The government then amended its complaint to include the breach of contract claims mentioned above. Specifically, the complaint alleged over-crowding and inadequate sanitation and visitation opportunities at the prison facilities. Applying the doctrine of primary jurisdiction, the district court judge stayed the judicial proceedings and ordered the United States Department of Justice to adjudicate the claims in the amended complaint before the LEAA, pursuant to statutory hearing procedures. Those procedures require notice and a hearing to determine whether an applicant or grantee is in compliance with the statute, regulations or specific grant agreements.[160]

On appeal, the Seventh Circuit held that the district court erred in

155. Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858 (D. Del. 1970).
156. *See generally* Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976).
157. 627 F.2d 813 (7th Cir. 1980).
158. 563 F.2d 1121 (4th Cir. 1977).
159. *Id.* at 1123.
160. 627 F.2d at 816.

applying the doctrine of primary jurisdiction because the agency itself was the plaintiff. In so ruling, the court followed its earlier case, *ICC v. All-American, Inc.*,[161] and relied upon the views of Professor Kenneth Culp Davis. According to Professor Davis, the doctrine of primary jurisdiction should be invoked when the court is principally concerned with acquainting itself with the agency's views. Accordingly, it is unnecessary to invoke the doctrine when the agency itself is before the court.[162] The court also reasoned that the issue of compliance with standards is one traditionally within the purview of judicial competence, and unlike issues involving the reasonableness of agency standards, no deference to the agency was necessary. Moreover, the court expressed doubt as to whether there were adequate administrative procedures by which the agency could proceed were it given the matter to adjudicate. The court also noted that the statutory procedures were only available for applicants and grantees, and not for institutions such as the defendant correctional institution.[163] The court concluded, "Where no administrative remedy exists, the doctrine of primary jurisdiction does not apply."[164]

During the period of the survey, the Seventh Circuit decided a second case involving the issue of primary jurisdiction. In *Norfolk & Western Railway v. B.I. Holser & Co.*,[165] the railroad was attempting to recover undercharges on the shipment of grain from grain elevators to the east coast. The applicable tariff prescribed a lower charge for ten-car shipments, as opposed to single car shipments. This lower charge reflected the lower costs due to reduced switching from elevator sidings when ten-car loads are shipped. According to the tariff, the reduced rate would not be available to a shipper whose disability required the originating railroad line to switch more than one "cut"[166] of cars to the shipper's facility.

Before the district court, the railroad alleged that it had undercharged for shipments involving less than ten cars. Although there was frequently space for ten cars, for the convenience of the railroad less than ten cars were loaded. An inspector for the ICC informed the parties that under the circumstances the ten-car rate was not proper. Thus, according to the ICC, the shippers had been undercharged.

161. 505 F.2d 1360 (7th Cir. 1974).
162. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.02 at 14 n.41 (1958).
163. 627 F.2d at 818.
164. *Id.*
165. 629 F.2d 486 (7th Cir. 1980).
166. A cut is defined as a quantity of cars delivered to or removed from the track or tracks at one location at one time. *Id.* at 487.

However, the district court interpreted the tariff provision in favor of the shippers, concluding that the railroad had not undercharged them.[167]

The railroad appealed, arguing that the district court erroneously based its ruling on matters properly within the primary jurisdiction of the ICC. The Seventh Circuit rejected this argument and affirmed the district court. The Seventh Circuit reasoned that the doctrine of primary jurisdiction would not apply unless the disputed tariff was so technical that the agency's expertise would better enable it to interpret the term than the court or unless it was necessary to examine the cost allocation underlying the tariff. The Seventh Circuit concluded that neither of these conditions existed in the instant case, although it neglected to analyze the tariff issue.

When faced with the issue of primary jurisdiction, a court is essentially concerned with the proper allocation of power between the court and the agency. However, a review of the two cases decided by the Seventh Circuit during the period of this survey suggests that resort to the doctrine of primary jurisdiction was unnecessary. A close analysis of *Elrod* and *Norfolk & Western* reveals that those cases did not involve the issue of primary jurisdiction.

In *Elrod*, the significant question was not one of primary jurisdiction, but both a question of the authority of the Justice Department to sue and one of exhaustion of administrative remedies. All of the issues could be resolved by finding that the Justice Department had a cause of action and that there were no administrative remedies to exhaust.

In *Norfolk & Western*, the court's analysis contains several flaws. Assuming *arguendo* that primary jurisdiction exists, the court probably erred in its analysis. The tariff terms were subject to disputed technical interpretations, and the ultimate correctness of the interpretation turned on the cost allocation underlying the ten-car rule. Thus, if the doctrine exists and were applied, the matter should first have been resolved by the agency with expertise and experience in such cost allocation.

In *Norfolk & Western*, the plaintiff railroad companies sued to recover alleged shipping undercharges. Yet these same plaintiffs raised the issue of primary jurisdiction before the Seventh Circuit. Just as primary jurisdiction should not be invoked when the agency is the plaintiff, it should not be applied when the plaintiff raises it.[168]

167. *Id.* at 488.

168. The court also found that the shippers had asked for and had space for ten cars, but it

In fact, no case needs to be analyzed as one of primary jurisdiction.[169] All such cases raise one or more other questions that permit more direct and sound disposition: (1) Is there a private right of action? If not, the court has no jurisdiction. If so, the agency has no jurisdiction.[170] (2) Has there been abrogation of statutory or common law causes of action by the enabling statute? If not, the court has jurisdiction and the agency does not. This is because the plaintiff is exercising its choice of remedies, not because remedies are unavailable from the agency. If so, there is no jurisdiction in the court.[171] (3) Has there been a federal preemption? If not, the state cause of action can proceed. If so, there is no state cause of action.[172] (4) Has the agency the authority to immunize otherwise illegal action? Other questions must be decided if this is answered in the affirmative, that is, has the agency had the opportunity to exercise the power and has it granted the immunity? If the answer to either is no, then the court has jurisdiction, and there is nothing for the agency to decide. If the answers to the questions are affirmative, then there is no cause of action for the court to hear.[173] (5) Are there agency remedies that the legislature intended be exhausted? If not, the court can proceed. If so, the court has no jurisdiction.[174]

In each of these five circumstances, either the court or the agency has jurisdiction, not both. Therefore, there is no need to decide which of the two bodies should proceed first. Eliminating the rubric "primary jurisdiction" would clarify the real issues summarized above. The fact that these classes of cases concern different conceptual problems and are unrelated to a determination of which body (court or agency) should proceed, is illustrated by three cases decided by the Seventh Circuit.

In *Mite Corp. v. Dixon*,[175] the court discussed federal preemption of state causes of action. Illinois has empowered its Secretary of State to pass upon the substantive fairness of a tender offer to purchase stock and to prohibit the offer if it is determined at a hearing to be inequitable. Mite Corp. made a tender offer for the stock of Chicago Rivet &

was the carrier's convenience that led the carrier to provide less than ten cars. From that perspective, a finding by the ICC that the ten-car rate did not apply could appear to the court to be obviously incorrect.

169. *But see* Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645 (1973).
170. Cort v. Ash, 422 U.S. 66 (1975).
171. Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).
172. Garner v. Teamsters, 346 U.S. 485 (1953).
173. Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958).
174. Rosado v. Wyman, 397 U.S. 397 (1970).
175. 633 F.2d 486 (7th Cir. 1980), *prob. juris noted*, 451 U.S. 968 (1981).

Machine Co., an Illinois corporation. At the same time, Mite brought an action in federal district court challenging the constitutionality of the Illinois Business Take-Over Act[176] on the ground that federal legislation preempted state authority to regulate tender offers. While determining whether a state statute is void under the supremacy clause is notoriously complicated, the Seventh Circuit noted that "over the years the general tests to be applied . . . have become reasonably well established."[177] The court quoted the Supreme Court's summary of these rules:

> The first inquiry is whether Congress, pursuant to its power to regulate commerce has prohibited state regulation of the particular aspects of commerce involved . . . . [W]hen Congress has "unmistakably ordained," that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.
>
> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict . . . . [The] task is "to determine whether, under the circumstances . . . [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[178]

While questioning that delay is necessarily undesirable, the court held that a policy balance had been struck by Congress in this area[179] and that the court should not second-guess such legislative judgment. Thus, because of the delay caused by a state hearing on the fairness of the tender offer, the court concluded that the Illinois act was preempted by the federal law.[180]

If there is a preemption in *Mite Corp.*, there is no jurisdiction in a court to consider a state based cause of action. If there is no preemption, the federal courts have no basis to interfere with a state cause of action and thus must dismiss the suit.

Thill Securities Corp. v. New York Stock Exchange[181] was an antitrust action challenging the anti-rebate rule of the New York Stock Exchange[182] (NYSE) in effect at that time. There was no question that the anti-rebate rule was the result of a combination in restraint of trade,

176. ILL. REV. STAT. ch. 121½, § 137.51-.70 (1979).
177. 633 F.2d at 490.
178. *Id.* (quoting Jones v. Rath Packing Co., 430 U.S. 519 (1977)).
179. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976).
180. 633 F.2d at 498.
181. 633 F.2d 65 (7th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).
182. *Id.* at 66.

violating the Sherman[183] and Clayton Acts.[184] The Securities Exchange Act of 1934[185] had been interpreted to permit the Securities and Exchange Commission (SEC) to authorize actions by the NYSE otherwise in violation of the antitrust laws, if they were integral and necessary to effective operation of the nation's securities exchanges and enforcement of the securities laws.[186] The Seventh Circuit reviewed the history of the anti-rebate rule and found it specifically approved by the SEC as a necessary part of its regulatory policy. Therefore, the court concluded the Exchange's actions were immune from suit under the antitrust laws.

Under the circumstances in *Thill*, there is no jurisdiction in the courts to maintain an antitrust action, and thus, it must be dismissed. Had the agency not yet acted, the court would have had to dismiss to permit the agency to determine the immunity question. This deferral to the agency, however, does not require analysis of coordination or agency expertise. Rather, it is necessary because of the agency's power to act to preclude any court cause of action.

In *Indiana Manufactured Housing Association v. FTC*,[187] the Federal Trade Commission (FTC) had begun a rulemaking proceeding pursuant to its authorizing statute. The presiding officer failed to make findings as to the prevalence of the alleged false or misleading act or practice. Review was sought prior to the FTC's determination of what rule if any should be adopted. The Seventh Circuit held that the petitioners had failed to exhaust administrative remedies, and therefore judicial review was premature.

The petitioners' argument for an exception to the well-established requirement of exhaustion was that failure to review now made the alleged defect unreviewable, because section 18 of the FTC Act provides that "the contents and adequacy of any statement (of basis and purpose supporting the adopted regulation) shall not be subject to judicial review in any respect."[188]

The Seventh Circuit has recognized an exception to the exhaustion requirement in cases in which judicial review effectively will be foreclosed if the court chooses not to intervene in the administrative proceeding.[189] However, since the FTC had not decided that findings on

183. 15 U.S.C. §§ 1-2 (1976).
184. 15 U.S.C. § 15 (1976 & Supp. IV 1980).
185. 15 U.S.C. § 78s(b) (1976).
186. Gordon v. New York Stock Exch., Inc., 422 U.S. 659 (1975).
187. 641 F.2d 481 (7th Cir. 1981).
188. 15 U.S.C. § 57a(e)(5)(C) (1976 & Supp. IV 1980).
189. *See* Jewel Companies v. FTC, 432 F.2d 1155 (7th Cir. 1970).

"prevalence" were required, the court concluded that "it should be the first to consider the issue."[190] Further, section 18 indicates a congressional intent to preclude all judicial review. Clearly the court had no jurisdiction if the petitioners did not exhaust agency remedies. In this case, the notion that only one entity has jurisdiction is reinforced by section 18.

Standing to Sue

In *Marshall & Ilsley Corp. v. Heimann*,[191] the Seventh Circuit discussed the question of who can obtain judicial review of agency action. First Bank of LaCrosse bought Midland National Bank and operated it as a new branch bank. These transactions were approved by the Comptroller of the Currency of the United States. The plaintiffs, other Wisconsin banks, alleged that the approval violated state and federal statutory limitations on the establishment of branch banks by national banks. The defendants argued that the plaintiffs had no standing to challenge the Comptroller's approval, and the district court found no injury in fact and dismissed the suit. The Seventh Circuit found injury, but concluded that the plaintiffs did not come within the zone of interests protected by the statutes relied upon.[192]

This is one of the rare cases which has relied on the zone of interest segment of the modern standing test to find no standing.[193] The district court acknowledged that a "new" branch bank would create injury in fact sufficient to satisfy the standing requirement, but saw the situation in this case as presenting merely a change in ownership, not a new bank. Thus the competitive circumstances did not change. The Seventh Circuit more realistically recognized that a new owner (especially "an enormous bank holding company")[194] changed the competitive environment, and found injury in fact.

The zone of interest requirement was first articulated by the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Comptroller of the Currency*.[195] There, the Court held that no explicit statutory provision was necessary to confer standing so long as the plaintiff was within the class of persons that the statutory provision

190. Indiana Manufactured Hous. Ass'n v. FTC, 641 F.2d at 482. *See* Industrial Union Dep't v. American Petroleum Inst., 444 U.S. 818 (1980).

191. 652 F.2d 685 (7th Cir. 1981).

192. *Id.* at 698.

193. *See* K. DAVIS, ADMINISTRATIVE LAW 107 (6th ed. 1977). *See also* Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130 (D.C. Cir. 1977).

194. 652 F.2d at 692.

195. 397 U.S. 150 (1970).

was designed to protect. This requirement was characterized as a "rule of self-restraint," not required by the Constitution.[196]

Courts, including the district court below, have held that the zone of interest requirement is no longer viable.[197] However, the Seventh Circuit "consistently has required satisfaction of the zone of interests test for standing."[198] This approach requires a precise delineation of the interests protected by a statute, followed by a factual determination of whether the plaintiff is within those interests. The Seventh Circuit has described a narrow range of interests in defining the zone.[199] It seems fair to characterize the court's approach as miserly.[200] The focus is less on the competing interests and values subsumed in the statutory compromise, and more on the effect of permitting a challenge to the agency's program.[201] Clearly this is inconsistent with the "trend . . . toward enlargement of the class of people who may protest administrative action."[202] Further, assuming that zone of interest is part of the standing text, it need not be applied in every case, as it is purely a self-imposed restraint. To use it both invariably and as a justification to require particular matching of injury and interest seems doubly wrong.

Reviewability

The Administrative Procedure Act incorporates the general rule that judicial review shall be available "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."[203] Few statutes expressly provide for a preclusion of judicial review,[204] and those that do are narrowly interpreted to provide at least some judicial review.[205] Even less common are judicial determinations of implied statutory preclusion of judicial re-

196. *Id.* at 154.

197. *See, e.g.*, Florida v. Weinberger, 492 F.2d 488 (5th Cir. 1974); Park View Heights Corp. v. Black Jack, 467 F.2d 1208 (8th Cir. 1972).

198. 652 F.2d at 693.

199. *Id.* The District of Columbia Circuit has also followed this approach. *See* Control Data Corp. v. Baldridge, 655 F.2d 283 (D.C. Cir. 1981).

200. *See, e.g.*, 652 F.2d at 694. "In order to fall within the zone of interests . . . plaintiffs must represent the particular competitive interest addressed by the statute." *Id.*

201. *See, e.g., id.* at 696. "If other banks were allowed to challenge the Comptroller's determination . . . the objectives justifying these emergency procedures could be thwarted by the purely selfish desires of competitors to keep a new competitor out of the local banking community." *Id.* at 696-97.

202. Association of Data Processing Serv. Orgs., Inc. v. Comptroller of the Currency, 397 U.S. at 154. *See also* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

203. 5 U.S.C. § 701(a) (1976).

204. W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW 942 (7th ed. 1979) [hereinafter cited as GELLHORN].

205. Arnolds v. Veterans' Administration, 507 F. Supp. 128 (N.D. Ill. 1981).

view.[206] The intent of the drafters of the Administrative Procedure Act and the current view of the Supreme Court, as expressed in *Citizens to Preserve Overton Park, Inc. v. Volpe*,[207] concerning the proper interpretation of the second exception (*i.e.*, "action . . . committed to agency discretion") is that it applies only in the very limited circumstances where "statutes are drawn in such broad terms that in a given case there is no law to apply . . . ."[208]

Since *Overton Park*, many courts have adopted the "no law to apply" test.[209] That this is an overreaction to the complexity of the prior law[210] and an oversimplification of the Supreme Court's views is indicated by the Court's recent decision in *Southern Railway v. Seaboard Allied Milling Corp.*,[211] where it considered the language of the statute, the determinations placed within the statutory design of the enabling act, the legislative history, and case law interpreting analogous statutes in deciding the question of reviewability.

During the period under study, the Seventh Circuit considered two cases that cited the "no law to apply" test: *Laketon Asphalt Refining, Inc. v. Department of the Interior*,[212] and *United States v. Winthrop Towers*.[213] *Laketon Asphalt Refining* concerned mineral deposits on federal lands. The United States owns vast acreage containing deposits of oil and gas. Section 36 of the Mineral Leasing Act[214] provides that royalty payments to the United States under oil and gas leases shall, on demand of the Secretary of Interior, be paid in oil and gas. The Secretary in turn sells to the highest bidder the royalty oil and gas not needed by the United States. Because this practice resulted in purchase domination by the larger refiners, Congress amended the Act to provide for oil preference allocations to refiners without their own sources

206. GELLHORN, *supra* note 203, at 939.

207. 401 U.S. 402 (1971).

208. 401 U.S. at 410 (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)).

209. *See, e.g.*, Ness Inv. Corp. v. Department of Agriculture, 512 F.2d 706 (9th Cir. 1975); Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974).

210. Prior to the Supreme Court's decision in Abbot Laboratories v. Gardner, 387 U.S. 136 (1967), which articulated a strong presumption of reviewability, the law was so complex that a widely cited article listed nine "factors" which most often shape decisions that review be denied: (1) broad agency discretion; (2) expertise required to comprehend subject matter; (3) managerial nature of agency; (4) impropriety of court intervention; (5) desirability of informal agency action; (6) lack of judicial ability to insure "correct" result; (7) need for expedition; (8) large number of potentially appealable agency orders; (9) availability of other limitations on agency discretion. Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367, 380-95 (1968).

211. 442 U.S. 444 (1979).

212. 624 F.2d 784 (7th Cir. 1980).

213. 628 F.2d 1028 (7th Cir. 1980).

214. 30 U.S.C. § 192 (1976).

of supply.[215] In administering this program, the Department of Interior divided the country into five geographic areas. Refiners in each area were given preferences for the purchase of royalty oil produced in their area. This policy was promulgated as a final regulation without notice and opportunity to comment, pursuant to the exception to the notice and comment requirements of the Administrative Procedure Act, for matters pertaining to "agency management or personnel or to public property, loans, grants, benefits, or contracts."[216] Laketon Asphalt was a non-preference purchaser of royalty oil from the northern Rocky Mountain area, an area from which it had purchased much royalty oil prior to the challenge to the regulations.

The Seventh Circuit upheld the Department of the Interior on both procedural and substantive grounds. In so doing it rejected the argument that the Secretary's geographic allocation of royalty oil was not subject to judicial review as it is committed by law to agency discretion. The court found that the language of the statutory provision[217] limited the Secretary's discretion to allocate the oil among eligible refiners in the area in which the oil was produced. Had a proposed form of the Act been adopted which gave the Secretary "complete discretion . . . to determine to whom the oil should be sold in accordance with his findings as to how the public interest would best be served,"[218] it might have been one of "those rare instances where there is no law to apply and thus no review by the court would have been possible."[219]

Winthrop Towers[220] involved an action on behalf of the Secretary of Housing and Urban Development (HUD) to foreclose a federally insured mortgage. The district court granted HUD's motion for summary judgment because, in the absence of law to apply, judicial review

215. *Id.*

216. 5 U.S.C. 553(a)(2) (1976). This is a much criticized provision, *see* Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886 (1975), but Congress has not as yet seen fit to change it.

217. As amended, the statute reads, in pertinent part:

> *Provided*, That inasmuch as the public interest will be served by the sale of royalty oil to refineries not having their own source of supply for crude oil, the Secretary of the Interior, when he determines that sufficient supplies of crude oil are not available in the open market to such refineries, is authorized and directed to grant preference to such refineries in the sale of oil under the provisions of this section, for processing or use in such refineries and not for resale in kind. . . . *Provided further*, That in selling such royalty oil the Secretary of the Interior may at his discretion prorate such oil among such refineries in the area in which the oil is produced.

30 U.S.C. § 192 (1976).

218. S. REP. No. 566, 79th Cong., 1st Sess. 3 (1945).

219. Laketon Asphalt Refining, Inc. v. Department of the Interior, 624 F.2d 784, 794 n.17 (7th Cir. 1980).

220. 628 F.2d 1028 (7th Cir. 1980).

of the agency's action was not available. Specifically, the district court had found that there were no standards or limits against which to review the agreed authority of HUD to foreclose. The Seventh Circuit reversed this determination and found that such a standard or limit, sufficient to permit review, was set out in section 2 of the National Housing Act.[221]

This test of non-reviewability, *i.e.*, "no law to apply," raises questions about the delegation doctrine. In *A.L.A. Schecter Poultry Corp. v. United States*,[222] the Supreme Court found that section 3 of the National Industrial Recovery Act[223] was an insufficient standard to canalize the administrator's discretion, and therefore the statute was unconstitutional.[224] Perhaps the courts should revive a stricter delegation doctrine and find statutes unconstitutional where there is "no law to apply" rather than do the opposite and find agency action unreviewable under a grant of unlimited discretion.[225] In this regard the Supreme Court decision in, *Southern Railway*,[226] while retaining the "no law to apply" test, seems to have returned to a more defensible rationale, requiring consideration of other factors.

INSPECTIONAL AUTHORITY

One of the most important powers of regulatory agencies concerned with the public health and safety is the power to inspect the facilities of the regulated entity. Originally it was held that such in-

221. 42 U.S.C. § 1441 (1976). This section sets out in detail the national housing policy. Interestingly, the court stated that the language was not "precatory." United States v. Winthrop Towers, 628 F.2d 1028, 1035 (7th Cir. 1980). The word precatory is defined as "having the nature of prayer, request, or entreaty; conveying or embodying a recommendation or advice or the expression of a wish, but not a positive command or direction." BLACK'S LAW DICTIONARY 1059 (5th ed. 1979). The notion that particular statutory language is precatory has been raised in attacks on broad law or societal reform statutes. For instance, in Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977), public transit companies argued unsuccessfully that the language of section 504 of the Rehabilitation Act of 1974, 29 U.S.C. § 794 (1976), was precatory. Section 504 provides in part that "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

More recently, in Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981), however, it was successfully argued that the language of the Developmentally Disabled Assistance Bill of Rights Act, 42 U.S.C. § 6011 (1976), *was* precatory.

222. 295 U.S. 495 (1935).

223. 48 Stat. 195 (1933), *as amended by* Act of June 14, 1935, ch. 246, 49 Stat. 375 (1935) (declared unconstitutional in A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

224. The language of this section seems similar to the language of the National Housing Act, and the other statutes discussed in note 221 *supra*. It is difficult to discern a principled basis for distinguishing between statutory language which is precatory, not precatory, or unconstitutional for giving insufficient guidance to an agency administrator.

225. *See* Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582-86 (1972).

226. 442 U.S. 444 (1979).

spections were not searches subject to the fourth amendment.[227] Then it was determined that they were searches, but that diminished probable cause based on a reasonable periodic pattern of inspection would satisfy the fourth amendment's requirement.[228] This relaxed approach is sufficiently vague that questions concerning its meaning have since been brought to the Supreme Court at least six times[229] and continue to challenge lower courts, including the Seventh Circuit.

In *Burkart Randall Division of Textron, Inc. v. Marshall*,[230] a corporation filed suit seeking declaratory and injunctive relief prohibiting an Occupational Safety and Health Administration (OSHA) officer from inspecting one of its facilities. The plaintiff corporation contended that the probable cause standard applied by the district court in granting the OSHA inspection warrant was in error. Burkart argued that the criminal probable cause standard should be met, not the more relaxed administrative probable cause standard. Alternatively, the corporation argued that if this more relaxed standard had been applied, the warrant application failed to satisfy it. Finally, the corporation maintained that the warrant was invalid because of its overbroad scope, permitting an inspection of the entire premises rather than being limited to those areas specifically related to the complaint.

The Seventh Circuit in *Burkart* first addressed the issue of which standard of probable cause was appropriate, the flexible administrative standard or the criminal standard. Citing several Supreme Court cases which have held that probable cause in the criminal law sense is not required,[231] the court in *Burkart* held that the administrative probable cause standard was to be applied in the issuance of a warrant for an OSHA inspection based on employee complaints. The court acknowledged that criminal probable cause is required when there is a possibility that an administrative investigation may be criminal in nature, for example, when fire officials investigate a possible arson. However, such was not the case in *Burkart*.

In dealing with the corporation's alternative argument, that the evidence was insufficient to establish even administrative probable cause,

227. Frank v. Maryland, 359 U.S. 360 (1959).

228. Camara v. Municipal Court, 387 U.S. 523 (1967).

229. Michigan v. Tyler, 436 U.S. 499 (1978); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Biswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1971); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

230. 625 F.2d 1313 (7th Cir. 1980).

231. Marshall v. Barlow's Inc., 436 U.S. 307 (1978); Camara v. Municipal Court, 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967). *See also In re* Establishment Inspection of Gilbert & Bennett Mfr. Co., 589 F.2d 1335 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979).

the court held that the sworn warrant application, submitted by the OSHA compliance officer sufficiently informed the magistrate of the substance of the employee complaints. The magistrate was thus able to exercise independent judgment as to whether an inspection was justified, "rather than acting as a mere rubber stamp validating the decision already reached by the Secretary of Labor."[232] The warrant application was sufficiently detailed and specific in its description of the contents of the employee complaint to "satisfy the 'specific evidence' manner of establishing probable cause."[233]

The court also rejected the corporation's objection to the issuance of the inspection warrant because it was based on unwritten complaints employees. The court held that there is no statutory requirement or judicial interpretation preventing OSHA from determining that an inspection is justified on the basis of an informal employee complaint. The court also disposed of the corporation's assertion that the warrant application did not satisfy the requirement of "specific evidence of an existing violation"[234] due to the lapse of time between OSHA's receipt of the employee complaints and the issuance of the warrant. The court held that where "the nature of the alleged conditions makes reasonable the conclusion that violations of the Act remained on Burkart's premises at the time of the warrant application,"[235] such a warrant should be issued authorizing an OSHA inspection.

Finally, the court in *Burkart* discussed the issue of whether a warrant authorizing an OSHA inspection should be limited to the areas identified in the employee complaints. The court held that such an inspection "need not be limited in scope to the substance of those complaints."[236] Rather,

> in light of the broad remedial purposes of the Act, the strong federal interest in employee health and safety, and the protections provided by the warrant requirement, it will generally be reasonable in such a case to conduct an OSHA inspection of the entire workplace identified in the complaints.[237]

Although there may be exceptions in extraordinary circumstances, this was not such a case. Accordingly, the court in *Burkart* upheld the district court's issuance of a warrant to inspect the plaintiff corporation's

232. 625 F.2d at 1319.
233. *Id.* at 1321.
234. *Id.* at 1322.
235. *Id.*
236. *Id.* at 1325.
237. *Id.* at 1325-26.

premises by an OSHA compliance officer.[238]

Judge Wood dissented, finding nothing "anomalous"[239] in distinguishing between "neutral" periodic area inspections which presuppose some general finding of necessity, and non-neutral inspections provoked by complaints. "Neutral" inspections need be supported by less than traditional probable cause and are limited in scope to the jurisdictions of the agency. Inspections resulting from complaints require more probable cause and are limited to areas complained about.[240]

The constant tension in administrative inspection cases is between a pragmatic awareness that health and safety standards can only be enforced on a random audit basis and the strict probable cause requirements of the fourth amendment. Here the majority of the court clearly adopted a "flexible"[241] approach.

CONCLUSION

Many of the administrative law cases decided by the Court of Appeals for the Seventh Circuit during its 1980-81 term demonstrate the complexity of judicial review of administrative agency decisions. These cases exemplify the present confusion as to what standards of review apply to each type of agency action, how intense scrutiny under a given standard should be, and whether review of particular types of actions should be available at all. This confusion has led to a lack of predictability in these cases which works to the ultimate detriment of the public and the regulated entities. A more standardized approach is needed, but is unlikely to occur without legislative action.

238. *Id.* at 1326.
239. *Id.* at 1328 (Wood, J., dissenting).
240. *Id.*
241. *Id.* at 1317.