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ADMINISTRATIVE LAW

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It is the opinion of the authors that one of the principal values of a survey such as this is its use as a research tool for practitioners and students. Therefore, an endeavor has been made to include all of the decisions of the Court of Appeals for the Seventh Circuit for this last term dealing with what normally is considered administrative law without regard to whether the contribution of a particular opinion is considerable or minor. The only decisions intentionally omitted were those decided on the weight of the evidence or peripherally involving administrative law. Also, the authors felt compelled to present the cases in their proper perspective, as regards existing law, wherever possible. This required the inclusion of background information in some instances and reference to pertinent non-Seventh Circuit decisions in others. Although the order of the subject matter follows that generally used in textual material devoted to administrative law, the subpoena cases are discussed at the very end of the article.

PROCEDURAL DUE PROCESS

Where administrative action is attacked on the basis that the procedure utilized violated the due process clause, the court must first determine whether a protected interest is involved and, if it is, whether the procedural safeguards actually furnished were sufficient. The Court of Appeals for the

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Seventh Circuit was required to cope with one or both of these issues in a number of decisions involving academicians, public employees, prisoners, welfare recipients and social security applicants.

Academicians

Teachers

In the first decision, *Stebbins v. Weaver*,[1] the plaintiff had been originally employed as an Assistant Professor in the Mathematics Department of the University of Wisconsin - Milwaukee for a term of three years. At the time of his original hiring, he had been "informed that, with normal development in the areas of teaching, research, and community service, he could expect to obtain tenure."[2] He had received a second three-year contract and during the entire period of his employment, the plaintiff had been successful in the three areas originally mentioned to him as being necessary to obtaining tenure. In January 1970, the Executive Committee of the Department of Mathematics had refused the plaintiff tenure and, in its July 1970 meeting, that committee had given the following reasons for its action: "[1] His reasearch was not such as to warrant promotion[;] [and 2] his area of complex analysis was adequately covered by tenured faculty in the department."[3] Four days of hearings had been held, in March and April of 1971 by the Executive Committee, to determine whether or not to reopen its prior decision. At the hearings the plaintiff had been allowed to present evidence concerning his qualifications but had not been permitted to question members of the committee about the facts on which their earlier decision denying tenure had been predicated. Two of the committee members had not attended all of the hearings, but had participated in the final vote. The plaintiff's request that the decision be based only on the evidence presented at the hearings had been denied. At the completion of the hearings, the committee had refused to alter its decision and the plaintiff had made successive appeals, to various committees in the hierarchy of the University of Wisconsin system, all of which had been denied.

In a civil rights action instituted against the President and Board of Regents of the University of Wisconsin system, the plaintiff had claimed that the procedure utilized in denying him tenure had violated his due process rights and had requested the entry of a decree to that effect. He had prayed for reinstatement as Assistant Professor and an injunction preventing the University from hiring any tenured teachers for the Mathematics Department until after he had received procedural due process and a final determination of his application for tenure.

1. 537 F.2d 939 (7th Cir. 1976).
2. *Id.* at 941.
3. *Id.*

In their motion to dismiss, the defendants had contended, among other things, that the plaintiff had not possessed a "protected interest" in his tenure aspirations and, therefore, that the due process clause had no application. The district court[4] had found for the plaintiff on this particular issue because: "*In the present case, the plaintiff has alleged an explicit, though unwritten, contractual agreement under which he was entitled to tenure provided certain conditions on his part were met, and he has alleged that those conditions were met.*"[5] The court, however, had determined that the procedural safeguards actually accorded the plaintiff had satisfied due process requirements and dismissed the complaint.

On appeal, the decision was affirmed for other reasons. The circuit court decided that plaintiff did not have an interest which was protected by the due process clause and concluded that he was in the same position as the untenured faculty member in *Board of Regents v. Roth*.[6] There the United States Supreme Court had held that an instructor, who had been hired for one year, had no legally protected interest in continued employment after the lapse of that year. As a result he was not entitled to the safeguards of the due process clause when his employment was not continued. The lower court in the present case also had cited the *Roth* decision but had decided that there was a contractual commitment on the part of the university system to grant tenure to the plaintiff if he had performed in accordance with the requirements initially described to him. In refusing to recognize such a commitment, the circuit court stated that "*we also must take as true plaintiff's allegation that he was informed that he could eventually expect tenure if he met certain standards of professional competence. This is of course true of most neophyte members of University faculties, including this very institution.*"[7]

The reluctance of the court to construe informal statements of tenure requirements made at the time of original hiring as a commitment to grant tenure is understandable. Tenure and its requirements are always a topic of conversation at any initial employment of a teacher. If such informal discussions could result in a contractual commitment, it would be impossible for school administrators ever to discuss the tenure requirements with individuals who are about to be employed. This would be unfortunate for both the job applicant and the school administration. Communication between the two would be decidedly impaired and the hiring process would be made awkward and less satisfactory. There is no doubt that incorporation of appropriate language in the employment contract could have resulted in a

4. 396 F. Supp. 104 (W.D. Wis. 1975).
5. *Id.* at 111 (emphasis added).
6. 408 U.S. 564 (1972).
7. 537 F.2d at 942 (emphasis added).

commitment to grant tenure upon fulfillment of stipulated prerequisites. In such event, a protected interest would be created by contract and due process would prevent the denial of tenure without appropriate safeguards. Such a fact situation does not exist here.

After the court determined that no contract to grant tenure existed, the only remaining basis for a due process requirement was the instructor's "unilateral expectation of tenure." The *Roth* case had already determined that this was not sufficient.

It is true that in *Roth* the teacher's contract had been for one year only and, in the present case, the plaintiff had been granted two, three-year contracts. One might argue that the longer the period of employment exists, the more substantial the expectation, that it will continue and culminate in tenure; as the degree of expectation increases, the more reasonable its elevation to a protected interest becomes. However, this rationale would require the use of a weighing process in order to determine the existence of a protected interest. This approach was rejected in the *Roth* case and appears to have been repudiated completely by three recent United States Supreme Court cases.[8]

In *Stebbins*, the court also considered the impact of the decision not to grant tenure upon the plaintiff's reputation or ability to obtain another position. If such reputation or ability had been impaired, the plaintiff's right to liberty would have been affected and, as indicated by the Court in the *Roth* decision, he would have been entitled to the protection of the due process clause. The court in *Stebbins*, however, found that there had been no public disclosure of the reasons for the denial of tenure and, therefore, that the Board's action had not stigmatized the plaintiff or impaired his ability to seek and obtain other employment.

It would be difficult to escape the fact that a refusal of tenure would affect the individual's reputation in the eyes of the community. Even though such conclusions were unwarranted, he probably would be thought of as either an incompetent or a troublemaker. It might, therefore, be argued that even in this type of case there is a need for procedural safeguards. On the other hand, it is doubtful whether the possibility of unwarranted community assumptions should dictate the use of disruptive, time-consuming and costly procedures.[9]

8. Meachum v. Fano, 96 S. Ct. 2532 (1976); Montanye v. Haymes, 96 S. Ct. 2543 (1976); Bishop v. Wood, 96 S. Ct. 2074 (1976).

9. 537 F.2d at 943 & n.3. The plaintiff also argued that his substantive due process rights were violated because the denial of tenure was arbitrary, capricious and without evidentiary basis. The court, however, found that, since the plaintiff did not possess an interest which was protected by procedural due process, he could not complain as to the reason for the denial of

The second school case, *Hostrop v. Board of Junior College Dist. No. 515*,[10] involved an appeal by a former president of Prairie State Junior College. Hostrop had initially sued the Board in 1972 for violating his substantive and procedural due process rights.[11] He had alleged that he had been improperly removed from his position as the District's Chief Administrative Officer and that the removal had arisen out of the fact that he had drafted and circulated, among his staff members, a statement containing recommendations for changes in the school's Ethnic Studies Program. That statement had been made public without Hostrop's consent. The publicity resulting from the statement's release had created problems with the Board because the Board had considered the statement a violation of its own public commitment to the then present Ethnic Studies Program.

The plaintiff's theory in the district court had been two-pronged: (1) his removal had constituted a violation of his right to freedom of speech because it had been based upon the fact that he had drafted and circulated the memorandum in question, and (2) he had not been given a notice or hearing prior to his removal. In dismissing the action, the district court had found that the memorandum was not protected by the first amendment and that the plaintiff had no protected interest requiring the application of the due process clause.

Upon appeal the Seventh Circuit reversed and remanded the case for trial.[12] It determined first that the contents of the memorandum were protected by the first amendment and second, that the plaintiff was entitled to the safeguards of the due process clause because his removal terminated contractual rights and adversely affected his future employment opportunities.[13]

Upon remand, the district court had entered judgment for the defendants.[14] The court first had concluded that the reason for the plaintiff's dismissal was not the fact that he had written the controversial memorandum but that he had withheld the contents from the Board until it was made public by another source. This had eliminated the freedom of speech issue. The court

tenure. The court did, however, recognize the fact that the reason would have become subject to judicial scrutiny if it had been alleged that the denial was based upon some impermissible discrimination or as punishment for exercising a constitutional right, such as freedom of speech.

10. 523 F.2d 569 (7th Cir. 1975), *modifying*, 399 F. Supp. 609 (N.D. Ill. 1974). Hostrop's problems with the Board have now been discussed in four separate opinions.

11. Hostrop v. Board of Junior College Dist. No. 515, 337 F. Supp. 977 (N.D. Ill.), *rev'd*, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

12. 471 F.2d 488 (7th Cir. 1972).

13. It appeared that, at the time the plaintiff was fired on July 23, 1970, he had an employment agreement which terminated on June 30, 1972. Also, he had alleged in his complaint that the Board, in justifying his dismissal, had stigmatized him by accusing him of misrepresentation, supplying false information and withholding important information.

14. 399 F. Supp. 609 (N.D. Ill. 1974).

then had decided that the plaintiff had not been deprived of property or liberty without due process because the employment agreement on which the plaintiff had predicated his alleged property right was not binding on the Board at the time of removal[15] and because the plaintiff himself had made public the Board's charges of concealment and misrepresentation which had caused his stigmatizing. The court also had concluded that the plaintiff had waived his right to a hearing by refusing to attend the Board meeting at which he had been discharged.

On appeal, the decision was affirmed in part and reversed and remanded in part. The circuit court agreed that the plaintiff had not been removed simply because he had written the memorandum. There was other evidence of wrongdoing. Also the summary removal had not violated the plaintiff's right to liberty. Since the Board's charges of misrepresentation and concealment had been made public by the plaintiff, any adverse effect that those charges would have upon future employment opportunities had been induced by the plaintiff's own conduct. Thus, he could not utilize his own conduct as a basis for requiring the protection of the due process clause.

The circuit court, however, did not agree with the remainder of the decision. It took the view that at the time of removal the plaintiff was still employed under an existing agreement, and therefore, had had a property right which entitled him to the protection of the due process clause. Since a protected interest was found to exist, the present court then had to determine whether, as the district court had found, the plaintiff had waived his right to a hearing by failing to attend the July 23, 1970 meeting. The appellate court held that there had been no such waiver.[16]

The latter determination was based on the fact that the Board had already decided to terminate the plaintiff's employment and had already made a commitment to a replacement. The court viewed this as establishing that the Board had pre-judged the issues and, therefore, had not offered the plaintiff a fair hearing. Thus, plaintiff's refusal to attend the meeting did not constitute a waiver of his right to due process. In ascertaining the relief suitable for the due process violation, the court noted that an injunction or declaratory judgment would be inappropriate because the plaintiff's employment contract had long since terminated. As to monetary damages, the court took into account the fact that the removal was justified[17] and held that plaintiff was not entitled to

15. The court found that the manner in which Hostrop had submitted the new employment contract deceived the Board.

16. 523 F.2d at 575-76. In a subsequent case, Fern v. Thorp Pub. School, 532 F.2d 1120 (7th Cir. 1976), the court found that a teacher had, in effect, waived his right to a hearing by failing to request it when the procedure proffered him permitted such request. He thus was denied recovery in a civil rights action based on a denial of due process.

17. 523 F.2d at 579. Having been raised by the plaintiff in his complaint, this issue had been

his salary for the remainder of the contract term. Even though actual pecuniary loss had not been established, the court concluded that the plaintiff could recover damages for the deprivation of intangible due process rights. Since the ascertainment thereof was a fact question, the case was remanded to the district court for trial of that issue.[18]

Students

Students also have alleged deprivation of due process rights. In *Hill v. Trustees of Indiana University*,[19] a graduate student had been awarded failing grades in two courses taught by the same professor and had been informed in a letter from his teacher that the grades were a penalty for plagiarism committed in the courses. A reviewing committee had been appointed in accordance with the usual procedures of the school in investigating charges of plagiarism. Since the Student Code of Conduct, adopted by the Trustees of the University, provided a different type of procedure for plagiarism cases, the Review Board had been disbanded.[20] The student had been informed that all charges and the failing grades would be held in abeyance pending the return of the professor to the university that fall. Instead of awaiting the professor's return and taking advantage of the procedure established by the Student Code of Conduct, the student had withdrawn from the university and had instituted a civil rights action against the professor and the Trustees of Indiana University in their official and individual capacities.[21]

The student had alleged that using the failing grades as a penalty for plagiarism, without a prior hearing, had deprived him of a protected interest without due process. The defendants in a motion to dismiss had argued: (1) that the Indiana two year statute of limitations had run, (2) that the Board of Trustees could not be sued in a civil rights action because that statute only applied to the wrongful conduct of a "person," and (3) that the complaint failed to allege a claim upon which relief could be granted. The district court had dismissed the complaint and an appeal was taken.

tried in the lower court. That court had determined that the Board was justified in terminating the contract. The circuit court agreed.

18. *Id.* at 580. Any damages awarded would be assessed against the Board by reason of the court's jurisdiction under 28 U.S.C. § 1331 (1970). The court determined that no recovery would be allowed under the Civil Rights Act, 42 U.S.C. § 1983 (1970), because the Board was not a "person" within the terms of that Act, and the individual members would not be liable personally because they had acted in good faith and not wrongfully. 523 F.2d at 577-78.

19. 537 F.2d 248 (7th Cir. 1976).

20. The Code provided in part that:

> No penalty shall be imposed by the instructor until the student has been informed of the charge and the evidence on which it is based and has been given an opportunity to present his defense to the instructor. If the faculty member finds the student guilty, he shall assess a penalty within the course and shall promptly report the case in writing to the Dean of Students.

Id. at 250 n.1.

21. *See id.* at 251 for a summary of the district court decision.

In the majority opinion,[22] the circuit court obviated the discussion of all the defenses raised below by concluding that the facts alleged in the complaint did not indicate that the plaintiff had been deprived of any protected interest. The court reasoned that, even if the plaintiff had a protected interest, he had not as yet been deprived of it. While the failing grades had been awarded prior to any hearing, the resultant repercussion of such grades had been held in abeyance until a hearing could be given. The plaintiff had not been expelled or suspended and had not suffered any form of disciplinary action. On the contrary, he had remained a student in good standing with a right to continue his university education.[23] There could be no question that the student had a protected interest and, therefore, that disciplinary action could not be effected without satisfying due process requirements.[24] However, here, any disciplinary action had been held in abeyance until a hearing was possible. The majority's dismissal of the complaint is consistent with generally accepted requirements of due process. As long as a hearing is available before a particular decision becomes effective, those requirements are satisfied.

Public Employees

The expectation of continued employment was considered a "protected interest" in *Mims v. Board of Education*,[25] which involved a relatively unique fact situation. The plaintiffs, five female employees of the Chicago Board of Education, had been certified by the Civil Service Commission and had worked as "Film Service Men I" for the Director of Visual Education. Due to a loss in federal funding in 1970, it had become necessary to reduce the work force in that particular department and the plaintiffs had been "laid off." Funds had been available to close down the abandoned program and this function had been performed by uncertified, temporary, male employees. The plaintiffs had protested to the Board of Education and Civil Service Commission and had contended that they should have been allowed to perform the work necessitated by the closing of the programs. The Director of Civil Service personnel had explained that the men had been retained temporarily to do the heavy work of moving equipment. When the plaintiffs had received no satisfaction from the Board of Education or Civil Service Commission, they instituted a civil rights action against the Board of Education, its Director of Civil Service personnel, its Director of Visual Education, and the three members of the Chicago Civil Service Commission. The plaintiffs had sought backpay, reinstatement and costs, including attor-

22. The concurring opinion is not relevant to this discussion.

23. In fact, he had been allowed to change his major to political science.

24. Dixon v. Alabama State Bd. of Higher Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

25. 523 F.2d 711 (7th Cir. 1975).

ney's fees, and had alleged that, due to sex discrimination and their not having been given a hearing prior to the layoff, their civil rights had been violated. The district court had decided not only that the plaintiffs had failed to establish any sex discrimination but also that due process did not require a hearing prior to a layoff because no property rights had been involved.[26]

On appeal the circuit court sustained the lower court's decision in regard to the sex discrimination charge but found that the tribunal had erred in failing to find a protected interest. The district court in effect had decided that, since the plaintiffs had been laid off and had not lost their civil service status, they had not been deprived of any protected interest. The appellate court, however, refuted this rationale and stated that "*[w]e recognize that a layoff is less drastic than a discharge and may not require all the procedural safeguards necessary before termination through discharge . . . but we think that plaintiffs had a property interest in their continued active employment, not just in their status as civil servants.*"[27] Although the court was not very clear about the scope of its decision, one would assume that the protected interest in continued employment stemmed from the plaintiffs' civil service status and not from the fact that they were engaged in public employment.[28] As to the type of procedural protection to be accorded the plaintiffs in this particular situation, the court stated:

> Plaintiffs at least were entitled to an opportunity to attempt to demonstrate that they were capable of performing work assigned to the six temporary employees . . . The issue of whether plaintiffs could perform the work, unlike that of the need to cut back due to loss of federal funding, was one of which plaintiffs might have been able to contribute information and valid persuasion, possibly resulting in a temporary continuation of employment. Regardless of whether Rosengarden was correct in his judgment, they were nevertheless entitled to a hearing to attempt to show he was wrong.[29]

In spite of that language and finding for the plaintiffs, the court affirmed that they were not entitled to any relief.[30]

26. *See id.* at 713 for a summary of the district court decision.

27. *Id.* at 715 (emphasis added).

28. If all public employees, regardless of the basis of their employment, were entitled to due process protection prior to their removal for whatever cause, governmental processes would be impaired. The resultant delays and expenses in firing inept employees would be intolerable.

29. 523 F.2d at 715.

30. *Id.* First of all, reinstatement could not occur because the positions involved had long since been terminated. Second, the plaintiffs could not recover damages from either the Board of Education or the Civil Service Commission because they were not "a person" under the Civil Rights Act. 42 U.S.C. § 1983 (1970). The individual defendants had acted in good faith within the scope of their duties and were, thus, immune from liability. The law, as it existed at the time of the layoff in 1970, would not have given these individuals any indication that they would have to hold a hearing prior to such a layoff. Therefore, they had acted in good faith. *Id.* at 716.

A technique of liberally construing the scope of a protected interest in order to broaden the area protected was employed in *Confederation of Police v. City of Chicago*.[31] The plaintiffs, representing a majority of the patrolmen employed by the Chicago Police Department, had requested that the defendants be required to provide collective bargaining[32] and grievance procedures. The complaint had alleged that Chicago patrolmen were subject to adverse job action, such as changes in geographic assignments and work schedules, denials of vacation schedules and leaves of absence, and demotions through reassignments, without an explanation or opportunity to contest such action. The plaintiffs' claim to a formal grievance procedure had been based on two constitutional arguments: (1) the absence of grievance procedures violated the due process clause, and (2) the failure to establish such procedures violated the equal protection clause because non-academic employees of the Chicago Board of Education and civil service employees of the Chicago library system already had been afforded such protection.

After determining that neither clause had been violated, the district court had dismissed the action.[33] On appeal the circuit court reversed. In deciding the due process issue, the district court had adopted the view that the patrolmen did not have a constitutional right to a grievance procedure and that there was no Illinois statute which attempted to confer that right. The circuit court was unwilling to accept the latter conclusion and rationalized as follows:

> A sufficient property interest to require due process may be found in an "entitlement" to a particular job. *Goss v. Lopez*, 419 U.S. 565, 572 . . . (1975). If there is such entitlement, then transfer of an individual to a job with less pay or imposing substantially greater burdens is an impairment of this entitlement, a taking of property which can be accomplished only after compliance with due process procedures. In this case, we conclude that entitlement to the particular job arises from Ill. Rev. Stat. ch. 24, § 10-1-18.1 (1973). This statute provides for a hearing for a suspension of thirty days or more and for termination. We think that a demotion or other substantially disadvantageous change is the kind of loss which can only be imposed after meeting standards of due process.[34]

The logic of this conclusion can be tested only by analyzing the statute relied upon by the court which stated:

In any municipality of more than 500,000 population, no officer or

31. 529 F.2d 89 (7th Cir.), *vacated*, 96 S. Ct. 3186 (1976) [hereinafter referred to in the text as *COP*].

32. Since it is beyond the scope of this article, this issue will not be discussed.

33. 382 F. Supp. 624 (N.D. Ill. 1974).

34. 529 F.2d at 92 (citations omitted). That interpretation of the statute, as well as that reasoning, had been utilized and supported previously, in Kropel v. Conlisk, 60 Ill. 2d 17, 322 N.E.2d 793 (1975), which will be discussed, hereafter, in the text of the article. *See* text accompanying notes 48-53 *infra*.

> employee of the police department in the classified civil service of the municipality whose appointment has become complete may be removed or discharged or suspended for more than 30 days except for cause upon written charges and after an opportunity to be heard.[35]

One might argue that the scope of the entitlement visualized by the circuit court is broader than that actually created by the statute. The expressed legislative intent is to protect the police officer by requiring that all discharges and suspensions in excess of thirty days shall be for cause which shall be determined after he has had an opportunity to be heard. No mention is made of any lesser adverse job action and the statute creates no explicit protection. Although not articulated by it, the circuit court apparently viewed the entitlement created by the statute to be sufficiently broad to encompass not only the enumerated rights but also all those necessary to prevent circumvention of those rights.

For instance, a police officer, who could not be discharged without cause established at a hearing, might be harassed into voluntarily terminating his employment by successive transfers, demotions, refusals of leaves of absence, and vacation scheduling, which he could not contest. Thus, the legislative intent would be defeated through the use of adverse job action which did not have to be accompanied by procedural safeguards. Perhaps the court was seeking to prevent this possibility by liberalizing the construction of the scope of the statutory entitlement.[36] Having determined that due process required the establishment of a grievance procedure, the court addressed itself to the form of such procedures when it stated:

> Because the district court held that the patrolmen had no such procedural rights, it determined neither the extent of those rights nor the amount of protection necessary for them. We cannot determine these issues from the record before us; they must be resolved upon remand. It is not improper for this Court, however, to afford some direction to the district court in this regard.
>
> In the context of the operations of a police department, we do not believe that grievance procedures require a stay of ordered and orderly transfers and demotions. The police department must be capable of immediate response to emergency situations. This capability would be substantially impaired if, for example, patrolmen were permitted to refuse to honor transfers pending exhaustion of grievance procedures. This concern for the effective performance of the police department is no justification for a complete denial of all procedural rights but transfers, demotions and the like should be presumed valid until successfully challenged through the grievance procedures.

35. ILL. REV. STAT. ch. 24, § 10-1-18 (1975).

36. The Illinois Supreme Court, in Kropel v. Conlisk, 60 Ill. 2d 17, 21, 322 N.E.2d 793, 795 (1975), recognized a more dire possibility, de facto discharge accomplished by successive, ad infinitum, maximum (thirty days), summary suspensions.

> The district court should give special attention to the forms that the adverse job action may take. Several such actions have been mentioned here; among the most obvious is the demotion which can cost the patrolman up to $1,000 per year. At oral argument, counsel for appellants alluded to other more subtle, non-obvious adverse actions. Each such action should be analyzed, and the district court must determine whether the rights of the patrolmen encompass freedom from arbitrary imposition of such actions and, if so, how those rights are to be protected.
>
> The grievance procedures to be afforded the patrolmen need not mirror in all respects those afforded other civil servants. The quasi-military quality of the police force does not justify complete denial of all grievance procedures. It does, however, justify use of a different grievance procedure within the police department.[37]

Embodied in the court's remarks is an acute understanding that due process protection must be tailored to practical considerations. This is the main object of the current concept of "flexible due process."

The remand to the district court was interrupted by the United States Supreme Court's granting of certiorari. That Court vacated the circuit court's judgment and remanded the case[38] for reconsideration in light of the Court's subsequent opinions in *Montanye v. Haymes*,[39] *Meachum v. Fano*,[40] and *Bishop v. Wood*.[41]

In the first two cases, prisoners had been transferred from one penitentiary to another without adherence to any hearing requirements even though such transfers might have been based upon misconduct and the inmates might have suffered some disadvantage in living conditions. The Court found that the prison inmates had no constitutional right to remain in the institution to which they were originally sent and could not find any state statute or policy requiring such. Since the prisoner transfer policy in the involved states had been left to the complete control of the prison system, the Court found that the inmates had possessed no interest to be protected.[42]

Of greater significance to the *COP* court is the *Bishop* decision, which involved the construction of a local ordinance governing employment of

37. 529 F.2d at 92.
38. 96 S. Ct. 3186 (1976).
39. 96 S. Ct. 2543 (1976).
40. 96 S. Ct. 2532 (1976).
41. 96 S. Ct. 2074 (1976).
42. In both cases, Justices Stevens, Brennan and Marshall strongly disagreed with the basic concept applied and, in *Meachum*, with the judgment. In the latter, they decried liberty as being a creature of the state or the Constitution by stating "if the inmate's protected liberty interests are no greater than the state chooses to allow, he is really little more than the slave described in the 19th century cases." 96 S. Ct. at 2542 (dissenting opinion). In both cases they would have determined whether a protected liberty interest would evolve, from the alleged "grievous loss," which the *Meachum* transfer, to a less favorable institution, engendered, but the *Montanye* one, not allegedly based upon a material difference between two facilities, did not. They, apparently, would use a weighing process to determine the presence or absence of a protected interest.

policemen. Bishop had been employed by Marion, North Carolina for thirty-three months and apparently had expected to retain his position unless and until he voluntarily terminated it or was removed for cause. This expectation had been based upon the city's personnel ordinance[43] and the common, municipal employment practice in Marion[44] whereby, after a six-month probationary period, city personnel apparently became "permanent" employees who would not be removed without cause. However, the district court had determined that the ordinance provided for dismissal without any hearing and that the petitioner, therefore, had no property interest in continued employment.[45] The Court agreed, because the plaintiff "held his position at the will and pleasure of the city,"[46] and affirmed, in a five to four decision, that the police officer had no property interest, granted by statute or otherwise, protected by the fourteenth amendment. Thus, due process was not applicable to a mere "expectation" of continued employment and there was neither express terminology in the Code nor "permanence" of employment sufficient to create, as state policy, a property interest under the law of North Carolina.[47]

43. The Marion Personnel Ordinance states that:

> *Dismissal.* A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice.

96 S. Ct. at 2077 n.5.

44. During Bishop's tenure of employment, as one of 17 city employees, no other person had been discharged, with or without cause. *Id.* at 2077.

45. *See id.* at 2079 for a summary of the district court decision. There had been no prior judicial interpretation of that ordinance, but the district court judge, sitting in North Carolina, had interpreted it to mean that the petitioner "held his position at the will and pleasure of the city." *Id.* at 2078 n.9 (quoting the district court decision).

46. *Id.* at 2078-79. Apparently the district court judge had analogized petitioner's employment to that of a school teacher, whose employment could be terminated at the end of the school year without his being given reasons, charges or a hearing. *See* 279 N.C. 254, 182 S.E.2d 403 (1971). Of course, that analogy ignored the fact that nontenured teachers are employed on a year to year basis and that the Supreme Court of North Carolina did not determine that the teacher's employment could be terminated "at the will" of the employer, but could be "terminated" (in that he was not rehired) at the end of the school year, the natural and contractual time of termination of a teaching position.

Nevertheless, neglecting to emphasize that point made in n.9 of the majority opinion, refusing to determine the reasonableness of its application, and noting that "the Circuit Court of Appeals for the Fourth Circuit, albeit by an equally divided Court" (96 S. Ct. at 2078 n.9), had "accepted" that analogy and construction, the Supreme Court found that "the City Manager's determination of the adequacy of the grounds for discharge [was] not subject to judicial review." *Id.* at 2079. Such determination was within the absolute discretion of the City Manager.

47. The dissent concluded, primarily, that the ordinance did create a property interest in that it clearly conditioned petitioner's dismissal on "cause" and that the majority's holding implicitly conceded that the City Manager must determine that such a cause had existed. If "cause" were necessary, due process would require a hearing in order to preclude an arbitrary determination of the presence of "cause." Thus, the legislature could not give a right with one hand while allowing its deprivation with the other without appropriate procedural safeguards. It

In *Montanye*, *Meachum* and *Bishop*, the Court stresses that the safeguards of due process apply only to interests or expectations created by the Constitution, statutes or state policy. Thus, one does not consider the seriousness of the impact on the individual in determining whether the expectation or interest is a protected one because it is the nature of that interest or expectation which controls. The Court appears to determine the nature of an interest by reference to the Constitution, statutes or state policy. If any of these were the primary source of such an interest, it is considered a protected right, entitled to the safeguards of the due process clause.

Thus, the Court apparently desired that the circuit court upon remand of the *COP* case determine whether the police officers' interests in being free from arbitrary, adverse job action, not amounting to discharge, were created by the statute. The statutory provision relied upon by the circuit court merely disallowed discharge or suspension for more than thirty days without a hearing. No lesser adverse job action was specifically included. However, it is possible that the circuit court still might achieve the same result by utilizing the Court's reasoning to determine that the provision creating the interest, to be free from arbitrary termination or suspension for more than thirty days, included freedom from arbitrary lesser job action. Since the Court apparently has decreed that a protected interest must originate in the Constitution or be granted by the state through statutes, interpretation thereof, or state policy, the final decision in the *COP* case will depend upon the circuit court's acceptance of the public policy and of the construction of section 10-1-18.1 of the Municipal Code as enunciated by the Illinois courts.

Both the statutory construction and the public policy of the State of Illinois were explicitly set forth in *Kropel v. Conlisk*,[48] wherein the Illinois Supreme Court, determining the invalidity of a patrolman's thirty-day, summary suspension,[49] stated:

> It is apparent that if section 10-1-18.1 of the Municipal Code is construed literally, it is a statute which does not, on its face, insure due process of law to those under its jurisdiction. Yet, it is clear from the statutes and rules above set forth that the public policy of this State, regardless of any constitutional considerations, is that a disciplinary suspension of more than 1 week of scheduled working days cannot be levied without providing some means of review of

could not, constitutionally, legislate away anyone's constitutional right to due process. In addition, Justices Brennan and Marshall recognized a "liberty interest" created by "the badge of infamy" imposed upon the police officer by his discharge for derogatory reasons. 96 S. Ct. at 2074, 2080-82 (dissenting opinion). The majority had determined that the disclosure was not made public until discovery was precipitated in the present action and, therefore, could not relate back to the discharge.

48. 60 Ill. 2d 17, 322 N.E.2d 793 (1975).

49. The police superintendent contended that ILL. REV. STAT. ch. 24, § 10-1-18.1 (1973) allowed him to suspend, summarily, a subordinate for 30 days.

> the suspension. Therefore, all of the above statutes and rules should be considered in pari materia.[50]

"All the above statutes and rules" to be considered "in pari materia" were those governing the employment and discipline of various Illinois governmental employees other than Chicago policemen. Those provisions allowed short duration, summary suspensions of employees and other types of administrative, disciplinary measures which would require a hearing.[51] After deciding that the statutory law of Illinois required a procedure to permit a policeman to avoid the adverse effects of a summary suspension of more than five days,[52] the court determined that section 10-1-18.1 did not preclude establishment of such a procedure and that it in fact, did authorize its establishment.[53] The same, general attitude in *Kropel* that public employ-

50. 60 Ill. 2d at 25, 322 N.E.2d at 797. In addition to ILL. REV. STAT. ch. 24 § 10-1-18 (1973), the court discussed the original, 1961, Municipal Code section, which had covered all Chicago employees and had provided for a hearing for suspensions of more than seven days or within six months after a previous suspension. Other provisions and rules it considered included ILL. REV. STAT. ch. 24, § 10-2.1-17, ch. 127, § 63b101-63b120.1 (1973) (section 63b108.b16 provided procedures for questioning both discharge and demotion which could be done only for cause) and Department of Personnel rules 2-640, 2-650 and 325, promulgated thereunder; and ILL. REV. STAT. ch. 121, § 307.13 (1973).

51. For instance, section 10-1-18 required a hearing for a suspension exceeding five days and for any suspension within six months after a previous suspension. The court viewed this requirement as recognizing:

> [t]wo areas of possible abuse in the area of summary suspension. First it recognizes that such suspensions do have a substantial economic impact on the employee, so a review procedure is available if the suspension is for more than 5 days. Second, it recognizes that there must be some limitation on the authority to summarily suspend, for absent such limitation such suspension could be levied consecutively and result in a *de facto* discharge of the employee.

60 Ill.2d at 21, 322 N.E.2d at 793 (citations omitted).

52. *Id.* at 25, 322 N.E.2d at 797. That decision has been acknowledged to affect suspension for 30 days in People *ex rel.* Maxwell v. Conlisk, 60 Ill. 2d 243, 326 N.E.2d 377 (1975) (dictum), wherein the plaintiff recovered his salary for the entire period of his arbitrary suspension, including the allegedly discretionary first 30 days. *Kropel* was also noted, in Hill v. Daley, 28 Ill. App. 3d 202, 328 N.E.2d 142 (1975) (dictum), as an additional reason not to review an allegedly unlawful suspension, to obviate any due process problem engendered by suspension for less than 30 days or a longer one imposed, without a hearing, subject to a later Police Board hearing.

53. Specifically, the Illinois State Supreme Court reasoned that:

> It is clear from all of the above statutes that the provision, "Nothing in this Section limits the power of the superintendent to suspend a subordinate for a reasonable period, not exceeding 30 days," does not necessarily preclude the police board from establishing a procedure for reviewing the propriety of any such suspension. Indeed, immediately preceding the quoted provision, the statute provides: "A majority of the members of the Police Board must concur in the entry of any disciplinary recommendation of action." (Ill. Rev. Stat. 1971, ch. 24, par. 10-1-18.1.)

60 Ill. 2d at 25-26, 322 N.E.2d at 797-98.

Further, the court stated:

> Section 10-1-18.1 provides in part that "The Police Board shall establish rules of procedure not inconsistent with this Section respecting notice of charges and the conduct of the hearings before the Police Board, or before any member thereof appointed by the Police Board to hear the charges." We consider this language to authorize the police board to formulate procedures for the review of disciplinary suspensions for less than 30 days ordered by the superintendent, a majority of the members of the board being necessary to uphold the suspension.

Id. at 26, 322 N.E.2d at 798.

ment regulated by statute is entitled to due process safeguards commensurate with the nature of the adverse job action can be found in other decisions. For instance, the Illinois Supreme Court, in effect, determined that the due process clause required procedural safeguards in connection with the layoff of an employee who had civil service status.[54] Likewise, recognition that geographical transfers were allowed only for cause has been given by the Illinois Appellate Court for the Fourth District.[55] Demotion is another lesser, adverse job action, which has been found to be limited by the necessity for valid cause, protected by due process safeguards and incapable of being otherwise available under local law.[56]

Therefore, reconsideration by the circuit court of its decision in the *COP* case, pursuant to the Court's mandate, could conceivably result in the same conclusion it had originally achieved.[57] This could be accomplished within

54. Powell v. Jones, 56 Ill. 2d 70, 305 N.E.2d 166 (1973). The Illinois Supreme Court, recognizing that one certified as a state employee pursuant to the various statutes and rules, had an entitlement to continued employment safeguarded by due process, determined that such entitlement was amply protected by existing procedures. Those included various administrative hearings. Therefore, the court found that due process was satisfied and did not require the additional, plenary hearing sought by the plaintiffs.

55. In Farny v. Civil Serv. Comm'n, 10 Ill. App. 3d 80, 293 N.E.2d 450 (1973), the deputy fire marshall had had his administrative hearing, after which the civil service commission had reassigned him from downstate Illinois to the Chicago area, on the basis that the geographical transfer was in the best interest of the Department of Public Safety. The court determined that, despite the presumption that the commission had acted in good faith, there was not substantial evidence to support its conclusion. The court also objected to the hearing officer's disallowance of evidence that such transfer would create great inconvenience to plaintiff in that it was, apparently, a practice to consider hardship to the transferee. It held "that the Civil Service Commission may not apply one rule in one case and a different rule in another where the circumstances are fundamentally the same on the issue of good faith, welfare of the Department and the necessity for transfer." *Id.* at 85, 293 N.E.2d at 453. Thus, the procedural safeguards necessary to effectuate a valid geographical transfer, having been exercised ineffectually, were preserved by the action of the court in affirming the judgment that the transfer was not made in good faith.

56. Wojcik v. Village of Harwood Heights, 17 Ill. App. 3d 478, 308 N.E.2d 240 (1974). A village ordinance permitted the mayor to remove, summarily, the police chief. When the Mayor did so, the police chief filed a mandamus action contesting his removal and appointment to his prior rank of lieutenant. The court determined that removal power was vested solely in the Board of Police and Fire Commissioners and could not be divested by local ordinances. Therefore, pursuant to ILL. REV. STAT. ch. 24 § 10-2.1-17 (1969), the removal was invalid and a hearing was required.

57. The Seventh Circuit had occasion to consider application of the *Bishop* case and the state policy of Illinois in Olshock v. Village of Skokie, 541 F.2d 1254 (7th Cir. 1976). It distinguished the ordinance in the *Bishop* case, which allowed discharge at the will of the city, from the Illinois statute (ILL. REV. STAT. ch. 24, § 10-2.1-17 (1975)) which provided that policemen were dischargeable for cause only. Since it also determined that "[t]he Illinois statute (ILL. REV. STAT. ch. 24, § 10-2.1-17 (1975)) as interpreted by Illinois courts, created a property interest in employment entitled to protection under *Bishop* . . .," (541 F.2d at 1258) it considered whether the plaintiffs' discharges for cause were valid. There, some of the policemen, engaged in a "uniform protest," had been discharged for cause. Others had not. Finding that employment of counsel appeared to be the distinguishing basis, the court held that this was arbitrary and affirmed the district court's order for reinstatement of plaintiffs with backpay, minus certain penalties. *Id.* at 1260.

the perimeters established by that Court through two slightly different approaches. First, the circuit court could determine, as discussed above,[58] that the policy of the State of Illinois, as reflected by its various statutes and administrative rules regulating public employment, requires procedural safeguards for any type of adverse job action affecting positions encompassed by such statutes. The presence of such policy, by the Court's own decisions, would elevate the employee's interest in being free from arbitrary job action to a protected one. Second, the circuit court could decide that section 10-1-18.1, which specifically grants Chicago patrolmen freedom from arbitrary discharge, was intended to protect patrolmen from any arbitrary job action of a lesser type which could, through repetitious use, force a voluntary resignation. Such an interpretation would appear reasonable and would allow the court to conclude that procedural safeguards were required for adverse job action, such as changes in geographic assignments and work schedules, denials of vacation schedules and leaves of absence, and demotions through reassignment. Whether the circuit court will indulge in either of these approaches and, if it does, whether the United States Supreme Court will accept the result, is problematical.[58.1] One might conclude, based upon the current decisions of the two courts, that the former is more likely to occur than the latter.

Prisoners

A rapid expansion of the catalog of protected interests in the area of prisoners' grievances appeared to be a reasonable expectation until the United States Supreme Court recently cast doubt upon such expectation in two late decisions.[59]

Originally, in *Morrissey v. Brewer*,[60] the Court had decided that the due process clause applied to the revocation of a parole and, as a result, that the parolee was entitled to the presence of certain procedural safeguards. The Court thus had abandoned the previously held notion that parole was a mere privilege and therefore the parolee was not eligible for due process protection. This altered view had been the result of the Court's detailed consideration of a parolee's interest in the continuation of his freedom. It had reasoned that the continuation of an opportunity which enabled him to live a normal life and

58. *See* text between notes 47 and 48 *supra*.

58.1 Immediately prior to the publication of these suggested methods of dealing with the United States Supreme Court's mandate, the Seventh Circuit reversed its original position in the COP case. It merely concluded that there was no Illinois law on which a protected interest could be based. The narrow view thus taken is probably reflective of the current attitude of the Supreme Court.

59. Montanye v. Haymes, 96 S. Ct. 2543 (1976), and Meachum v. Fano, 96 S. Ct. 2532 (1976).

60. 408 U.S. 471 (1972).

enjoy all those human pursuits cherished in our society deserved the fundamental protection offered by the due process clause and, thus, had elevated the interest of a parolee to remain at liberty to the status of a protected interest.[61] The Court's subsequent decision in *Wolff v. McDonnell*[62] had expanded upon this theme. There the Court had determined that a prisoner, who had been charged with misconduct of the type which could lead to forfeiture of good time credit,[63] had been entitled to the protection of the due process clause. The protected interest in that case was the expectation of future freedom, rather than, as in the *Morrissey* situation, the continuation of freedom already granted.[64]

However, two 1976 United States Supreme Court decisions, *Montanye v. Haymes*[65] and *Meachum v. Fano,*[66] may moderate the expansion of a prisoner's protected interests. In both of these cases, the Court determined that prisoners could be transferred from one penal institution to another, without their being provided a procedure to contest such action, even though the transfers might have been based upon misconduct and even though the inmates might have suffered some disadvantage in living conditions. The Court first decided that the safeguards of due process applied only to interests created by the Constitution, statutes or state policy. It then determined that the prisoner's expectation to remain in a particular institution was not part of his essential liberty, the infringement of which was prohibited by the Constitution. Thus, if an inmate's expectation were to be protected, there must be some other basis for elevating it to that status. The state could create the interest by allowing transfers only for specific reasons because there then would be a statutory interest deserving of due process protection. Since the prisoner "transfer policy" in the involved states had been left to the complete discretion of the prison system, the inmates had possessed no interest to be protected.[67] Since *Meachum* and *Montanye* were decided after the Seventh

61. While the court rejected the theory that the weight of an individual's interest determined whether it was deserving of due process protection and did adopt the notion that the nature of such interest was controlling, it relied on the value of continued liberty as the basis of its decision. One is hard pressed to differentiate between the rejected basis and the accepted one.

62. 418 U.S. 539 (1974).

63. Such credit would ordinarily reduce a prisoner's period of incarceration.

64. In Wolf v. McDonnell, the Court relied on a Nebraska statute (NEB. REV. STAT. § 83-185 (Cum. Supp. 1972)), which created good time credits, as granting a right safeguarded by the due process clause. 418 U.S. at 558.

65. Montanye v. Haymes, 96 S. Ct. 2543 (1976).

66. Meachum v. Fano, 96 S. Ct. 2532 (1976).

67. That conclusion controlled, irrespective of the facts that the one was an allegedly administrative transfer and the other was an acknowledged disciplinary transfer. However, the *Montanye* decision was remanded, apparently, to allow application of due process requirements to the claim that the disciplinary transfer was based upon the respondent's exercising his constitutional right to petition the courts. The dissent considered that sufficient for affirmance, rather than the remand decreed by the majority. Apparently the latter had merely reversed the circuit court's opinion that disciplinary, as opposed to administrative, transfers required pro-

Circuit cases discussed in this section, it will be necessary to evaluate the impact of the former on the present status of the latter.

The expectation of freedom through quick release was considered a protected interest in the Seventh Circuit's decision, in *United States ex rel. Richerson v. Wolff*,[68] that the due process clause applied to a state parole proceeding. Petitioner had been serving a sentence in an Illinois correctional institution and had been denied a parole by the Illinois Parole and Pardon Board for the following reasons:

> It is the opinion of the Board that an early parole on this offense where police officers were wounded while doing their duty, would deprecate the seriousness of such an offense and would not deter others from committing such crimes. The Board recognizes your excellent institutional adjustment and well conceived parole plans and recommends that you continue in your excellent adjustment in the institution.[69]

The prisoner had petitioned the district court for a writ of habeas corpus[70] and had complained that the parole procedure had violated the due process clause because he had not received an adequate explanation of the reasons for the denial. The motion of the warden and the Illinois Parole and Pardon Board for a dismissal on the ground that the reasons given by the Board were sufficient had been granted and this appeal resulted.

The first issue the circuit court considered was whether the due process clause had any application to a proceeding culminating in the denial of a parole. In deciding that it did, the court relied upon dicta in its prior decision, *King v. United States*.[71] There the court had determined that the Administrative Procedure Act[72] applied to federal parole hearings and required a statement of reasons when a parole was denied. Despite the fact that there had been no issue of due process involved in *King*, the court had stated that "*[a] substantial argument can be made that some modicum of due process should attend the denial of the expectation of conditional freedom on parole in as much as its termination after having been granted inflicts a 'grievious loss' of a 'valuable liberty'. . . .*"[73] Thus, in the eyes of the court, if actual liberty obtained through parole cannot be terminated without the safeguards guaran-

cedural safeguards. The dissent surmised that, though inarticulated, the alleged interference with the constitutionally protected right to petition the courts was considered to be sufficient, by the majority, to apply due process safeguards.

68. 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976).

69. *Id.* at 801 (quoting the Board's explanation for its denial of parole). Refusing a prisoner's parole if "his release at that time, would deprecate the seriousness of his offense or promote disrespect for the law," is a statutory ground for such refusal. ILL. REV. STAT. ch. 38, § 1003-3-5(c)(2) (1975).

70. *See* 525 F.2d at 797 for a summary of the district court decision.

71. 492 F.2d 1337 (7th Cir. 1974).

72. 5 U.S.C. § 553(e) (1970).

73. 492 F.2d at 1343 (emphasis added).

teed by the due process clause, the expectation of freedom by parole is entitled to similar treatment.

More in point, however, is the court's reliance on *Wolff*. It will be recalled that in *Wolff* the Court had recognized that a prisoner's expectation of a quick release, based upon good time credits, was an interest protected by due process.[74] Although the basis of the expectation in *Richerson* was an anticipated parole rather than the reduction of a sentence through the use of good time credits, this difference would appear to be of no consequence. Whatever its basis, the expectation of a quick release has the same importance and significance to a prisoner. As a result, the court held in *Richerson* that due process was applicable.[75]

At this point it is interesting to note that, in the *Meachum* decision, the majority made passing reference to parole proceedings by stating that "[t]he granting of parole has itself not yet been deemed a function to which due process requirements are applicable."[76] This would appear to be merely a recognition that the Court has not yet decided the issue and not an indication of its disposition on the matter. One would assume, however, that, since the opportunity for parole is created by statute, the Court will treat it as a protected interest on the basis of the due process theory asserted in *Meachum*.

Once the circuit court determined in the present case that a prisoner's interest in parole was a protected one, the next issue was whether due process required a statement of the reasons for denial of parole. The court again cited *Wolff* because it had required "a written statement of factfindings as to the evidence relied upon and [of] the reasons for the disciplinary action taken"[77] which could result in a forfeiture of good time credit. While the court does not discuss the protective value of a written statement of the basis for the denial of parole, such would be readily apparent. A statement of the reasons why parole was denied would better enable a reviewing court to determine whether the denial was based upon permissible grounds and would permit the prisoner to rectify any stated deficiencies to enable him to be eligible for parole at a later date. It is therefore not surprising that the court concluded that "due process includes as a minimum requirement that reasons be given for the denial of parole release."[78]

74. *See* text accompanying notes 62-63 *supra*.

75. The same result was achieved in two prior decisions of different circuits: United States *ex rel.* Johnson v. Chairman of the N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.*, Reagan v. Johnson, 419 U.S. 1015 (1974); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974).

76. 96 S. Ct. at 2540 n.8. *See* Scott v. Kentucky Parole Bd., *cert. granted*, 423 U.S. 1031 (1975) (No. 74-6438).

77. 525 F.2d at 800 (quoting 418 U.S. at 563).

78. 525 F.2d at 800.

The next question before the court was whether the reasons actually given satisfied the due process standard. The court adopted the following test established in *United States ex rel. Johnson v. Chairman of New York State Board of Parole*:[79]

> To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of facts are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision . . . and the essential facts upon which the Board's inferences are based.[80]

The court applied this test to the statement given by the Illinois Parole and Pardon Board and found it to be adequate for the following reasons: (1) the statement informed the prisoner of the statutory basis of the denial; (2) it indicated the facts which brought the prisoner's case within the scope of such statutory basis which thus enabled a reviewing court to determine whether the parole had been denied for a permissible reason; and (3) it indicated that the prisoner's progress towards rehabilitation was satisfactory up to this point. He, thus, was informed that, if his pattern of conduct continued, his opportunity for future parole would be enhanced. The psychological significance of such a statement was obvious.

A somewhat further expansion of prisoner protected interests occurred in *Holmes v. United States Board of Parole and United States Bureau of Prisons*.[81] Upon Holmes' arrival at the federal penitentiary at Terre Haute, Indiana, he had been classified, pursuant to a statute which allowed "classification and segregation of federal prisoners . . .",[82] as a "special offender" by the Bureau of Prisons. The Bureau, in order to facilitate such classification, had listed eight categories of prisoners who could be labeled "special offenders."[83] Holmes' experience and background had included him in catagory (2) which covered "[c]ases where official investigative reports show that an offender was involved in sophisticated criminal activity of an organized nature, or was a close or frequent associate of individuals involved in organized criminal activity."[84]

The purpose of the classification was to enable the Bureau to provide "close supervision to avoid situations which would result in undue adverse public reaction or would represent a threat to a particular inmate, the

79. 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.*, Reagan v. Johnson, 419 U.S. 1015 (1974).
80. 525 F.2d at 804 (quoting 500 F.2d at 934).
81. 541 F.2d 1243 (7th Cir. 1976).
82. 18 U.S.C. § 4081 (1970).
83. United States Bureau of Prisons Policy Statement No. 7900.47 (1974).
84. *Id.*, *quoted in* 541 F.2d at 1245 n.2.

institution, or the community."[85] The following explanation contained in the Bureau of Prisons Policy Statement indicated the type of supervision to be exercised in the case of a special offender: "Inmates who fall into the categories stipulated in this Policy Statement may not be transferred or approved for any community activities without prior approval from the Central Office, Correctional Programs Division."[86]

After Holmes had been denied parole, he had instituted an action in the district court[87] based upon the Mandamus[88] and Declaratory Judgment[89] statutes. He had alleged that his classification as a special offender was arbitrary and capricious, that he had been denied a hearing in regard thereto, and that, as a result of the classification, he had been denied a parole and a furlough and his transfer to a medical facility had been delayed.[90] He had requested that the defendants be ordered to remove the special offender classification, to afford him all the privileges allowed other prisoners, and to consider his request for parole without reference to the special offender classification. The district court denied the government's motion to dismiss and granted the plaintiff summary judgment. In so doing, the court not only held that the due process clause was applicable to the classification process but also established specific procedures to be followed in that process.

Upon appeal, several issues were presented to the circuit court for its consideration.[91] Addressing itself first to the basic due process question, the court discussed the impact of the classification of "special offender" on the interests or expectations of the prisoner in the following manner:

> A special offender may not be transferred or participate in community programs without prior approval from the Central Office, which results in "inordinate delays" compared with other prisoners' ability to personally request such transfers before a prison advisory committee or a case worker. The resulting delay is particularly burdensome when, as here, the purpose of the request for transfer was to obtain medical treatment.
>
> With respect to furloughs, Bureau of Prisons Policy Statement No. 7300.12c (July 23, 1974) provides that furloughs will ordinarily not be granted for persons identified with large-scale criminal activities. In light of the purposes of furlough as set out in the Bureau of Prisons Policy Statement, this restriction may be devastating to the social, moral and economic rehabilitation of the prisoner and his family.

85. *Id.*
86. *Id.*
87. *See* 541 F.2d at 1245 for a summary of the district court decision.
88. 28 U.S.C. § 1361 (1970).
89. 28 U.S.C. §§ 2201, 2202 (1970).
90. 541 F.2d at 1246. The delay resulted from the fact that a "special offender" could not be transferred without the approval of the Central Office, Correctional Program Division of the Bureau of Prisons, in Washington, D.C. *Id.* at n.4.
91. That involving the applicability of mandamus, to this situation, is discussed herein in the section concerning methods of judicial review. *See* text accompanying notes 224-233 *infra*.

> The special offender classification also affects a prisoner's prospects for release on parole. Those special offenders whose designation is based on participation in organized crime may be designated as "original jurisdiction" cases by the Regional Director of the Board of Parole, 28 C.F.R. sec. 217(a), (b)(2) (1974). All such applications are submitted to the Board for consideration *en banc*. Although the Board does review the underlying evidence upon which the special offender designation is based, the inmate's opportunity to challenge the designation at this stage is minimal. . . .
>
> We find it unrealistic to believe that once it has been determined that a prisoner may be the type that is particularly susceptible to involvement in 'situations which would result in undue adverse public reaction or would represent a threat to a particular inmate, the institution or the community', consideration is not given to this determination when furlough or transfer is considered. We find it equally untenable to suggest that this prior determination will play no part in the parole decision when the Bureau of Prisons Policy Statement provides that a furlough, a far lesser liberty than parole, will ordinarily be denied to such prisoners."[92]

The court then concluded, without extensive discussion, that a prisoner's expectations of obtaining furlough, transfer, or parole were protected interests and, therefore, could not be adversely affected in the above described manner, without observing due process requirements.

Since the court had already determined in *Richerson* that a prisoner's interest in parole was a protected one, *Holmes* merely extended this status to anticipated furloughs or transfers. If one accepts the court's conclusion that these aid in the rehabilitation of the prisoner and his family, it would appear that the extension is warranted. Nevertheless, the only way the result attained in *Holmes* can withstand re-examination, on the basis of *Meachum's* theory that a protected interest is created only by the Constitution, statute or state policy, is to establish that those opportunities alleged to have been impaired by the "special offender" classification (parole, furlough and transfer) were granted to the prisoner by statute or governmental policy and were not subject to the discretion of the prison system. Parole would appear to meet this condition. It is doubtful whether the other two would.

Assuming arguendo that the circuit court's decision that a protected interest existed in *Holmes* is correct, the court's reference to the procedures established by the lower court for prisoner classification is pertinent. The district court had adopted the following requirements:

(1) A written notice prior to the designation containing a brief description upon which the contemplated designation is based;
(2) The opportunity to have the assistance of retained counsel, to be heard in person, to present witnesses and to confront and

92. 541 F.2d at 1250-51.

cross-examine any witnesses called by either or both defendants;
(3) Appointment of a hearing officer who does not have personal knowledge upon which the special offender designation is based;
(4) Written findings by the hearing officer if the officer should determine that a special offender classification is warranted, and submission of such determination and findings to the Bureau of Prisons; and
(5) The opportunity for review of the hearing officer's determination that the special offender classification is warranted by the Chief of Classification and Parole at plaintiff's institution of incarceration, by the warden of the institution, and by the Bureau of Prisons.[93]

In evaluating the propriety of these procedures, the court recognized that it was necessary to accommodate both the needs of the prisoner and the needs and objectives of the penal institution and affirmed all but two of the lower court's requirements. The circuit court felt that the presence of counsel at the hearing might "give the proceeding a more adversary cast and tend to reduce the utility of the special offender classification as a correctional tool. . . ."[94] It took the position, therefore, that although there should not be an absolute right to retain counsel, counsel should be permitted when the issues were complex or the prisoner was unable to conduct his own defense. The court also took issue with the right of the prisoner to call, confront and cross-examine witnesses because that might create a risk of reprisal or undermine prison authority. As a result, the court felt that that opportunity should be left to the determination of the hearing officer on a case by case basis.

After a court has recognized a new statutory or constitutional right, it usually is not long before the court is requested to apply such retroactively. This occurred in *Bailey v. Holley*[95] with respect to the requirement that a decision denying parole be supported by stated reasons. The petitioner had been convicted of violating a federal statute and had been serving his sentence in a federal penitentiary. After a hearing, his application for parole had been denied and he had requested a statement of reasons for such denial. The Board of Parole had sent him the following response: "The Board has not been supplying reasons and the Board members have not been recording the justification for the decision."[96] The petitioner had filed suit for habeas corpus in the district court[97] and had alleged that the refusal of the Board to furnish reasons for its decision had violated the due process clause and the

93. *See id.* at 1246 for a summary discussion of these requirements.
94. *Id.* at 1253.
95. 530 F.2d 169 (7th Cir. 1976).
96. *Id.* at 171.
97. *See id.* for a summary of the district court decision.

Administrative Procedure Act as previously construed by the Seventh Circuit in the *King* case. The district court had denied the petition and had found: (1) that the due process clause did not require stated reasons in parole denial cases and, (2) that the *King* case would not be given retroactive application to a 1973 parole denial.

While an appeal was pending, the Seventh Circuit rendered its decision in *Richerson*. There it had been found that due process required that a denial of a parole be accompanied by reasons for the denial. The court thus was required to determine whether either the statutory or due process requirements should be applied retroactively. It noted that the United States Supreme Court had recognized originally that there was no legal concept either requiring or prohibiting retroactive application of a decision[98] and that the Court subsequently had adopted the following criteria to be utilized in determining whether or not retroactive effect should be given: the underlying purpose of the new rule, the reliance on the prior law by law enforcement officials, and the effect of retroactivity on the administration of justice.[99] Applying these criteria to the present situation, the circuit court first determined that the presence of reasons in parole denial cases was significant in according the prisoner fairer treatment but was not so fundamental as to be considered indispensable. Second, the Board of Parole had had a consistent policy against supplying reasons for denial for thirty years. Since this policy had continued for that period without judicial disapproval, the Board reasonably had relied on such standards in this particular situation. Third, if the requirement were to be applied on a retroactive basis, thousands of parole denials would be effected.[100] For these reasons the court concluded that its due process decision in the *Richerson* case would not be applied retroactively.[101]

This decision appears to be reasonable because it preserves a policy which promotes improvement of procedural safeguards. The courts would be reluctant to adopt new standards if, each time this was accomplished, thousands upon thousands of cases which had been disposed of earlier had to be reopened. Such would cause a complete breakdown of law enforcement. This adverse effect, however, will not occur where the new standards are not applied retroactively.

Welfare Recipients

Ever since *Goldberg v. Kelly*,[102] welfare recipients have been accorded

98. Linkletter v. Walker, 381 U.S. 618 (1964).
99. Stovall v. Denno, 388 U.S. 293 (1967).
100. 530 F.2d at 175. In 1973 alone, 10,915 paroles had been denied.
101. Citing the present case, the court achieved the same result in Berkley v. Benson, 531 F.2d 837 (7th Cir. 1976).
102. 397 U.S. 254 (1970).

the protection of the due process clause. Their interest in the continuation of assistance has been based upon a statutory entitlement which, according to current thought, requires such protection. Two recent Seventh Circuit decisions have been predicated upon this principle.

In the first, *White v. Roughton*,[103] suit had been instituted to enjoin the township officers in charge of the local welfare program from terminating welfare payments to two plaintiffs and from denying the third plaintiff's application for such assistance without their being given an opportunity to contest these adverse actions. At the hearing for a preliminary injunction, the following facts had been established: (1) Welfare payments to two of the plaintiffs had been terminated without notice, explanation or information as to their rights of appeal; (2) the third plaintiff's application for assistance had been denied without explanation or information as to her rights to appeal; and (3) defendants had administered the local welfare program without the benefit of written standards of eligibility. The district judge had denied the preliminary injunction[104] because he had determined that the plaintiffs would not prevail on the merits. The court's own independent findings had been that none of the plaintiffs were eligible for public assistance.

On appeal the circuit court cited *Goldberg v. Kelly* and reversed and remanded with instructions because it found that the procedure utilized by the defendants in the administration of the local welfare program was deficient in two respects. First, no opportunity had been afforded for a pretermination hearing, and second, written standards of eligibility had not been adopted. The court considered both of these to be requirements of due process in welfare cases. A hearing prior to the termination of assistance was imperative because the recipient might be dependent upon such assistance for his very existence and should not be deprived of such payments without an opportunity to be heard. The requirement of written standards of eligibility was based on the need for equal and consistent treatment. In the present case eligibility had been determined by the defendant and his staff "based upon their own unwritten personal standards." The court felt that this uncontrolled discretion in the administrator and his staff was clearly a violation of due process.

The defendants had argued that the lack of an opportunity to be heard at the administrative level had been cured by the trial court hearing which had culminated in the finding that the plaintiffs were not eligible for public assistance. Rejecting this contention, the circuit court found first, that the judicial function was limited to a review of the action taken at the administrative level and did not include an independent judicial decision concerning eligibility and second, that a lack of an articulated standard of eligibility

103. 530 F.2d 750 (7th Cir. 1976).
104. *See id.* at 751 for a summary of the district court decision.

would deprive plaintiffs of due process regardless of when the hearing occurred.[105]

It is clear that the court's decision, requiring due process in welfare cases, is intended to encompass not only termination of assistance but also the denial of an application for assistance. By characterizing modern welfare as an entitlement rather than a privilege, the courts intend that those charged with the administration of welfare programs should not have unfettered control. To preserve that intent, unbridled administrative discretion must be eliminated from the application process as well as the termination process. Thus, in order to comply with due process requirements, the establishment of standards of eligibility is necessary in both instances.[106] Since the procedural devices made available for the protection of each may differ due to the differences in the positions of an applicant and a recipient, the court remanded the case back to the trial judge for his assessment of the procedures which actually had been utilized in the denial of public assistance.

The second case, *Banks v. Trainor*,[107] considered the extent of the notice required by the due process clause in a welfare case. As a participant in the federal Food Stamp Program, the State of Illinois had been required to adopt standards of eligibility which conformed to those established by the United States Department of Agriculture. Prior to July 1, 1975, the bonus value of food stamps (the difference between the cost of the stamps and their value at the store) had been determined on the basis of a percentage of the food allowance for a particular household. After that date an income method had been adopted whereby the bonus value was calculated on the basis of "net food stamp income" (the household's gross income less certain deductions). The changeover from one method of calculation to the other generally resulted in decreased benefits because the food stamps were more expensive.

The Illinois Department of Public Aid, which supervised the state's food stamp program, had mailed out notices of reduction to each participating household. These notices had indicated the change in the method of calculation and also had provided the recipients with three figures: (1) the recipient's income, (2) the bonus value of the stamps under the old method of computation, and (3) the bonus value under the new method. Even though the recipient had been informed that he could obtain a detailed explanation of the computations upon request, there had been no indication as to how the figures were computed nor what underlying data was utilized in the calculations.

105. *Id.* at 754. The transcript of the trial court's hearing clearly indicated that the judge had used his own personal standards in determining that the plaintiffs were not eligible for public assistance.

106. *See* Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968).

107. 525 F.2d 837 (7th Cir. 1975), *cert. denied*, 424 U.S. 978 (1976).

Under the available appeal procedure, if an appeal were filed within ten days of the notice, no reduction in the bonus value would occur until the final determination of that appeal.

The plaintiffs had instituted a class action to enjoin application of the new method of calculating bonus value until all recipients had been provided with an adequate advance notice thereof.[108] The trial court had issued the preliminary injunction and upon appeal, the circuit court was required to determine whether that injunction should have been issued. That court found that the notice did not comply with the requirements of due process because it did not contain all of the information necessary to enable a recipient to determine whether the computation for his particular household was correct. Even though the procedure permitted the recipient a hearing upon appeal, he would not be able to prepare properly for it without adequate basic information. The defendants argued that no notice was required because the action taken represented a mass change in benefits.[109] Conceding that due process did not require a notice to each individual where administrative action had general application to a class, the court pointed out that individual notices were required here because the calculation of bonus value under the income method required an individual determination for each household. Therefore, it found that the preliminary injunction was appropriate but suggested that the parties, with the intervention of the district court judge, agree upon a type of notice which would meet the needs of all concerned.

Social Security Applicants

Since the Social Security Act [110] creates a statutory right to certain types of benefits, an applicant is entitled to the safeguards of the due process clause in determining whether he comes within the scope of this act. In *Lonzello v. Weinberger*,[111] it had been contended that the procedure utilized to reject plaintiff's application for disability insurance benefits did not meet due process requirements. After an evidentiary hearing, the administrative law judge had determined that the plaintiff was entitled to disability benefits. The Appeals Council of the Social Security Administration had decided on its own motion to review that decision and had notified the plaintiff that the necessity for additional medical evidence required that he be examined by a doctor. He also had been invited to submit further evidence and to present oral argument before the Council in Arlington, Virginia. Pursuant to the Council's request, plaintiff had undergone a physical examination. The medical report had been

108. *See id.* at 838-40 for a summary of the district court decision.

109. *Id.* at 842. The regulations of the Department of Agriculture do not require individual notices for "mass changes in benefits." 7 C.F.R. 271.1(n)(2)(i) (1976).

110. 42 U.S.C. §§ 301-1396 (1970) [hereinafter referred to in the text as SSA].

111. 534 F.2d 712 (7th Cir. 1976).

sent directly to the Council and a copy of the report, together with certain other evidence which was to be included in the record, also had been forwarded to the plaintiff. In comments sent to the Council the plaintiff had disputed parts of the doctor's report.

The Council, apparently relying upon the doctor's report, had reversed the administrative law judge's decision. The plaintiff then had appealed to the district court, which affirmed,[112] and thereafter to the circuit court, which reversed. The plaintiff had argued that the procedure utilized by the Council violated due process because he had not been given an opportunity at an evidentiary hearing to rebut all the evidence relied upon by the Council. He had contended that he had a right to cross-examine the physician who had submitted the adverse report. The defendant, on the other hand, had argued that the plaintiff had waived his right to complain by failing to request an appearance before the Council.

In answer to defendant's argument, the court stated first, that the plaintiff's financial condition would not have permitted him to travel to Virginia and, second, that oral argument before the Council would not have satisfied due process because it would not have been an evidentiary hearing. Thus, the court found that the plaintiff was entitled to a decision based on the evidence adduced at a hearing. Since one of the requirements of such a hearing was that the plaintiff be given an opportunity to rebut all the evidence which could be utilized in arriving at a decision, due process had not been satisfied. For this reason the circuit court reversed with instructions that the case be remanded to the Council for a rehearing.

JUDICIAL REVIEW

In determining whether to seek judicial review of an adverse administrative action, several threshold issues must be considered: (1) whether such review has been legislatively precluded, (2) whether the party who desires to initiate the review has standing, (3) whether the doctrines of primary jurisdiction, exhaustion of remedies or ripeness would, at this point in the proceedings, prevent a judicial review, (4) whether the scope of the review is sufficiently broad to include the issues involved, and (5) what procedural methods are available for such review. The Seventh Circuit was confronted by all these problems during its last term.

Preclusion

The Administrative Procedure Act[113] authorizes judicial review "[e]xcept to the extent that (1) statutes preclude judicial review; or (2) agency

112. 387 F. Supp. 892 (N.D. Ill. 1974).
113. 5 U.S.C. §§ 701-706 (1970) [hereinafter referred to in the text as APA].

action is committed to agency discretion by law."[114] Thus, a judicial review is not available if Congress intended to withhold it. Such intent may be express or implied. The United States Supreme Court has taken the position that the above quoted provision of the APA establishes a presumption that judicial review is available and that it is the burden of the party opposing such review to establish that Congress intended to preclude it.[115] This judicial attitude has been adopted by the lower federal courts and was the basis of the decisions in several recent Seventh Circuit cases.

The presumption in favor of judicial review was rebutted in *Paramount Farms, Inc. v. Morton*,[116] which involved an attempt to enjoin condemnation proceedings for the acquisition of Outer Island, a Lake Superior island within the then recently created Apostle Island National Park. The plaintiff, the owner of the island, had refused an offer of $195,000 and had claimed that the property was worth at least $900,000. Failing to obtain the property through negotiation, the Park Service had instituted condemnation proceedings.[117]

The complaint in the injunction suit alleged that during negotiations the park service had failed to comply with the Uniform Relocation Assistance and Real Property Activities Policies Act of 1970,[118] which established certain guidelines to be adhered to by the various agencies of the federal government in acquiring real property. The alleged violations occurred when defendant: (1) had failed to make "every reasonable effort" to acquire the property by negotiation; (2) had failed to have the property appraised; (3) had failed to provide plaintiff with a written statement of the amount the Park Service had established as just compensation, as required by section 4651 of the Policy Act;[119] and (4) had taken coercive action (the threat of condemnnation) to compel an agreement on the price to be paid for the property, which was forbidden by the same section.

The plaintiff's action had been instituted under the judicial review provision of the APA.[120] The defendant had sought a dismissal on the ground that the Policy Act precluded judicial review and, as a result, section 701(a) of the APA deprived the court of jurisdiction. For his preclusion argument, the defendant had relied upon section 4602(a) of the Policy Act which states that: "*[t]he provisions of section 4651 (setting forth the guidelines) . . . of this Act create no rights or liabilities and shall not effect the validity of any*

114. *Id.* § 701(a).

115. Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 156 (1969); Barlow v. Collins, 397 U.S. 159, 166 (1969); Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

116. 527 F.2d 1301 (7th Cir. 1975).

117. 384 F. Supp. 1294 (W.D. Wis. 1974).

118. 42 U.S.C. §§ 4601-4655 (1970) [hereinafter referred to in the text as the Policy Act].

119. *Id.* § 4651.

120. That statute is no longer considered an independent grant of subject matter jurisdiction to the district courts to review agency decisions. Califano v. Sanders, 97 S. Ct. 980 (1977).

property acquisition by purchase or condemnation."[121] The district court judge had held that it had been the clear intent of Congress to preclude judicial review for any alleged noncompliance with the provisions of the Policy Act and had granted the government's motion to dismiss.[122] This decision was affirmed by the circuit court.

That court apparently had no difficulty in accepting the lower court's conclusion that the Policy Act precluded judicial review. It already had determined, in a 1975 decision,[123] that a private cause of action would not result from the violation of the guidelines because of the language of section 4602(a). This conclusion had been reached by other federal courts whenever the same issue had been litigated.[124] Having negated the right to have the Policy Act's guidelines adhered to, it would appear to follow that judicial review was precluded.

On the other hand, there is some logic to the notion that, even though the Policy Act specifically negates private causes of action, it is not to be construed as preventing a judicial review when its main purpose is to force a public agency to perform in accordance with its statutory duties. That argument has not been utilized.

Nevertheless, the circuit court had not relied merely upon the language of section 4602(a). It also had analyzed the legislative history of the Policy Act and found explicit language, in the committee's reports, that judicial review of other provisions of the Policy Act was not contemplated because the legislature had not intended the federal courts to become bogged down with actions alleging violations of guidelines which had been adopted merely to establish a preferred way of acquiring property. The court also supported its decision on the pragmatic basis that the failure to comply with the guidelines had not worsened the property owner's position.

Thus, the Policy Act, in no way, attempted to withhold any previously held rights from that party. If negotiations for the purchase of the property failed, the government still would be required to proceed through condemnation and such proceedings would provide the owner with adequate safeguards. Therefore, if the government had withheld information, as alleged in the complaint, it could be obtained through discovery processes during the condemnation proceeding. Thus, it is clear that, in spite of the strength of the presumption in favor of judicial review, the statute creating the public agency is controlling. Here, the court construed the statute as precluding judicial review. That construction, based on statutory language, legisla-

121. *Id.* § 4602(a) (emphasis added).
122. 384 F. Supp. at 1296.
123. Rhodes v. City of Chicago, 516 F.2d 1375 (7th Cir. 1975).
124. *See* 527 F.2d at 1304 for a list of cases.

tive history and the fact that no vital interest was left unprotected by the lack of review, appears to be reasonable.

It is not necessary for a plaintiff to bring an action under the APA in order to take advantage of the presumption permitting judicial review because that presumption arises in any consideration of the reviewability of administrative actions. For instance, in *Bradford School Bus Transit, Inc. v. Chicago Transit Authority*,[125] one of the issues on appeal was whether the Urban Mass Transportation Administration's[126] action of providing financial assistance to the Chicago Transportation Authority,[127] at the time the latter was in violation of the Urban Mass Transportation Act of 1964,[128] which created and controlled the agency, was reviewable. In June 1974, the CTA had contracted with the UMTA to obtain financial assistance. Their contract had "included a provision, which, under certain conditions, specifically prohibited the CTA from engaging in school bus operations in competition with private bus operators"[129] and a later agreement had provided for additional financial assistance. Subsequently, the CTA had submitted a bid, which had been accepted by the Chicago Board of Education, to provide bus transportation for Chicago school children and the bid of the plaintiff, a school bus operator, had been rejected. Allegedly the plaintiff had suffered the loss of that contract because of the CTA's and UMTA's violation of the Act which was intended "to protect private school bus companies from competition by federally funded public transit systems."[130]

Therefore, plaintiff had brought an action, individually and on behalf of all private school bus operators in the CTA's service area, for a declaratory judgment that the CTA was in violation of the Act and its grant contract and for an injunction against the UMTA's providing any further financial assistance to the CTA. In addition to dismissing the plaintiff's complaint for lack of standing,[131] the district court had concluded that judicial review of the UMTA's conduct was precluded by implication.[132] The circuit court reversed because it felt that the congressional provision for the non-competition agreement, as well as what the court felt was the UMTA's discretion in regard

125. 537 F.2d 943 (7th Cir. 1976).

126. Hereinafter referred to in the text as UMTA.

127. Hereinafter referred to in the text as CTA.

128. 49 U.S.C. §§ 1601-1613 (Supp. IV 1974) [hereinafter referred to in the text as the Act].

129. 537 F.2d at 944. The Act provided that: "No Federal financial assistance shall be provided . . . unless such applicant and the Secretary shall have first entered into an agreement that such applicant will not engage in school bus operations, exclusively for the transportation of students and school personnel, in competition with private school bus operators." 42 U.S.C. § 1602(g) (1970).

130. 537 F.2d at 946.

131. That issue is discussed in the section on standing. *See* text accompanying notes 146-160 *infra*.

132. *See* 537 F.2d at 945 for a summary of the district court decision.

to breaches thereof, was insufficient to infer that Congress intended to preclude judicial review. The Act clearly intended to protect the interests of private bus operators. That indicated an intent to safeguard such interests in the courts, especially in view of the fact that there was neither clear and convincing evidence to the contrary nor any statutory language of an intent to foreclose judicial review.[133] The presumption permitting judicial review was bolstered by the clear purpose of the Act to protect private school bus operators. Under such circumstances, the court's decision was inevitable.

Thus, it seems that the presumption may be used to refute an implication of preclusion of judicial review unless the statute creating a right contains specific preclusion provisions or other very clear language that can be said to disallow judicial review. Such clarity was found in *Diercks v. FSLIC*.[134] There the plaintiff had contested the right of the Federal Savings and Loan Insurance Corporation to accept the highest net bid, rather than plaintiff's highest gross bid, for the sale of corporate property, without notice of its intent to accept the highest net bid. He appealed the dismissal of his complaint[135] on the ground that the lack of notice denied him due process. The court determined that the federally created corporation was given corporate powers by statute[136] which left the handling of internal corporate affairs entirely to its unfettered discretion and that, therefore, the intent to disallow judicial review was evident. It also noted that the APA prohibited judicial review of agency action "committed to agency discretion by law"[137] and the *Ferry v. Udall*[138] holding that due process did not require a hearing "where only a potential privilege to purchase United States land is involved."[139] Thus, the presumption of reviewability may be overcome not only by a statute's preclusion of judicial review but also by the vesting of absolute discretion in the agency whose decisions are sought to be reviewed. If the agency has been designated the sole determiner of issues before it, the presumption has no force.

Preclusion of judicial review need not be all inclusive. It may be limited, as under the SSA, to cases involving less than a stated amount. That limitation effectively precluded judicial review of a disputed lesser amount in *Rubin v. Weinberger*.[140] There, the plaintiff had contested disallowance of $1,130.12

133. That reasoning was based on the presumption, as propounded by the United States Supreme Court in Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970), and followed previously in this circuit in Cotovsky-Kaplan Physical Therapy Ass'n v. United States, 507 F.2d 1363 (7th Cir. 1975).

134. 528 F.2d 916 (7th Cir. 1976).

135. *See id.* at 917 for a summary of the district court decision.

136. 12 U.S.C. § 1819 (1969).

137. 5 U.S.C. § 701(a)(2) (1970).

138. 336 F.2d 706 (9th Cir. 1964).

139. 528 F.2d at 917 (quoting 336 F.2d at 714).

140. 524 F.2d 497 (7th Cir. 1975).

she had claimed for hospitalization benefits under the SSA. On appeal, the administrative law judge had reduced the contested amount to $722 by allowing her six additional days benefits of $408. His decision had become final when the Appeals Council had denied further review. The plaintiff then had sought judicial review in the district court,[141] which had granted the government's motion to dismiss because such review was precluded by section 1869(b)(2) of the SSA.[142] This section limited appealable claims to those of $1,000 or more.

Plaintiff had contended that such foreclosure of review had violated due process and that her claim had been for $1,130.12. The circuit court found that those contentions were without merit because the statute provided for judicial review *after* a final decision of the Secretary and at that time the amount in controversy had been $722. Apparently, it felt that the $408 she had been awarded could not now be "in controversy."[143] The court thus considered the disputed $722 as insufficient to bring the claim within the statute's reviewability provision and also held that its preclusion of judicial review did not violate due process because the fiscal limitation was a rational justification to avoid overburdening the courts and was, therefore, constitutional.[144] The preclusion provision here withstood a constitutional attack because, in the court's view, it was justified.

Since the courts have seldom dealt with possible constitutional limitations on the preclusion of judicial review, this area of the law is relatively barren of signposts. Neither discussion nor consideration of the presumption favoring judicial review is necessary here because the courts need not look elsewhere for authority in order to grant relief when the statute provides for judicial review. However, it must be remembered that such relief is the judicial review itself and not the specific relief that a party may seek from a governmental agency. The reviewing court's only function is to prevent the agency from abusing the power delegated to it. This function was assumed by the courts at the very outset when every move of administrative agencies was suspect and it has persisted to the present time. Even though the all consuming suspicion has now diminished, it still exists in the form of wariness of occasional administrative abuses. Although there is a modicum of statutory basis for the presumption favoring judicial review, it is actually a creation of this judicial attitude.[145]

141. *See id.* at 498 for a summary of the district court decision.

142. 42 U.S.C. § 1869(b)(2) (Supp. IV 1974).

143. *Id.*

144. 524 F.2d at 500. The court, for the same reason, found that the preclusion of review of smaller claims did not deny equal protection. *Id.*

145. This basic notion, that judicial review is a necessary protective device, may be the rationale for the finding of reviewability in United Transp. Union v. Indiana Harbor Belt R.R., where the court construed an unclear statute, which permitted judicial enforcement of an

Standing

The Seventh Circuit was also involved in two cases with the issue of a litigant's standing to seek judicial review. In the first, *Bradford School Bus Transit, Inc. v. Chicago Transit Authority*,[146] the CTA had entered into a grant contract with the UMTA, pursuant to the provisions of the Act, and the latter party had agreed to provide financial assistance to the CTA. The grant had prohibited the CTA from competing with private bus operations in providing school bus services, except in certain instances.[147] In apparent violation of the grant and the Act, the CTA had submitted a bid to the Chicago Board of Education to provide school bus service in Chicago. The plaintiff, a private operator in the same area, also had submitted a bid but the CTA's bid had been accepted. The plaintiff then had instituted an action, on its own behalf and as representative of all private school bus operators in the area, for a declaratory judgment that the CTA had violated the grant contract and the Act and to enjoin further financial assistance from the UMTA. Contending that the plaintiff lacked standing and that judicial review was precluded, the defendant had moved to dismiss. The district court had upheld those contentions and the plaintiff appealed.[148]

The circuit court first addressed itself to the issue of standing[149] and concluded, on the basis of the criteria established by the United States Supreme Court in *Association of Data Processing Services, Inc. v. Camp*,[150] that the plaintiff did have standing. That case had stated that the requirements for standing were: (1) that the plaintiff had, in fact, suffered an injury, and (2) that the plaintiff was arguably within the zone of interests to be protected by the Act. As an unsuccessful bidder, the present plaintiff actually did suffer an injury and thus satisfied the first requirement. Since one purpose of the Act was to prohibit competition by public transit systems assisted by federal grants with private school bus operators, this plaintiff was within the zone of interests to be protected and the second requirement also was fulfilled.

In dismissing the complaint for plaintiff's lack of standing, the lower court had relied on the Seventh Circuit's 1969 decision in *South Suburban Safeway Lines, Inc. v. City of Chicago*.[151] There the court had denied

administrative order, but made no provision for review when enforcement was not sought. 540 F.2d 861 (7th Cir. 1976).

146. 537 F.2d 943 (7th Cir. 1976). The court ultimately referred the case to the UMTA for the primary administrative action discussed in the section herein devoted to primary jurisdiction and/or exhaustion of remedies. *See* text accompanying notes 125-139 *supra*.

147. 49 U.S.C. § 1602(g) (1970).

148. 537 F.2d at 945.

149. The court determined that judicial review was not precluded, as has been discussed in the preclusion section of this article. *See* text accompanying notes 113-145 *supra*.

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

151. 416 F.2d 535 (7th Cir. 1969).

standing to a private transit company, which had challenged a grant to the CTA by the UMTA, for the extension of the latter's rail service because it would place the CTA in competition with the plaintiff. A prohibitory provision, similar to that involved in the present case, required denial of financial assistance which would enable a public transit company to compete with a private carrier, unless certain essentials were shown to exist.[152] Determining that that plaintiff had no legally recognized right to be free from competition, the court had held that it lacked standing to contest the CTA's grant. The court, thus, had applied the legal rights theory[153] of standing which had been prevalent prior to the Court's decision in *Data Processing*. Since the Court had altered the basis for standing in that decision, the *South Suburban* decision had been rendered obsolete and, in the words of the circuit court, "the district court's reliance on *South Suburban* was misplaced."[154]

The circuit court's analysis, in the present case, took into account both of the criteria for standing established by *Data Processing* and left no doubt that the court fully accepted and applied the basic theory enunciated in that case.[155] However, in a case decided earlier in the term, the court had failed to clarify its position to this degree. In *Airco, Inc. v. Energy Research & Development Administration*,[156] the court had determined that a disappointed bidder had possessed standing to challenge a governmental procurement decision without referring to *Data Processing*, and had justified its position as follows:

> Before turning to the merits, we must address the issue of standing. In *Rosetti Construction Co. v. Brennan*, . . . the court considered the merits of a disappointed bidder's challenge to a procurement decision after commenting that "the Administrative Procedure Act, 5 U.S.C. § 702, provides a basis for such consideration." Although the standing issue was not briefed or argued in *Rosetti*, this remark cannot be dismissed as dictum because the court had a continuing duty to determine whether a statutory basis for its jurisdiction existed. Recent cases in the other circuits have agreed that disappointed bidders have standing to obtain judicial review. *See Armstrong & Armstrong, Inc. v. United States*, . . . We see no need to reconsider the standing issue at this time.[157]

152. 49 U.S.C. § 1602(c) (1964).

153. In the federal courts, no litigant had standing unless he could allege an infringement of one of his common law, constitutional, or statutory rights. The courts were reluctant to recognize that statutory provisions, such as the one involved in *South Suburban* and in the present case, created a new substantive right.

154. 537 F.2d at 945.

155. One authority, however, has discerned a trend in the federal courts to downgrade, pay lip service to, or completely ignore, the "zone of interests" requirement. K. DAVIS, ADMINISTRATIVE LAW OF THE 70'S (1976).

156. 528 F.2d 1294 (7th Cir. 1975).

157. *Id.* at 1296.

This cursory explanation leaves considerable doubt about the theoretical basis for the court's finding of standing. Several possibilities are evident. The court's reference to the standing provision of the APA[158] might indicate reliance thereon as creating standing in a disappointed bidder. Since the Seventh Circuit already has held that that provision, without reference to an existing legal right or another statute, does not create standing, such reliance is unlikely.[159] The reference to the *Armstrong* case and the cases cited therein might indicate the court's adoption of the standing theory utilized in those cases. This assumption also creates uncertainties because some of those cases apply the *Data Processing* theory of standing with the same precision that this court does in the *Bradford School Bus* case and others do not.[160] Even though one can agree with the result achieved in *Airco*, because an actual injury had occurred, the absence of any definitive statement of the basis for the holding is regrettable. The use of this decision as precedent in subsequent cases could compound the confusion which already exists in the law of standing.

Primary Jurisdiction, Exhaustion of Administrative Remedies and Ripeness

Statutory preclusion of judicial review and lack of standing are only two of the preliminary defenses available to defeat a plaintiff's attempt to obtain judicial relief from administrative action. Prior to reaching the issue of whether a plaintiff is entitled to any relief, the court also may need to determine whether it would consider his claim. If it is more reasonable for the governmental agency to conclude its administrative processes before any judicial action is contemplated, the court may refer the cause back to the administrator for further consideration because the purpose of administrative law is to allow specialized groups to handle specialized problems involved in specific areas of law. If the agency is to perform its statutory functions, it cannot be subjected to judicial interference before it has an opportunity to perform. Therefore, in those areas where and at those times when the agency's expertise is necessary to a proper effectuation of the purpose of a statute, the courts usually will refrain from accepting jurisdiction of the cause. This might be the result when the administrative body has primary jurisdiction of the cause, the plaintiff has failed to exhaust his administrative remedies or the action is not yet ripe for review. All these concepts are available to the court in a variety of situations to test the timeliness of a request for judicial relief and all were utilized by the Seventh Circuit during its last term.

158. The APA's standing section states that: "a person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1970).

159. 416 F.2d 535 (7th Cir. 1969).

160. *See* William F. Wilke, Inc. v. Department of the Army, 485 F.2d 180 (4th Cir.1973).

Primary Jurisdiction

The first of the timing devices, primary jurisdiction, requires initial pursual of the administrative procedure in those situations where a party has concurrent remedies, one judicial and one administrative. Upon determining that the concept is applicable in a given case, a court either will dismiss the request for judicial relief or hold it in abeyance and force the plaintiff into the administrative stream.[161]

The Seventh Circuit invoked the doctrine of primary jurisdiction in *Bradford School Bus Transit, Inc. v. Chicago Transit Authority*[162] where it will be recalled, the plaintiff, a private school bus operator, had sued the CTA and the UMTA.[163] The plaintiff had requested: (1) a judgment declaring that the CTA had violated the Act and the terms of a contract with the UMTA, under which the CTA was to receive financial assistance from the UMTA, and (2) that the UMTA be enjoined from providing the CTA with further financial assistance. The complaint alleged that the CTA had been awarded a contract to furnish school bus service to the Chicago Board of Education and that the CTA had bid for the contract in competition with the plaintiff in violation of the Act and contract.[164] Upon determining that the plaintiff lacked standing and that the Act precluded judicial review, the district court had dismissed the complaint.

Upon appeal, the circuit court held that the plaintiff did have standing and that the Act did not preclude judicial review.[165] However, it affirmed the lower court's decision by invoking the doctrine of primary jurisdiction. Approximately a year after plaintiff's suit had been instituted, the UMTA had "established complaint procedures and remedies available to interested parties 'alleging a violation or violations of terms of an agreement' entered into 'pursuant to' an UMTA grant."[166] Even though the administrative remedy had come into existence after the plaintiff had sought judicial relief,

161. The justification for depriving a litigant of a choice of remedies is usually articulated as a need for uniformity of decision, the need for expertise in decision making and the need for orderly procedure.

162. 537 F.2d 943 (7th Cir. 1976). *See* text accompanying notes 125-139, 146-160 *supra*.

163. *See id.* at 945 for a summary of the district court decision.

164. Both the statute and contract prohibited, with certain exceptions, a recipient of federal financial assistance from engaging in school bus operations in competition with private operators.

165. These issues are discussed in this article under those respective headings. *See* text accompanying notes 113-145 (preclusion), 146-160 (standing) *supra*.

166. 537 F.2d at 948. The regulations provided for filing a complaint and established an investigatory procedure whereby both the complainant and the grant recipient, alleged to have violated the school bus provision, submit evidence supporting their respective positions and rebutting their opponent's. An evidentiary hearing could be held at the administrator's discretion. If from the evidence the administrator determined that a violation had occurred as alleged, he could "order such remedial measures as he may deem appropriate," including the withholding of further financial assistance. *See id.* at 948-49 n.3 for a discussion of these regulations.

this fact did not deter the court from applying the primary jurisdiction doctrine. Apparently it took the view that, since the administrative remedy had been made available prior to any judicial decision on the violation issue, the plaintiff should be required to pursue it. The court recognized that primary jurisdiction has not always been applied where concurrent remedies are present when it stated:

> There is no fixed formula for the invocation of the doctrine of primary jurisdiction and "the decision whether to apply it depends upon a case by case determination of whether, in view of the purposes of the statute involved and the relevance of administrative expertise to the issue at hand, a court ought to defer initially to the administrative agency."[167]

Without further comment, the court simply concluded that the doctrine was appropriate in this case.

One might wonder why the court insisted upon preliminary resort to the UMTA. This query appears to be answered by the court's prior comment that "it [the doctrine of primary jurisdiction] applies where a claim is originally cognizable in the courts whenever enforcement of that claim requires resolution of issues, which under a regulatory scheme, have been placed within the competence of an administrative body."[168]

Customarily, the courts have deferred to the agency where it has, by its experience and knowledge, something to contribute to the final solution of the problem. If such contribution would be nonexistent because the issue involved is purely legal in nature, primary jurisdiction will not be invoked. The court then will retain the case and avoid the added expense of an administrative proceeding because eventually it will be required to cope with the legal issue upon judicial review. Where factual issues are involved, however, the courts usually determine that agency knowledge and experience can be important in deciding those issues. For instance, in the present case, the statutory restriction against grant recipients' engaging in school bus operations does not apply "unless private school bus operators are able to provide adequate transportation, at reasonable rates, and in conformance with applicable safety standards."[169] If the CTA relies on this provision as a justification for providing school bus service to the Board of Education, the following fact issues would need to be considered: the adequacy of available private school bus service; the reasonableness of the rates for such service; and the compliance by the private operators with safety standards. These issues might be better left, initially, to the UMTA which has knowledge and experience in the field of mass transportation. After the initial fact finding proceeding

167. *Id.* at 949 (quoting Feliciano v. Romney, 363 F. Supp. 656, 674 (S.D.N.Y. 1973)).
168. *Id.*
169. 49 U.S.C. § 1602(g) (Supp. IV 1974).

before the UMTA, the court would have an opportunity for judicial review.[170] Based on these observations, the court's application of primary jurisdiction appears consistent with prevalent theories.

Exhaustion of Administrative Remedies

Even if administrative action has adversely affected a particular party, judicial review is not always available immediately. Often the agency statute, or procedural rules promulgated thereunder, provide for administrative reconsideration or review of the adverse decision. Due to the possibility that such subsequent agency action can result in a reversal of the initial decision, judicial relief is ordinarily withheld until those additional administrative steps are taken. Justification for judicial abstention in such a situation is usually based on the argument that the agency, as an expert, should be allowed to cope with the problem fully, prior to any judicial interference. The reason for requiring exhaustion may not always exist and, in such instances, circumvention is justified. For instance, a litigant may wish to attack the constitutionality of the very statute administered by an agency. It would appear to be a complete waste of time and effort to force him to litigate the constitutional issue before the agency because it is not an expert in constitutional law and, actually, lacks the authority to make any constitutional decisions. On the other hand, the constitutional issue may be dependent upon the application of the statute to a specific set of facts and thus, evidence would have to be heard and evaluated. Perhaps, in this situation, the agency should be allowed to hold the hearings, evaluate the evidence on the basis of its experience and knowledge, and then initially decide the constitutional question. That decision, of course, would be subject to judicial review. Requiring exhaustion, also, would appear to be reasonable where the administrative tribunal could obviate the constitutional question by deciding the case on another basis because the court might be able to avoid deciding a constitutional issue, an achievement which is consistent with the basic policy of the United States Supreme Court.[171]

An interesting Seventh Circuit case involving the necessity of exhausting administrative remedies, where the sole issue was the constitutionality of a statute, was *Wilson v. Edelman*.[172] This was a consolidated appeal of two separate suits seeking: (1) declaratory judgments that a certain provision of the SSA was unconstitutional, and (2) recovery of benefits which would have

170. The regulations provide specifically for such review under the APA.

171. *See* B. SCHWARTZ, ADMINISTRATIVE LAW § 178 (1976) for a discussion of the exhaustion doctrine as applied to constitutional issues arising in administrative procedure.

172. 542 F.2d 1260 (7th Cir. 1976).

been due if that provision had not been a means of destroying eligibility.[173] The plaintiffs were individuals who had been institutionalized either as patients in public mental hospitals or as defendants in jail awaiting trial. They had claimed that they had been eligible for disability assistance benefits under the SSA but that they had been prevented from receiving such funds by reason of section 1382(e)(1)(A) of the SSA which provides that "no person shall be an eligible individual or eligible spouse for purposes of this subchapter with respect to any month, if throughout such month, he is an inmate of a public institution."[174] Some of the plaintiffs had been receiving benefits which had been terminated upon their being institutionalized but others had not. In addition to the personal actions, the plaintiffs also had sought to represent the claims of all individuals who had been denied benefits or whose benefit payments had been terminated because of the application of section 1382(e)(1)(A).

After the plaintiffs had moved for summary judgment, as well as permission to proceed as a class, the defendant, the Secretary of the Department of Health, Education and Welfare, had filed motions to dismiss or for summary judgment. He had contended, among other things, that the court lacked jurisdiction of the subject matter. It appeared that, in both suits, federal jurisdiction had been invoked on the bases of the mandamus statute, the APA, and the federal question and commerce provisions. The Secretary had argued that, since the plaintiffs were attempting to recover benefits under the SSA, the action was prohibited by section 405(h) of the SSA[175] which recently had been held by the United States Supreme Court[176] to bar any judicial action to obtain social security benefits, except as provided by section 405(g) of the SSA.[177] When plaintiffs had attemptd to base jurisdiction for their suits on this section, the Secretary had argued that they had failed to exhaust their administrative remedies as required by this particular provision's limitation of judicial review to "final decisions of the Secretary made

173. The suits also challenged the constitutionality of a section of the Illinois Public Welfare Act, ILL. REV. STAT. ch. 23, § 3-1.4 (1975). Since that phase of the litigation would not involve an exhaustion issue, it is not discussed here.

174. 42 U.S.C. § 1382(e)(1)(A) (Supp. IV 1974). It was claimed that this provision denied the plaintiffs equal protection and due process because incarceration would not terminate a disabled indigent's need for financial assistance. The public institution would not provide such things as newspapers, stamps, stationery, etc.

175. It provides in part that: "No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of title 28 to recover on any claim arising under this subchapter." 42 U.S.C. § 405(h) (1970).

176. Weinberger v. Salfi, 422 U.S. 749 (1975).

177. This provision states in part that:

> Any individual, after final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by civil action commenced within sixty (60) days after the mailing to him of notice of such decision or within such further found time as the Secretary may allow.

42 U.S.C. § 405(g) (1970).

after a hearing."[178] It had been the Secretary's view, that this was a built-in exhaustion requirement necessitating a hearing and a final decision[179] and that none of the plaintiffs had taken these jurisdictional steps before instituting the present litigation. Some of the plaintiffs' benefits had been terminated on their entry into a public institution but others had not even applied for benefits.

The district court, agreeing with the Secretary, had held that it lacked jurisdiction because the plaintiffs had failed to exhaust the administrative remedies required by the statute and had dismissed the actions.[180] Upon appeal, the court first determined that section 405(g) of the SSA contained a non-waivable jurisdictional requirement of a secretarial decision prior to judicial consideration of any claim for benefits. This conclusin was compelled by the United States Supreme Court's decision, in *Weinberger v. Salfi*[181] where that Court had required a denial of an application for social security benefits before allowing a judicial attack on the constitutionality of the statutory provision which had formed the basis for such denial. However, in two subsequent decisions, the Court had determined that summary termination of benefits constituted a reviewable, final decision of the Secretary.[182] Based on those two cases, the circuit court reasoned that the jurisdictional requirement of an agency decision had been satisfied by the suspension or termination of benefits at the time of incarceration. However, this did not conclude the court's problems because the suspension or termination arose out of a summary disposition without an accompanying hearing. Since section 405(g) required a "final decision of the Secretary made after a hearing," the statutory requirements had not been met and there had not been compliance with the regulations, which provided for internal reconsideration and review. The court again turned to *Weinberger* for a solution.

In *Weinberger*, the application for social security benefits had been denied at the local level without a hearing. The applicant had made no attempt to pursue the available procedures and agency reviews which would have culminated in a hearing and a decision at the highest administrative level. Even though that had appeared to be a complete lack of adherence to the requirements of section 405(g), the Court had allowed the applicant to seek judicial relief. The Court referred to the statutory mandate of a "final decision of the Secretary made after a hearing" and stated as follows:

178. *Id.*

179. In order to obtain a "final decision" the regulations require a number of procedural steps which are not mentioned in the statute. *See* 542 F.2d at 1260-61.

180. *See* 542 F.2d at 1268 for a summary of the district court decision.

181. 422 U.S. 749 (1975).

182. Mathews v. Eldridge, 424 U.S. 319 (1976); Mathews v. Diaz, 96 S. Ct. 1883 (1976). In the latter, the Court also had limited that jurisdictional requirement, under proper circumstances, to a mere filing of an application.

> The term "final decision" is not only left undefined by the Act [SSA], but its meaning is left to the Secretary to flesh out by regulation. Section 405(1) of the Act accords the Secretary complete authority to delegate his statutory duties to officers and employees of the Department of Health, Education and Welfare. The statutory scheme is thus one in which the Secretary may specify such requirements for exhaustion as he deems serves his own interests in effective and efficient administration. While a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary, we believe it would be inconsistent with the congressional scheme to bar the Secretary from determining in particular cases that full exhaustion of internal review procedures is not necessary for a decision to be "final" within the language of § 405(g).
>
> Much the same may be said about the statutory requirement that the Secretary's decision be made "after a hearing". Not only would a hearing be futile and wasteful, once the Secretary has determined that the only issue to be resolved is a matter of constitutional law concededly beyond his competence to decide, but the Secretary may, of course, award benefits without requiring a hearing. We do not understand the statute to prevent him from similarly determining in favor of the applicant, without a hearing, all issues with regard to eligibility save for one as to which he considers a hearing to be useless.[183]

Thus, the Court had determined that the Secretary had authority to establish his own exhaustion requirements depending upon his needs in a particular case. If he desired to treat a decision of a subordinate as final, even without a request for reconsideration or administrative review, he could do so. Also, if he viewed a hearing as a useless step, he could abandon it as a requirement for exhaustion. The Court then had found that, in accordance with this discretion, the Secretary had waived all the procedural requirements after the preliminary decision and, thus, that his decision was to be treated as final and ripe for review.

In the present case, the circuit court followed this lead and held that the procedures, which had been available after the termination of benefits, had been waived by the Secretary by his motion for summary judgment, by his failure to plead the defense of exhaustion originally, and by his conduct and statements in the district court indicating that the only issue was the constitutionality of the contested provision. On that basis, the circuit court decided that: (1) the plaintiffs, whose benefits had been terminated upon incarceration, were entitled to judicial relief; (2) the district court's dismissal of the actions should be vacated; and (3) the cases should be remanded to the lower court to consider those plaintiffs' claims for class relief and requests for declaratory judgment. Obviously, the plaintiffs who had not even applied for

183. 422 U.S. at 766-67.

benefits had not fulfilled the requirements of section 405(g) and, therefore, were not entitled to pursue a judicial remedy.

One might gather from the present decision and the opinion in *Weinberger* that the Secretary has complete discretion to determine that degree of compliance with section 405(g) and his internal procedures which must occur before a party is entitled to judicial intervention. Both of those opinions stress the fact that the Secretary's waiver makes complete exhaustion unnecessary. It might be assumed, therefore, that the court would have no alternative but to dismiss the suit for lack of jurisdiction if the Secretary failed to waive the procedures which were circumvented. However, when one reads between the lines, and analyzes the Court's subsequent decision, in *Mathews v. Diaz*,[184] a different picture emerges.

Although the Court again had utilized the term "waiver" as justifying the failure to exhaust the "full panoply of administrative remedies available," a true waiver had not occurred in *Mathews*. Actually, the Secretary had moved for a dismissal of the suit for benefits on the specific ground of failure to exhaust administrative remedies. Despite this fact, the Court had permitted one of the plaintiffs, who had not even received a decision on his application for benefits,[185] to contest the constitutionality of a particular eligibility provison of the SSA. In justifying its decision, the Court had stated:

> Although the Secretary moved to dismiss for failure to exhaust administrative remedies, at the hearing on the motion he stipulated that no facts were in dispute, that the case was ripe for disposition by summary judgment, and that the only issue before the District Court was the constitutionality of the statute. As in *Salfi*, this constitutionality question is beyond the Secretary's competence.[186]

Therefore it would appear that the court will automatically conclude that the Secretary has waived all other exhaustion requirements and that the court has jurisdiction if the record indicates that the benefits have been applied for and the only issue involved is one of constitutionality. Since the applicant should not be required to litigate a constitutional question before an administrator who lacks the authority to decide it, such a result is undoubtedly reasonable. The court's insistence on the use of waiver to justify the circumvention of complete exhaustion, where a waiver does not actually exist, may be somewhat perplexing. However, it must be remembered that the court is dealing with a statutory requirement of exhaustion rather than a judicially imposed one. Since it could not, in theory, justify a circumvention of the statutory requirement on the basis of judicial policy, it rationalizes its decision to allow judicial relief without exhaustion on the basis that the

184. 96 S. Ct. at 1883.
185. *Id.* at 1889.
186. *Id.* at 1889-90.

Secretary, within the discretion delegated to him, has waived those requirements.[187]

Ripeness

Unlike the other two timing devices, ripeness involves the court in a close analysis of whether the administrative action (usually of general application) has attained the stage where its adverse effect upon the party seeking judicial review is direct and certain and is not dependent upon further administrative process. A classic application of the doctrine has arisen out of administrative proceedings occurring pursuant to the Clean Air Act.[188]

The Environmental Protection Agency[189] is authorized under the Clean Air Act to establish air quality standards for the protection of the national health and welfare. The states are delegated the task of developing plans for the maintenance and enforcement of such standards in their respective jurisdictions and these plans are subject to the review and approval of the EPA. On March 8, 1973, the EPA, pursuant to a court order,[190] reviewed the plans submitted by the states and disapproved them on the ground that they were inadequate.[191] It, then, promulgated regulations which required that the states developing new plans were to identify geographical areas as Air Quality Maintenance Areas[192] within their boundaries "which, due to current air quality and/or projected growth rate, may have the potential for exceeding any national standard within the subsequent 10 year period."[193] The states were then to formulate a plan to prevent the violation of the national standards in those areas for such ten year period. When the State of Indiana did not establish within the time limit provided by the EPA any AQMA designations, the EPA, again acting pursuant to its statutory authority, designated four Indiana counties as AQMAs.

Petitions to review the EPA action were filed in the circuit court by two steel companies, three power companies and one municipality. In *Bethlehem Steel v. United States Environmental Protection Agency*,[194] the petitioners claimed that the above regulations, and the designations of the four counties as AQMAs, were invalid for several reasons: first, the regulations had been promulgated without adherence to the APA; second, the regulations had not

187. This same approach was used by the Supreme Court, in Mathews v. Eldridge, 424 U.S. 319 (1976), which involved the constitutionality of the very procedure to be exhausted prior to judicial intervention. The Court reasoned that the recipient, whose benefits had been terminated without a hearing, should not be required to exhaust those procedures, which he contended violated due process, prior to a judicial determination of whether or not they were unconstitutional. Incidentally, they were not held to be unconstitutional.

188. 42 U.S.C. §§ 1857-1857(l) (1970).

189. Hereinafter referred to in the text as the EPA.

190. National Resources Defense Council v. EPA, 475 F.2d 968 (D.C. Cir. 1973).

191. 38 Fed. Reg. 6279 (1973). *See* 475 F.2d at 970.

192. Hereinafter referred to in the text as AQMA.

193. 40 C.F.R. § 51.12(e) (1976).

194. 536 F.2d 156 (7th Cir. 1976). It should be noted that section 307(b)(1) of the Clean Air Act provided for judicial review, by petition, to a United States Court of Appeals.

been authorized by the Clean Air Act and, if they were, they were unconstitutional; and third, there was no basis for the AQMA designations. In requesting dismissal, the EPA contended that its action in designating the AQMAs was not ripe for review because no specific plans had been formulated and, therefore, the petitioners had not, as yet, been subjected to any regulations.[195]

In approaching the issue of ripeness, the court relied on the technique adopted by the United States Supreme Court in *Abbott Laboratories v. Gardner*.[196] There the Court had set forth several considerations for determining whether the administrative action was ready for review: First, a court should avoid involving itself in controversies which could not be solved, except on the basis of hypothetical or speculative facts or policies, because problems of this nature were not consistent with the classic judicial function. Second, a court should avoid interfering with the administrative process until a definite regulation or decision had evolved because unnecessary judicial harassment of an agency would impede its progress and would be costly in money and effort. Third, a court should avoid intervention unless the effect of the administrative action, on those requesting judicial intervention, was definite and ascertainable. This was because the nature and extent of the impact should be known in order for the court to determine whether the plaintiff was entitled to relief and what type of relief would be appropriate. These considerations had been reduced to two areas of concern for use in the solution of a given case: (1) fitness of the issue for judicial review, and (2) the hardship to the parties if judicial abstention were observed.

In analyzing the fitness of the issues for judicial review, the court acknowledged that the following issues in the present case were ready for review: the constitutional and statutory validity of the 1976 regulations, the validity of the procedure used in promulgating such regulations, and whether there was a substantive basis for the designated AQMAs. Since all the issues involved either completed matters or pure questions of law and no future occurrences were necessary to clarify them, waiting would not aid the court in deciding any of them. Even though they were technically ready for review, the issues actually had arisen out of a continuing proceeding, which would result eventually in the establishment of clean air regulations for the AQMAs. Designating such areas had been only the first step in the process. Since the attacked regulations merely provided for the study by the state of the air

195. It was initially argued, by several of the plaintiffs, that ripeness was not an appropriate defense in this case, because the Clean Air Act provided for a judicial review of any action taken pursuant to its authority, regardless of its present effect. Finding that the judicial review section merely dealt with the procedure of review, and not its timeliness, the court dismissed that contention.

196. 387 U.S. 136 (1967).

pollution problems in the AQMAs and imposed no burden on the plaintiffs, the court felt that it should not interfere with the administrative process at this point, that the agency should not be impeded in the completion of a task which was vital to the national health, and that the issues could be decided after final agency action.

The court then addressed itself to the hardship which the plaintiffs would suffer if judicial consideration were postponed. The administrative action complained of had required nothing of the plaintiffs at this time. Therefore, one would assume that no hardship had resulted from such action. The plaintiffs, however, attempted to demonstrate a present injury by alluding to the fact that the designation by the EPA of AQMAs had created problems for them in the area of capital planning, i.e., maintenance of presently unascertainable capital reserves to purchase air pollution equipment or to convert from one fuel to another in order to meet any requirement established for the AQMAs. In addition, the power companies complained that the designations disrupted the normal growth of their service area and, thus, rendered financial planning to meet future needs difficult, if not impossible. Also, a Securities and Exchange Commission regulation required the utilities to divulge in any prospectus for the sale of securities the EPA designation and its potential effect on their financial position and this rendered such sales more difficult and expensive. The court viewed these alleged injuries as too "vague and speculative" to justify judicial intervention. No immediate expenditures were required of the companies and the administrative action did not otherwise have a direct impact upon the daily affairs of any of them.

The hardship alleged to have been suffered by the municipality of Evansville was somewhat more direct. That city had been invited to participate in the air quality studies which were to follow the area's designation as an AQMA. Since its funds for environmental purposes were limited, its election to join the studies would force it to terminate ongoing projects. If it failed to participate, it alleged that the ultimate plan could suffer. Thus, the city would be required to make an immediate choice and commitment, which the other plaintiffs had not been required to do. Although the court recognized that the city had a difficult decision to make, it did have a choice because it had not been coerced by any administrative sanction to make any particular decision. Its financial dilemma was not created by the administrative action but by its own lack of funds. Since the court considered that the injuries asserted by these petitioners also were too vague, speculative, and indirect, there was no justification for interrupting the administrative process at this time.

The decision undoubtedly is sensible. All of the issues raised by the petitioners can be decided when the final plan has been formulated. Other

issues will become apparent at subsequent stages of the process and they also can be litigated at that same time. Judicial intervention of an ongoing administrative process can only be justified if actual harm is sustained at a given stage in the proceedings. Since the harm alleged here was not actual in nature, that justification would not exist. On this basis, the court correctly held that the action for judicial review was premature.

SCOPE OF REVIEW

In enacting the Food Stamp Act of 1964,[197] Congress specifically provided for judicial review of decisions made pursuant to that statute. The applicable section reads as follows:

> If the store or concern feels aggrieved by such final determination he may obtain judicial review thereof by filing a complaint against the United States in the United States district court . . . . The suit in the United States district court . . . shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence.[198]

Obviously, the type of judicial review established by this section is manifestly different from that based on an administrative record subject to the substantial evidence rule to which the courts are accustomed. It, therefore, is not surprising that those courts, which have acted pursuant to this provision, are not in full accord as to the exact scope of authorized review. The Seventh Circuit decision, in *Keith-Nowicki v. United States*,[199] focuses upon this discord.

There, plaintiff operated a retail food store and was a participant in the federal food stamp program. The Department of Agriculture found that the plaintiff had violated certain provisions of the Food Stamp Act and the regulations promulgated thereunder. Accordingly, it disqualified him as a participant in the program for a period of one year. The plaintiff had instituted an action, in accordance with section 2022 of the Food Stamp Act, for a judicial review of the administrative determination. The district court had held a trial de novo and had found that the plaintiff had committed the alleged violation and that the period of disqualification was within the limits permitted.[200] Although the court had disapproved of the length of the period of disqualification, it had concluded that it was not empowered to alter the sanction because the penalty was within the permitted limits. After its

197. 7 U.S.C. §§ 2011-2026 (1970).
198. *Id.* § 2022.
199. 536 F.2d 1171 (7th Cir. 1976).
200. *See id.* at 1173 for a summary of the district court decision.

decision, the same court, on its own motion, reopened the case on the basis of the Fourth Circuit's decision in *Cross v. United States*,[201] which had held that it was authorized not only to review the fact of a violation of the Food Stamp Act but also the appropriateness of the imposed sanction. Thereupon, the district court had held further proceedings, had determined that the one year period of disqualification was too harsh and thus was invalid, and had reduced that penalty to 120 days.

After determining that the district court had reopened the case within a proper time, the appellate court addressed itself to the scope of judicial review allowed by the Food Stamp Act. Since the circuits were not in complete agreement as to whether section 2022 allowed a reviewing court to consider the appropriateness of an administrative sanction, the court considered the various views of the other courts. In the *Cross* case, the Fourth Circuit had concluded that procedural due process required the court to review the penalty. It had considered that the procedure in the administrative stages was not adequate to satisfy due process requirements and, as a result, those requirements had to be provided for in the judicial review. Therefore, it was incumbent upon the reviewing court to consider all aspects of the sanction which had been administratively imposed. A similar result had been achieved by the Fifth Circuit in *Goodman v. United States*,[202] which had concluded that the reviewing tribunal could scrutinize both the finding of the violation and the administrative sanction. Its conclusion had been based on the plain meaning of the statute and not upon a due process requirement. In *Martin v. United States*,[203] the opposite view had been propounded in the Sixth Circuit. After reviewing the statutory language of the Food Stamp Act, it had determined that a reviewing court did not have the power to modify the sanction imposed by the agency as long as it was within the statutory limits. The Seventh Circuit agreed with that result and concluded that, if the sanction conformed to the limits specified in the statute or regulations, the reviewing court was without authority to redetermine its appropriateness. In so holding, the court adopted the United States Supreme Court's rationale in *Butz v. Glover Livestock Commission Co.*[204] "that where Congress has intrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy the relation of remedy to policy is peculiarly a matter for administrative competence."[205] Thus, the Seventh Circuit's refus-

201. 512 F.2d 1212 (4th Cir. 1975).
202. 518 F.2d 505 (5th Cir. 1975).
203. 459 F.2d 300 (6th Cir. 1972), *cert. denied*, 409 U.S. 878 (1972).
204. 411 U.S. 182 (1973). The case involved the scope of review of a decision, of the Secretary of Agriculture, made pursuant to his authority under the Packers and Stockyards Act, 7 U.S.C. §§ 181-195 (1970).
205. 411 U.S. at 185-86.

al to allow judicial tampering with the administratively selected penalty, would appear to compound the purported discord among the circuits.

That this diversity about the scope of review authorized by the Food Stamp Act is more discussed than actual is supported by an analysis of the language used by the involved courts. For instance, in the *Cross* decision, the circuit court, in determining that a reviewing tribunal could review and modify the sanction, quoted with approval the statement in *Butz* that "*[T]he Secretary's choice of sanction . . . (is) not to be overturned unless . . . it (is) 'unwarranted in law or . . . without justification in fact. . . .'* "[206] It concluded from this language that the scope of review of a sanction was limited to determining whether it was arbitrary or capricious and continued as follows:

> To be "valid," a sanction must not be arbitrary and capricious, and a sanction is arbitrary and capricious if it is unwarranted in law or without justification in fact. Thus, the scope of review of a sanction is not as broad as the scope of review of the fact of violation. The more limited scope of review of a sanction results from the vesting of discretion by Congress in the Secretary to devise and administer a scheme of disqualifications (7 U.S.C. § 2020) for the effective and efficient administration of the food stamp program (7 U.S.C. § 2013(c)).[207]

In describing the exact circumstances under which a court might modify an administrative penalty, it stated:

> In the instant case, there may be room to question the validity of the sanction, although we hasten to add that we express no view on what was a proper period of disqualification to impose on plaintiff. The district court characterized it as "harsh," but we do not conceive this to be a test. Rather, only in those instances in which it may be fairly said on the *de novo* record as a whole that the Secretary, acting through his designates, has abused his discretion by acting arbitrarily or capriciously, would the district court be warranted in exercising its authority to modify the penalty.[208]

Thus, it is obvious that the court in the *Cross* case did not adopt the position that the authority to review the administratively imposed sanction is unlimited.

Likewise, the allegedly conflicting *Goodman* opinion accepted the rationale of the *Cross* court that a sanction would only be invalid if it were arbitrary or capricious when it stated:

> We agree with the Fourth Circuit's statement of the standard to which trial courts must adhere when reviewing the sanction imposed by the Department of Agriculture: "To be 'valid' a sanction must not be arbitrary and capricious, and a sanction is arbitrary and

206. 512 F.2d at 1218 (quoting 411 U.S. at 185-86).
207. 512 F.2d at 1218.
208. *Id.*

> capricious if it is unwarranted in law or without justification in fact. Thus, the scope of review of a sanction is not as broad as the scope of review of the fact of violation."[209]

Again, it was concluded that review of the sanction was limited and not unrestrained.

An analysis of the Seventh Circuit's opinion in the present case illustrates that it is in essential agreement, and not in opposition, with the Fourth and Fifth Circuits. In describing the standards of review to be applied to administrative sanctions imposed pursuant to the Food Stamp Act, it utilizes the same quotation from *Butz* which the court in the *Cross* case used. It thus admits that the reviewing tribunal can determine whether or not the penalty is "unwarranted in law or without justification in fact." The court reversed the district court's intrusion into the area of administrative penalty on the following basis:

> Having found that the Secretary here made an allowable judgment in his choice of remedy, that the sanction imposed bears a reasonable relationship to the goal the legislation was intended to accomplish, and that the sanction was within the limits of the applicable statute and was valid, we feel compelled to reverse that part of the judgment of the district court which reduced the sanction from one year to 120 days as an impermissible intrusion into the administrative domain under the circumstances present here.[210]

If the administrative decision as to the period of suspension had been arbitrary or capricious, this court undoubtedly would have permitted the district court to take affirmative action in regard thereto.[211] Thus, the differences of opinion among the circuits discerned in the present case are more apparent than real.

The justification of all the courts for limiting the scope of judicial review was the basic assumption that Congress intended the administrator to be the final arbiter of the appropriateness of penalties. That assumption can be disputed. The fact that the legislature authorized a trial de novo in the district court could easily be interpreted as permitting the court to deal with all the issues, including penalty, as if this were an original proceeding. Under this theory the court would not be subject to any restraint and could fashion its own sanction.[212] Since current thought extolls the virtues of administrative expertise, this approach would appear to be unacceptable.

A 1972 amendment to the equal employment opportunity section of the

209. 518 F.2d at 511-12.

210. 536 F.2d at 1178.

211. Upon a finding of invalidity, the statute authorizes the court to enter its own judgment or order. *See* 7 U.S.C. § 2022 (1970). However, the Fifth Circuit, in the *Goodman* case, suggested that, in such event, the court might remand the matter back to the agency for its reevaluation. However, it appears that such a possibility would be left to the option of the district court.

212. This was the basis of the dissent in Martin v. United States, 459 F.2d at 302.

Civil Rights Act had created a similar judicial review problem.[213] In extending its protection to federal employees,[214] Congress had established an internal administrative procedure for dealing with alleged discrimination and had provided that anyone dissatisfied with the result of such a procedure could commence a "civil action" against the agency.[215] The statute did not indicate whether the "civil action" was to be a judicial review of the administrative decision or a trial de novo of the discrimination issue. This lack of clarity had resulted in a conflict of opinion among the lower courts.[216] The diverse positions taken usually were based upon an analysis of legislative intent. However, one court, in assessing the situation, observed that those tribunals favoring a trial de novo were located in areas where the incident of claims of discrimination by federal employees would be minimal and that those courts insistent upon a mere review were located in areas where such incidents would be numerous.[217]

In *Caro v. Schultz*,[218] the Seventh Circuit was required to take a position on this issue. There, the plaintiff, who had been employed by the Audit Division of the Internal Revenue Service, had claimed that she had not received appropriate promotions because of sex discrimination. She had pursued the internal procedures provided for by the statute and after being denied relief there, had filed suit in the district court.[219] In answer the defendant had filed a certified administrative record of the internal proceedings and had moved for summary judgment and a dismissal of the action. The district judge had denied the discovery sought by the plaintiff and ultimately had granted defendant's motion on the basis that the administrative record supported the internal decision. Upon appeal, the plaintiff claimed that she was entitled to a trial de novo and not merely a judicial review.

The circuit court, acknowledging the differences of opinion described above, decided to follow the lead of the Third Circuit in *Sperling v. United States*,[220] and held that a federal employee was entitled to a de novo trial on the issue of discrimination. Its conclusion was based on the specific language of the statute. The court noted that the Civil Rights Act provided that "the provisions of section 2000e-5(f) through (k) of this title, as applicable, shall

213. 42 U.S.C. § 2000e-16 (Supp. IV 1974) (amending 42 U.S.C. §§ 2000e to 2000e-15 (1970)).
214. 42 U.S.C. § 2000e-16(a) (Supp. IV 1974).
215. The provision in part stated that federal employees "may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C. § 2000e-16(c) (Supp. IV 1974).
216. *See* Sperling v. United States, 515 F.2d 474 n.39 (3rd Cir. 1975), for a list of decisions, both in federal district and circuit courts.
217. *Id.*
218. 521 F.2d 1084 (7th Cir. 1975).
219. *See id.* at 1085-86 for a summary of the district court decision.
220. 515 F.2d 465 (3d Cir. 1975).

govern civil actions brought hereunder."[221] Since the United States Supreme Court had already decided in *Alexander v. Gardner-Denver Co.*[222] that private employees were entitled to a de novo trial under section 2000e-5, the court felt that consistency required the same result in regard to federal employees. The court also alluded to statements in the Senate report and Congressional Record indicating a legislative intent that federal employees were entitled to an independent remedy in the courts. After stating that the plaintiff should be permitted discovery in order to respond to the government's motion for summary judgment, the court reversed and remanded.

The United States Supreme Court subsequently adopted this same interpretation of section 2000e-16(d) in another case,[223] and held that "civil action" referred to a trial de novo rather than merely a review of an administrative record, and resolved the existing conflict.

METHODS OF JUDICIAL REVIEW

The availability of any given method for the judicial review of administrative decisions may depend upon the restrictions or limitations imposed on its use by applicable statutes or judge made law. For example, in *Holmes v. United States Board of Parole*,[224] the plaintiff had sought a writ "in the nature of mandamus" pursuant to the federal mandamus statute,[225] in the district court[226] and had requested the court: (1) to require the defendants to expunge from his file the "special offender" classification which he had been given at the time of his incarceration in a federal penitentiary and "to afford him the privileges afforded other prisoners; (2) to give full consideration to his application for parole without considering the special offender classification; and (3) for other appropriate relief."[227] The gist of the plaintiff's request for relief had been that his due process rights had been violated because the classification had occurred without his having had an opportunity to defend against it.[228] The trial court had denied the defendants' motion to dismiss and the present appeal was taken.

In the circuit court the defendants initially argued that mandamus was not a proper remedy if another were available[229] and that the plaintiff was not

221. 42 U.S.C. § 2000e-16(d) (Supp. IV 1974).
222. 415 U.S. 436 (1974).
223. Chandler v. Roudebush, 96 S. Ct. 1949 (1976).
224. 541 F.2d 1243 (7th Cir. 1976).
225. 28 U.S.C. § 1361 (1970).
226. *See* 541 F.2d at 1245-46 for a summary of the district court decision.
279. 541 F.2d at 1246.
228. This issue is discussed in the due process section of this article. *See* text accompanying notes 1-112 *supra*.
229. This is a time-honored principle based upon the fact that mandamus, being an extraordinary writ, could only be utilized in the absence of any other method of obtaining relief. 541 F.2d at 1247.

entitled to his request for mandamus because he could have obtained administrative relief if he had exhausted his administrative remedies. It was further urged that after exhausting those administrative remedies, the judicial review should have been sought by a writ of habeas corpus.

As to the necessity for exhausting administrative remedies prior to seeking judicial review, the court stated that the plaintiff should not be required to engage in an act of futility. While the plaintiff had failed to adhere to the precise procedure prescribed by the Bureau of Prisons, he had requested a hearing regarding his special offender classification. Since that hearing had been denied by the highest administrative authority, a second request was unnecessary.

The defendants' argument that mandamus was not available because habeas corpus could be used met a similar fate. Finding that there was "conflicting dicta" in Seventh Circuit decisions regarding the appropriateness of habeas corpus to attack "conditions of confinement," the court stated:

> Assuming, however, that habeas [corpus] is available, we hold that the district judge did not abuse his discretion in granting mandamus relief . . . .
>
> Under the designation of special offender, Holmes has been compelled to live with a stigma that affects his opportunities for furlough and parole. A transfer or a dismissal by this court without prejudice so that Holmes could file an action under section 2241 would serve only to perpetuate a gross injustice in favor of preserving judicially formulated niceties which are neither required nor jurisdictional. We do not countenance such a result.[230]

That decision clearly was based upon equitable and pragmatic considerations rather than pure legal theory.[231]

The government's final thrust at the plaintiff's use of mandamus was based on the fundamental principle that the writ can be utilized only to compel the performance of a ministerial function and not a discretionary one.[232] Although the exact foundation of the defendants' argument is not apparent from the opinion, it may revolve around the fact that the plaintiff had alleged that the "special offender" classification had resulted in his being denied a furlough, a transfer and a parole. In other words, since the granting or withholding of such benefits is discretionary, the defendants would have no ministerial or preemptory duties to the plaintiff and mandamus would not be an appropriate remedy.

230. *Id.* at 1248.

231. However, the court bolstered its position by citing decisions, from other circuits, allowing the use of mandamus to challenge "conditions of confinement." *Id.*

232. In connection with that argument, the defendants also noted that mandamus was not a proper means to litigate complex constitutional issues. Rejecting that contention, the court found that "in cases charging a violation of constitutional rights, mandamus should be construed liberally." *Id.* at 1249.

The court, however, analyzed the plaintiff's theory in a slightly different manner because he actually had contended that the classification given him without a hearing was a violation of the due process clause. Therefore, when the defendants had utilized that classification in their deliberations on the plaintiff's requests for transfer, furlough and parole, they had violated their legal duties to the plaintiff. On this basis, the appellate court found that a ministerial and nondiscretionary duty had been alleged and that the plaintiff was entitled to a writ in the nature of mandamus.

Thus, this court has determined that under mandamus it can order the defendants to expunge the unconstitutional classification from the plaintiff's record. Since an affirmative act is to be performed, this appears to be a proper function of that writ. However, the plaintiff also requested that the defendants be compelled to decide his request for parole without consideration of the special offender classification. Such a negative type order may not be appropriate under the mandamus statute.[233] Nevertheless, if the classification were expunged from the record by court order, it cannot be utilized for any purpose. As a result, that portion of the plaintiff's prayer seeking negative relief may be ignored.

JUDICIAL ENFORCEMENT OF AGENCY SUBPOENAS

Judicial involvement in an administrative process may occur even before an agency decides to instigate formal proceedings. Such proceedings would not be appropriate unless there is reason to believe that a statute, which the tribunal is authorized to execute, has been violated. This requires some type of preliminary investigation during which an agency seeking information may issue its subpoena. If there is a refusal to comply with the subpoena, the agency must obtain judicial aid to enforce it and the party subpoenaed is given the opportunity to contest its enforcement during this judicial procedure. That party, realizing that a successful defense at this point may force the agency to terminate any further investigation, often exhibits considerable effort and ingenuity to avoid the enforcement of the subpoena. Two recent Seventh Circuit decisions illustrate the judicial responses to the various types of defenses which a subpoenaed party may utilize.

The first case is *FTC v. MacArthur*.[234] In order to determine whether the Bankers Life and Casualty Company was violating section 5(3) of the Federal Trade Commission Act[235] in its sale of subdivided Colorado real estate, the

233. It might be argued that the plaintiff was attempting to use mandamus to prevent the defendants from engaging in certain conduct, to-wit, using the special offender classification in determining whether the plaintiff should be granted certain prisoner's rights. It would appear that the granting of negative relief is not a proper function of mandamus under the federal statute. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW—CASES AND COMMENTS 158 & n.10 (6th ed. 1974).

234. 532 F.2d 1135 (7th Cir. 1976).

235. 15 U.S.C. § 45 (1970) [hereinafter referred to in the text as FTCA].

Federal Trade Commission[236] had issued a subpoena duces tecum.[237] Not wishing to testify or produce the required documents, even after being allowed to appear in Florida rather than Chicago, Bankers' personnel had not complied fully with the subpoena. Therefore, the FTC had instituted judicial action to enforce it and Bankers had to show cause why the government's petition should not be granted. It had defended on the ground of lack of jurisdiction of the subject matter; had moved to transfer, for the convenience of the witnesses and the location of documentary evidence, again to Florida; and had applied for an evidentiary hearing. The district court had ordered compliance with the subpoena, non-removal of the requested documents from Illinois, transference of non-Illinois record matters to Florida, and nondisclosure of information except at a public hearing and had denied an evidentiary hearing.[238] That entire order had been stayed pending appeals by both litigants.

On appeal, Bankers still was arguing against jurisdiction, denial of the requested hearing and failure to transfer the complete cause to Florida and the government was questioning the partial transference of the cause to Florida. In rejecting defendant's contention that the FTCA conferred enforcement jurisdiction only on a district court within the area in which the government's inquiry was being held,[239] the court stated that the FTC was authorized to inquire into the practices of corporations whose business affected commerce and into their relationships with other entities[240] "in any part of the United States."[241] The investigation being opposed had not been limited to any given area but had been addressed to any sellers of subdivided property to see if they were, or had been, engaged in unfair competition practices. Even though it had begun in Missouri and had been transferred thereafter to a Colorado office, the inquiry had been held in Chicago and elsewhere. In addition, defendant already had failed to honor the subpoena in the Florida proceeding[242] and the requested documents supposedly were in Chicago, as were the witnesses and defendant's general office. Those connections with Chicago were sufificent to establish that the inquiry should be held there because they bore a reasonable relationship to the investigation. Since the FTC could "invoke the aid of any court in the United States,"[243] those activities were not overshadowed by the Florida associations or by the issuance of the subpoena

236. Hereinafter referred to in the text as FTC.
237. 15 U.S.C. § 49 (1970) authorizes the Commission to issue subpoenas.
238. *See* 532 F.2d at 1139 for a summary of the district court decision.
239. 15 U.S.C. § 49 (1970).
240. *Id.* § 46(a).
241. *Id.* § 43.
242. For the convenience of the respondents, the return of the subpoena had been reset to Florida, from Chicago. 532 F.2d at 1139.
243. 15 U.S.C. § 49 (1970).

by the Missouri office. Thus, the district court had had jurisdiction to enforce the subpoena in Chicago (especially since it was the designated place of the hearing).

Despite defendant's contention that the adversary, as opposed to an evidentiary, hearing was insufficient because Bankers could have shown it was not a proper "inquiry," that the agency already had sufficient documents and that defendant was only a mortgagee and financier and not a seller of the real estate, the court found that an evidentiary hearing was not required. Since Bankers also had not shown that compliance would be burdensome or that the documents would be irrelevant and since its relation to the Colorado sales was an issue to be decided by the agency, there was no reason for an evidentiary hearing.

The district court's failure to enforce compliance, because some of the requested documents might have been outside Chicago, was as baseless as the district judge's feeling that the contempt citations would need to issue at the location of such documents. The FTC's authority to request information in any place, with the assistance of any court, belied those bases. As long as the court had in personam jurisdiction of the defendants, the location of any evidence could not defeat the statutory authority to enforce subpoenas and any Florida action would have been unnecessary.

The circuit court also determined that the nondisclosure order was superfluous because the FTC was prohibited by its own rules from revealing information and that the partial transfer of the action to Florida was undesirable because there would be no evidentiary hearing to inconvenience Florida witnesses and because duplications and conflicts could be incurred. Therefore, there was nothing to prevent compliance with the subpoena in its entirety in Chicago. The circuit court, thus, reversed the transfer, the nondisclosure clause and the limitation as to documents outside Chicago. The rest of the district court's decision was affirmed.

Similarly, the Seventh Circuit held that res judicata was not sufficient to prevent enforcement of an investigative subpoena in *FTC v. Feldman*.[244] Thus, the fact that the defendants or their antecedents had been investigated in the 1940's did not preclude a 1970's inquiry into their conduct, even though they previously had been found to have not affected commerce[245] and, thus, had not come within the provisions of the Sherman Anti-Trust Act.[246] Although they had produced affidavits to establish that their practices had not

244. 532 F.2d 1092 (7th Cir. 1976).

245. United States v. Yellow Cab Co., 338 U.S. 338 (1949). As operators of local taxicabs operating only within Chicago's city limits, defendants, in 332 U.S. 218, 230, 232 (1947), had been found not to be sufficiently related to interstate commerce to come within the Sherman Anti-Trust Act.

246. 15 U.S.C. §§ 1, 2 (1970).

changed and that they still did not affect commerce, the district court had felt that the application of res judicata would have been premature because the FTC had been acting under a different statute and because the United States Supreme Court had stated in the prior determination "that it did not intend to establish any absolute rule that local taxi service was 'beyond the reach of federal power.' "[247] The circuit court agreed because it felt that the interstate commerce issue was part of the investigation, that any future determination of this issue and collateral estoppel could be raised at the appropriate time, and that the FTC should be allowed to exhaust its administrative procedures prior to judicial interference. Actually, the investigation could result in a determination that judicial action was completely unnecessary but it was necessary to complete the investigation in order to determine whether the defendants did, at that time, affect interstate commerce. Likewise, the claim that the FTC was competing with the City of Chicago's regulatory power was premature and should await the FTC's final decision.

Thus, without good reason, the courts will not interfere with administrative investigation and will assist such investigations through the enforcement of subpoenas under statutory authorization, at least until such time as the agencies' conduct necessitates judicial intervention.

CONCLUSION

Although no area of administrative law is free of difficulty, the determination of whether a particular interest is a protected one for due process purposes continues to be most troublesome for the lower courts. This can undoubtedly be traced to the United States Supreme Court's apparent inability to contrive a rationale which will continue to satisfy it. Initially, it had appeared that the Court had favored an expansive concept which would broaden the area of due process protection. The lower courts had been responsive to that attitude and had commenced to expand the catalog of protected interests accordingly. Recently, however, the Court appears to be backing away from its original position and may now be attempting to limit the category of protected interests. As pointed out in the due process section of this article, one Seventh Circuit decision has been remanded for consideration in light of recent opinions of the Court.[248] This will undoubtedly occur in other circuits until the lower courts adjust their thinking to the Court's more restrictive attitude.

247. 532 F.2d at 1095 (citing 332 U.S. at 232).
248. *See* text accompanying notes 38-47 *supra*.