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# A COMPARISON OF THE ADMINISTRATIVE LAW OF THE CATHOLIC CHURCH AND THE UNITED STATES

*Rev. John J. Coughlin, O.F.M.\**

## I. INTRODUCTION

Some years ago, an international symposium of jurists described administrative law as encompassing

the entire range of action by government with respect to the citizen or by the citizen with respect to the government, except for those matters dealt with by the criminal law, and those left to private civil litigation where the government's only participation is in furnishing an impartial tribunal with the power of enforcement.<sup>1</sup>

The broad parameters of the concept of administrative law attest to its importance in any legal system. Indeed, for at least the past fifty years, comparative legal scholars have focused on diverse national systems of administrative law.<sup>2</sup> Canonists have also contrib-

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1. Henry J. Friendly, *New Trends in Administrative Law*, MD. B. J., Apr. 1974, at 6, 9.

2. See, e.g., ZAIM M. NEDJATI & J.E. TRICE, *ENGLISH AND CONTINENTAL SYSTEMS OF ADMINISTRATIVE LAW* (1978); *PAPERS IN COMPARATIVE PUBLIC*

uted to this area of comparative law.<sup>3</sup> The author believes that this Article represents the first attempt to compare the procedural requirements of administrative justice in canon law with those of the law of the United States.

Specifically, this Article compares the procedure for administrative law at the Supreme Tribunal of the Apostolic Signatura and at the United States Supreme Court.<sup>4</sup> The canonist refers to the "contentious-administrative" process to describe recourse against an administrative act which is brought to the Apostolic Signatura.<sup>5</sup> The American jurist speaks of the "judicial review" of administrative actions, which is entrusted to the federal courts and may culminate at

ADMINISTRATION (Ferrel Heady & Sybil L. Stokes eds., 1962); 1 WILLIAM WADE ET AL., ADMINISTRATIVE LAW: THE PROBLEM OF JUSTICE, AMERICAN AND NORDIC SYSTEMS (Aldo Piras ed., 1991).

3. See FRANCO BOLOGNINI, ATTI DELL'INCONTRO INTERDISCIPLINARE SU "LA TUTELA DELLE SITUAZIONI GIURIDICHE SOGGETTIVE NEL DIRITTO CANONICO, CIVILE AMMINISTRATIVO" (1991); Antonio Vitale, *Differenze e convergenze dei principi della giustizia amministrativa civile e canonica*, 98 MONITOR ECCLESIASTICUS 362 (1973). For a brief overview of English and Continental systems of administrative justice in comparison to ecclesiastical administrative justice, see PAUL HAYWARD, ADMINISTRATIVE JUSTICE ACCORDING TO THE APOSTOLIC CONSTITUTION "PASTOR BONUS" (1993). For intra-comparative studies of ecclesiastical administrative justice in different nations, see Zenon Grocholewski, *I Tribunali regionali amministrativi nella chiesa*, in DE IUSTITIA ADMINISTRATIVA IN ECCLESIA 135, 156 (Pio Fedele ed., 1984); Edward M. Egan, *De consiliis administrativis ecclesiasticis in civ. foed. amer. sept. constitutis*, 67 PERIODICA 16 (1978); Michaël R. Quinlan, *De schemate commissionum administratarum in Britannia et de sic dicto <<ombudsman>> a nova zelanda proposito*, 67 PERIODICA 607, 620-25 (1978).

4. The "Apostolic Signatura," a short form of the title given in 1983 CODE c.1445, § 1 (originally promulgated at *Codex Iuris Canonici auctoritate Ioannis Pauli Pp. II promulgatus*, 85 AAS 1 (1983)) (the English translation, THE CODE OF CANON LAW (Canon Law Soc'y of Gr. Brit. & Ir. trans., 1983), was followed for this Article), to the "Supreme Tribunal of the Apostolic Signatura" ("Supremum Signaturae Apostolicae Tribunal"), will be used throughout this Article. Likewise, the United States Supreme Court is often referred to as the "Supreme Court." While the adjective "American" ordinarily includes all the countries of South and North America, it is employed throughout the Article to describe the United States of America.

5. See generally 1983 CODE cc.1501-1670 (describing the contentious trial process).

the Supreme Court.<sup>6</sup> Despite the difference in terminology, both canon law and federal law furnish procedures by which an individual may bring recourse from an act of administrative power to the respective supreme tribunal. As supreme tribunals, both the Apostolic Signatura and the Supreme Court constitute the final guardians against the unlawful exercise of administrative power.<sup>7</sup>

On average, the Apostolic Signatura entertains approximately thirty cases of administrative recourse per year.<sup>8</sup> These cases are diverse in nature and concern matters such as: the removal of a pastor, the dismissal of a religious,<sup>9</sup> the suppression of a parish, the suppression of a religious house, the disputed election of a superior general and council, the revocation of the faculty to hear confessions, the suppression of a faculty of theology, the dismissal of a professor from an ecclesiastical faculty, the expulsion of a religious from a diocese, the prohibition of a layman from participating in the parish liturgy due to public scandal, the transfer of a pastor, and the validity of action taken by the provincial chapter in an institute of consecrated life.<sup>10</sup>

The Supreme Court hears approximately one hundred fifty cases a year,<sup>11</sup> of which only a small fraction are principally concerned with administrative justice.<sup>12</sup> Like the work of the Apostolic Signatura, the cases of administrative justice before the Supreme Court cover a large scope. They include matters of economic regulation, health and safety regulation, social security and welfare, immigration

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6. See generally Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1985) (discussing restrained judicial review of administrative decisions).

7. See 1983 CODE c.1445, § 2; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 23-61 (2d ed. 1988).

8. See Zenon Grocholewski, *La giustizia amministrativa presso la Signatura Apostolica*, 4 IUS ECCLESIAE 3, 4-5 (1992).

9. A "religious" is a member of a religious community, such as a Dominican, Jesuit, Benedictine, etc.

10. See Grocholewski, *supra* note 8, at 14.

11. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1093 (1987).

12. See *id.* at 1094.

and deportation, education, housing and urban development, and the environment, to name a few areas of concern.<sup>13</sup>

There are many things in common between the two bodies of law. The comparison of the two discloses three fundamental elements in common. First, the subject is the private person, who alleges some injury as a result of an administrative act.<sup>14</sup> Second, the object consists of the single administrative act, posited by a public organ of government, which allegedly caused some injury. Third, the process comprises that set of rules which is to be followed when the private person challenges the single administrative act. Accordingly, this study focuses on the review, by each of the supreme tribunals, of a single administrative act which is alleged by a private person to have caused some injury.<sup>15</sup>

In making the comparison between canon law and American Administrative law, this Article relies on three basic procedural models to explain the organization of the different systems.<sup>16</sup> In the first procedural model, termed "hierarchical recourse," the superior of the authority who posited the administrative act serves as judge of the case.<sup>17</sup> Elements of this model are evident in the administrative procedure of both canon law and United States federal agencies. The

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13. No reliable longitudinal study could be located that segregated the numbers of such cases heard by the Supreme Court into such categories. See *id.* at 1096-110.

14. In canon law, the subject would include real persons and private juridic persons. See 1983 CODE c.116, § 2. Likewise, American law has long recognized certain legal rights of private corporations along with real persons. See *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U.S. 206, 216 (1908) (reasoning that a corporation is its own entity, despite changing members and stock trading, and therefore can be tried in court like a person).

15. Since this Article compares the two supreme tribunals, it concerns the review of the administrative act itself, as well as any procedure through which recourse against the act has been brought prior to the supreme tribunals. In canon law, the prior process is one of hierarchical recourse; in American law, the process involves agency review of its own action and then judicial review in the lower federal courts. Compare 1983 CODE cc.1732-1739 (describing the process for recourse against administrative decrees), with *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (stating that an agency is given express authority to "fill any gap" in a particular statute, so long as it does not conflict with congressional intent).

16. See Ignacio Gordon, S.J., *De iustitia administrativa ecclesiastica, tum transacto tempore tum hodierno*, 61 PERIODICA 251, 253-54 (1972).

17. See *id.*

second model, termed "single jurisdiction," depends on judicial review of administrative acts rather than the establishment of a separate system of administrative tribunals for this purpose.<sup>18</sup> Judicial review of administrative acts by the United States federal courts would exemplify the single jurisdiction approach. In contrast, a third model of "double jurisdiction" requires, in addition to an ordinary judicial tribunal, a separate administrative tribunal which alone is vested with jurisdiction over acts of administrative power.<sup>19</sup> To a certain extent, the Second Section of the Apostolic Signatura fits this model.

Whatever the procedural structure for an appeal against an act of administrative power, one who exercises administrative power is vested with the discretion to choose between alternative courses of action.<sup>20</sup> Located at the heart of administrative law, discretion enables one who exercises administrative power to decide each case on its own merits. One commentator has suggested that "[d]iscretion is a tool, indispensable for [the] individualization of justice . . . . Rules alone, untempered by discretion, cannot cope with the complexities of modern government and modern justice."<sup>21</sup> Many such decisions emerge from discretionary judgments about what is good, fair, and just in a given situation. It seems to follow that the exercise of administrative discretion is fundamentally a human activity.<sup>22</sup> When either the Apostolic Signatura or the Supreme Court engages in the judicial review of an act of administrative power, the tribunal's function often amounts to the review of a discretionary decision.<sup>23</sup>

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18. *See id.*

19. *See id.*

20. *See* EDUARDO LABANDEIRA, *TRATADO DE DERECHO ADMINISTRATIVO CANÓNICO* 271 (1988).

21. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 25 (1969).

22. St. Thomas Aquinas developed the understanding of the *actus humanus* from the Aristotelian notion that a human act involved the use of free will and the faculty of reason. *See* ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* 615-17 (1926) [hereinafter *SUMMA THEOLOGICA*]; *see also* ARISTOTLE, *Nicomachean Ethics*, in 2 *THE COMPLETE WORKS OF ARISTOTLE* 1752, 1754 (Jonathan Barnes ed., 1984) (arguing that what is done under compulsion or by reason of ignorance is involuntary).

23. *See* Koch, *supra* note 6, at 471-78. *See generally* John P. Beal, *Confining and Structuring Administrative Discretion*, 46 *JURIST* 70, 70-106 (1986)

To be sound, any discussion of these administrative processes must take this fact into account.

To give the reader greater background, a short discussion of the methodologies employed in canon law and American law is in order. The canon law is designed to establish a just and equitable order for the Catholic community. To this end, the church is governed by the law set forth in the *Code of Canon Law*,<sup>24</sup> as well as by local laws and customs. The sources of ecclesiastical law include sacred Scripture and tradition, divine and natural law, ancient Roman law, magisterial pronouncements as well as contemporary interpretations and jurisprudence of the various Roman congregations.<sup>25</sup> To a large extent, the canonist views the law as an ideal, reflecting an eternally valid set of truths and principles to guide the conduct of the present.<sup>26</sup> As an ideal corpus of rules and principles, canon law serves an important pedagogical role for the members of the church who aspire to live in conformity with the ideal. A system of dispensations, which are granted through administrative acts, acknowledges that the ideal embodied within the law does not apply to every case and may sometimes be too severe.<sup>27</sup> Ecclesiastical law is, thus, never seen as an end in itself, but only as the servant of the Christian tradition.<sup>28</sup>

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(discussing the uses of administrative discretion and justice as exercised by ecclesiastical officials).

24. 1983 CODE.

25. See John A. Alesandro, *General Introduction*, in *THE CODE OF CANON LAW: A TEXT AND COMMENTARY 1-2* (James A. Corriden et al. eds., 1985) (this book is generally referred to as *AMERICAN COMMENTARY*).

26. See *id.* at 13-14.

27. See Charles Lefebvre, *Equity in Canon Law*, in *EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY* 100-03 (Ralph A. Newman ed., 1973).

28. For a summary of some of the numerous theories about the relationship between canon law and theology, see Ladislav Orsy, S.J., *Theology and Canon Law: An Inquiry Into Their Relationship*, 50 *JURIST* 402, 418-29 (1990). As illustrative of the theories, see, for example, WILHELM BERTRAMS, *DE RELATIONE INTER EPISCOPATUM ET PRIMATUM. PRINCIPIA PHILOSOPHICA ET THEOLOGICA QUIBUS RELATIO IURIDICA FUNDATUR INTER OFFICIUM EPISCOPALE ET PRIMATIALE* (1963) (explaining that canon law studies the external juridic realities of philosophical and theological truths); EUGENIO CORRECCO, *THEOLOGIE DES KIRCHENRECHTS: METHODOLOGISCHE ANSÄTZE* 96-107 (1980) (arguing that canon law should not be defined so much as *ordinatio rationis*, but rather as *ordinatio fidei*); GIANFRANCO GHIRLANDA, S.J., *IL DIRITTO NELLA CHIESA MISTERO DI COMUNIONE: COMPENDIO DI DIRITTO*

Just as with all other aspects of ecclesiastical law, administrative justice is intended to reflect a theology that “fully correspond[s] to the nature of the church, especially as it is proposed by the teaching of the Second Vatican Council.”<sup>29</sup> Specifically, it is conceived as being consistent with the Dogmatic Constitution, *Lumen Gentium*.<sup>30</sup> Certain “methodological options” are exhibited in the Dogmatic Constitution of the church, establishing the parameters of authentic ecclesiology.<sup>31</sup> Perhaps the prime postconciliar methodological option is to adopt an ecclesiological perspective that “describes the church as an object of faith, the study of which must be infused with faith.”<sup>32</sup> For the believer, the church is not merely an external organization, but a deep and profound *communio*.<sup>33</sup> From a theological

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ECCLESIALE 15-45 (1990) (indicating that canon law reflects the mystery of hierarchical communion in the church); LABANDEIRA, *supra* note 20, at 48-49 (indicating that given the sacramental character and special mission of the church, canon law, in its existence and authoritative interpretation, remains always subject to ecclesiastical authority); KLAUS MÖRSDORF, *SCHRIFTEN ZUM KANONISCHEN RECHT* (Winfried Aymans et al. eds., 1989) (indicating that canon law is a theological discipline with a juridical method); Pio Ciprotti, *Stato attuale e prospettive della giustizia amministrativa canonica*, 98 *MONITOR ECCLESIASTICUS* 354-61 (1973) (arguing that canon law may be considered as a proper object of juridical science).

29. Ioannes Paulus Episcopus Pp. II, *Constitutio Apostolica Sacrae Disciplinae Leges*, 75 AAS II xi (1983); see also Ioannes Paulus Pp. II, *Il Diritto Canonico inserisce il Concilio nella nostra vita*, 15 *COMMUNICATIONES* 128 (1983) (stating that the Pope speaks of the new Code as the “last conciliar document” or “ultimo documento conciliare”).

30. LUMEN GENTIUM (originally promulgated at Sacrosanctum Concilium Oecumenicum Vaticanum II, *Constitutio Dogmatica de Ecclesia*, 57 AAS 5 (1965)).

31. See Angel Anton, S.J., *Postconciliar Ecclesiology, Expectations, Results and Prospects for the Future*, in 1 *VATICAN II: ASSESSMENT AND PERSPECTIVES, TWENTY-FIVE YEARS AFTER (1962-1987)* 412-13 (Rene Lato-urelle ed., 1988).

32. *Id.*

33. *Communio* may be described as the unity of the College of Bishops, dispersed throughout the world, with the Pope, as the Bishop of Rome and successor to St. Peter, at the head of this college. For an authoritative description of the reality of *communio* and its centrality to the ecclesiology of Vatican II, see Congregatio pro Doctrina Fidei, *Litterae ad Catholicam Ecclesiam Episcopos de aliquibus aspectibus Ecclesiae prout est Communio*, 85 AAS 828, 838-50 (1993). See also Anton, *supra* note 31, at 413 (describing the ecclesiastical ministry as in intimate communion with all those who have been registered in Christ and ordained to transmit the blessings of redemption to the faithful).



and canonical viewpoint, this means that the church is thought to enjoy a juridic order that reflects the infinitely more dynamic and pneumatic presence of the Holy Spirit "who builds up and animates the Mystical Body of Christ, the People of God, transforms its members into the children of glory and ensures for them the liberty of the children of God, allows them to pray the prayer of Jesus (Rom. 8:15), and is operative in their apostolate."<sup>34</sup> Thus, the canonist operates from the context that neither the mystery of the church, nor any individual apostolic manifestation of that mystery, can be fully explained by the concept of the modern juridic society.

Consistent with the methodological principle that appreciates the church as an object of faith, canon law is viewed as sacred law, distinct from the civil law.<sup>35</sup> Although this Article attempts to compare the systems of ecclesiastical and American administrative law, it would be incomplete from the canonist's point of view to understand the church's juridic order as merely an institutional structure directed toward the common good.<sup>36</sup> Given the nobility of such a secular perspective, the canonist is nonetheless mindful that "the church is in Christ as a sacrament or sign and as an instrument of intimate union with God and of the unity of the whole human race."<sup>37</sup> The unique mission of the church in human history requires that canon law be

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34. Paulus Pp. VI, *Allocutiones: Ad Praelatos et Officiales Tribunalis Sacrae Romanae Rotae, a Beatissimo Patre novo litibus iudicandis ineunte anno coram admissos*, 65 AAS 98, 98 (1973).

35. See *id.* at 99.

36. See Leo Pp. XIII, *Litterae Encyclicae Satis Cognitum*, 28 ASS 708, 710 (1895-96).

37. LUMEN GENTIUM para. 8. It seems necessary to note that the Council went on to state: "This church, constituted and established as a society in this world, *subsists* in the Catholic Church, as governed by the succession to Peter and the bishops in communion with him . . ." *Id.* (emphasis added). For a discussion of the meaning of the term "subsists" and its ecclesiological and ecumenical implications, see Umberto Betti, O.F.M., *Chiesa di Cristo e Chiesa Cattolica, a proposito di un'espressione della Lumen Gentium*, 61 ANTONIANUM 726 (1986). See also Francis A. Sullivan, S.J., *The Significance of the Vatican II Declaration that the Church of Christ "Subsists in" the Roman Catholic Church*, in 2 VATICAN II: ASSESSMENT AND PERSPECTIVES TWENTY-FIVE YEARS AFTER, *supra* note 31, at 272-87 (stating that, according to Vatican II, "subsists in" means that the Catholic Church is the only organization where the Church of Christ continues to exist with all those proper ties and structural elements that it cannot lose).

ultimately measured, not by the standards of civil jurisprudence, but rather by its fidelity to the sacred Scripture and tradition in which God reveals himself.<sup>38</sup> Canon law is thus a proper object of modern juridical science, including, *inter alia*, the historical-critical method, the contribution of the social sciences, and of course, the comparative inquiry concerning cultural hermeneutics.<sup>39</sup> No critical methodology available to the canonist, however, may be permitted to eviscerate the authentic theological basis from canon law. The canonist seeks to transcend modern methodology by always approaching the juridic structure of the church as a manifestation of the deeper philosophical and theological truths that flow from faith, and most especially to sustain the reality of *communio*.<sup>40</sup>

Due to its explicitly theological perspective, the canonical methodology differs greatly from that of civil states and, in particular, from that of the United States.<sup>41</sup> American jurists tend to understand law not so much as an expression of immutable principles and ideals, but rather as a pragmatic set of rules designed to achieve certain results in a given situation.<sup>42</sup> Since the legislature often drafts a particular statute to respond to a certain situation, American law is likely to be far more detailed and complex than contemporary canonical legislation.<sup>43</sup> In addition to statutory law passed by the legislature, American law may also be the result of judicial activity. Judicial interpretations and decisions in particular cases carry precedential value for the resolution of like cases. When an American law fails to

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38. See Charles J. Reid, Jr. & John Witte, Jr., *Review Essay in the Steps of Gratian: Writing the History of Canon Law in the 1990s*, 48 *EMORY L.J.* 647, 655 (1999) (quoting sixteenth-century jurist Nicolaus Everardus describing canon law as rooted in the teachings of the Bible and inspired by the Holy Spirit).

39. For a description of the use of "cultural hermeneutics" in the stories that law tells about culture, see MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 8-9 (1987).

40. See, e.g., St. Bonaventure, *Itinerarium mentis in Deum*, in 5 *DOCTORIS SERAPHICI S. BONAVENTURAE OPERA OMNIA* 296 (1882).

41. For a general comparison of canon and American law, see Alesandro, *supra* note 25, at 10-14.

42. See *id.* at 13.

43. To recognize the difference in approaches, one need only compare the one-volume 1983 *Code of Canon Law*, which in the official version consists of 518 printed pages, to the main corpus of United States federal law, the eight-volume *United States Code*, which consists of many thousands of pages.

yield justice, the normal route is not to grant a dispensation, but to remake the law. In some cases, the legislature will pass a statute to counteract a judicial decision.

Stemming from the political theory of thinkers such as John Locke, the United States Constitution, and the Bill of Rights in particular, champions the protection of the individual against the power of the state.<sup>44</sup> The perduring value of the document is evident from the fact that what originated as a federation of thirteen original states has endured through, inter alia, a major civil war, enormous industrial development, and two world wars, to constitute a democratic and republican form of government for one of the mightiest economic powers in the history of the world.<sup>45</sup>

Even prior to independence, the English colonies followed in principle the common-law tradition with a class of lawyers many of whom were trained in London's Inns of Court.<sup>46</sup> Indeed, during the colonial period, almost as many copies of Blackstone's *Commentaries on the Laws of England* were purchased by American lawyers as by English.<sup>47</sup> These lawyers followed the common-law method in which the resolution of particular disputes by the courts yielded a corpus of law with precedential value. At the same time, the various states, as well as the federal government, were permitted to alter the common law through legislation. Both statutory and common law tended to reflect an extreme individualism, often cloaked in the language of formal natural rights.<sup>48</sup> The natural rights to contract and to private property, for example, were invoked as legal principles to protect the entrepreneur from many forms of government

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44. See U.S. CONST. amends. I-X.

45. See KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 247-63 (Tony Weir trans., 2d rev. ed. 1992) (describing the historical development of American legal methodology).

46. See ERWIN N. GRISWOLD, LAW AND LAWYERS IN THE UNITED STATES: THE COMMON LAW UNDER STRESS 5-11 (1965).

47. See ZWEIGERT & KÖTZ, *supra* note 45, at 247-48. For a fuller discussion of the influence of Blackstone's thought on American lawyers, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 16-17 (1977).

48. See M. Stuard Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L. REV. 555, 572-74 (1996) (describing the "natural law" antecedents of common law).

regulation.<sup>49</sup> Pursuant to pristine liberal political theory, freedom was defined as the absence of government restraint.<sup>50</sup>

Along with the enormous economic development that followed the Civil War came the rise of the American law school.<sup>51</sup> No longer would American lawyers be trained primarily in England or as apprentices to established American lawyers. Under the impetus of Joseph Story, the Harvard Law School was established, where Dean Langdell would institute the so-called "case method" by which students learned the law through the consideration of specific cases.<sup>52</sup> One brilliant adherent of the new methodology, Oliver Wendell Holmes, Jr., repudiated the formalism of the English common law. In a famous passage, Justice Holmes declared:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.<sup>53</sup>

Roscoe Pound further developed the sociological implications of Holmes's legal realism.<sup>54</sup> Pound rejected the abstract content of formal legal principles and advocated a methodology in which law continually interacts with the prevalent political, economic, and social circumstances of a given society.<sup>55</sup> Along similar lines, H.L.A.

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49. As late as the beginning of the twentieth century, the natural-law right to contract was invoked by the Supreme Court to invalidate a New York statute which limited bakers' work to a ten-hour day and sixty-hour week. See *Lochner v. New York*, 198 U.S. 45, 46 n.1, 61 (1905).

50. See Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 9 (1999) (describing liberalism in America).

51. See ZWEIGERT & KÖTZ, *supra* note 45, at 251-52.

52. For an historical account of American legal education and its implications for legal method, see ESTHER LUCILLE BROWN, *LAWYERS AND THE PROMOTION OF JUSTICE* 66-76 (1938).

53. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1951).

54. See Roscoe Pound, *The Need for a Sociological Jurisprudence*, 19 GREEN BAG 610 (1907).

55. See *id.* at 611-12. Dean Pound was also a vigorous advocate of the teaching of comparative law in the law school curriculum. In 1908, Louis

Hart argued that the judges create law in difficult or "indeterminate cases" based on the conventional social rules accepted by the given society.<sup>56</sup>

A concomitant development in American legal philosophy has been the focus on the "rule of law" as a prerequisite for the protection of individual freedom in the modern liberal state. According to Lon Fuller, the very essence of the rule of law is that in acting upon the citizen, a government will faithfully apply rules previously disclosed as those to be followed by the citizen and determinative of his rights and duties.<sup>57</sup> As Ronald Dworkin has explained it: "Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified."<sup>58</sup> Dworkin differs with Hart in that, as Dworkin sees it, judges resolve difficult cases not simply by imposing conventional values, but by consulting past precedents and cases which contain "the soundest theory of law."<sup>59</sup>

Based on these descriptions of the rule of law, two conclusions may be drawn. First, laws are intended to be promulgated, clear, prospective, coherent, stable, and applied with neutrality to all persons. Second, while the concept of the rule of law is not per se inconsistent with the theory of natural law, it does not presume a moral ontology. Rather, law finds its source in a process in which diverse beliefs, dispositions, and values are critically juxtaposed under the

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Brandeis, who like Holmes taught at Harvard and later became a Justice of the Supreme Court, wrote a legal brief for the Supreme Court case of *Muller v. Oregon*, 208 U.S. 412 (1908), which attracted great attention in legal circles since it transcended common law principles to include a copious amount of factual data and comparative law material. Another statement of this approach can be found in K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 12 (1951). For a general discussion of legal realism and the sociological jurisprudence, see WILFRED E. RUMBLE, JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM AND THE JUDICIAL PROCESS* (1968).

56. See H.L.A. HART, *THE CONCEPT OF LAW* 113 (1961).

57. See LON L. FULLER, *THE MORALITY OF LAW* 46-70, 94 (1964).

58. RONALD DWORKIN, *LAW'S EMPIRE* 93 (1986).

59. See E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 474-75 (1977).

scrutiny of reason. These criteria would apply to law made by both the legislature and the judiciary.

A more recent trend in American legal philosophy, the so-called "critical-legal-studies" approach, rejects the notion of the rule of law. As one adherent puts it: "There is never a 'correct legal solution' that is other than the correct ethical or political solution to that legal problem."<sup>60</sup> In one sense, the critical-legal-studies approach takes legal realism to its logical conclusion. It argues that although the form of a particular law may satisfy all the requirements of the rule of law, the substance, content, or goal of the law inevitably reflects moral and ethical values.<sup>61</sup> To put it simply, legislators and judges often impose their own values and beliefs about what is good for society. For the critical theorist, the problem with a neutral rule of law is that in a society characterized by moral, religious, and political pluralism, there are inevitably competing conceptions of the "good." Another thrust of the critical approach involves a radical critique of liberal political theory itself. Roberto Unger argues that the only aspect of the human good to which liberal theory renders an adequate account is individual freedom.<sup>62</sup> Consistent with this account, "values are subjective."<sup>63</sup> Even those values which may be held in common by members of a given group "are reducible to the qualities of its individual members."<sup>64</sup> In particular, the critical theorists fault the law of the liberal state for its failure to foster other fundamental human goods such as the experience of membership and participation in "organic community."<sup>65</sup> The critical-legal-studies approach points to an inherent contradiction in the rule of law of liberal theory. In the pluralist society, the subjectivity of values denies the possibility of an objective morality. However, legislators and judges inevitably impose conceptions of what is good or bad in human life as authoritative.<sup>66</sup> It should be noted that adherents of critical theory

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60. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW* 47 (David Kairys ed., 1982).

61. *See id.*

62. *See* ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 63 (1975).

63. *Id.*

64. *Id.*

65. *See id.* at 259-67.

66. Critical legal studies is not a monolithic position. The point expressed

have generally been more successful in deconstructing liberal theory than in proposing realistic alternatives. At the same time, both the liberal and critical theorists tend to eschew the inclusion of a moral ontology, such as natural-law theory, within the conception of law.

To suggest that American legal methodology has jettisoned all formal legal principles would, of course, be farfetched. Nonetheless, a glance at contemporary casebooks used by American law students discloses that economic analysis, along with historical, sociological, and psychological information, is often regarded as of equal value to legal principles.<sup>67</sup> Thus, in comparison to the canonical science, American legal methodology reflects the pragmatic view that the optimal good to be achieved in a given concrete situation merits more consideration than a set of ideal and immutable principles.<sup>68</sup> This is not to suggest that canon law is not practical, or that American law lacks ideals. The point is simply to illustrate the two different methodological perspectives.

In addition to this Introduction, the study consists of three main Parts and a Conclusion. Part Two considers the procedures of administrative law in canon law and federal law prior to final review at each of the systems' supreme appellate courts. It discusses the issue of the separation of powers from the perspective of the underlying theological and philosophical claims proper to each system of law. Part Three focuses on the structures and procedural law of the Apostolic Signatura and the Supreme Court. It explores the notion of due process that is operative in each system of administrative law. It also examines the jurisdictional parameters and competency of each of the supreme administrative tribunals. Finally, with respect to the broad theoretical issues raised by the separation of powers, due process, and competence, Part Four endeavors to summarize the study's modest contribution to the continuing project of comparative legal scholarship. Thus, the study promises to be of interest to the diverse fields of comparative law, administrative law, constitutional law, law and religion, and jurisprudence.

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above, however, is a common theme. *See id.* at 94.

67. *See* ZWEIGERT & KÖTZ, *supra* note 45, at 256.

68. *See* Alesandro, *supra* note 25, at 13.

## II. ADMINISTRATIVE LAW PRIOR TO REVIEW AT THE TRIBUNALS

This first Part compares the natures and procedures of administrative law prior to the contentious-administrative process at the Apostolic Signatura and judicial review at the Supreme Court. In canon law, recourse may be brought against the single administrative act as defined in the Common Norms of the 1983 Code.<sup>69</sup> The canonical process is one of hierarchical recourse that culminates at the appropriate Dicastery of the Roman Curia.<sup>70</sup> In comparison, according to United States federal law administrative agency decision making occurs through the distinct processes of rulemaking, formal adjudication, and informal adjudication, as stipulated in the Administrative Procedure Act (APA).<sup>71</sup> The vast majority of adjudication of administrative controversies in the American system follows a method of informal adjudication generally conducted by an administrative law judge whose decision may be appealed to the appropriate agency head.

### A. *Ecclesiastical Administrative Law*

#### 1. Nature of ecclesiastical administrative law

The Roman Catholic Church, which is presided over by the Roman Pontiff as the Successor to Peter, is understood as a *communio* of the particular churches.<sup>72</sup> Each particular church or diocese is governed by a bishop.<sup>73</sup> The promulgation of the 1983 Code by Pope John Paul II constituted the translation of the theology of the Second Vatican Council into orderly structures with practical effects.<sup>74</sup> The Dicasteries of the Roman Curia, on behalf of the Roman

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69. 1983 CODE c.36, § 1.

70. "Dicastery" is a general term which refers to the secretary of state, nine congregations, three tribunals, and the various councils and offices that comprise the Roman Curia. See generally PASTOR BONUS art. 2, § 1 (originally promulgated at Ioannes Paulus Pp. II, *Constitutio Apostolica de Romana Curia*, 80 AAS 841 (1988) (describing the canonical hierarchy)).

71. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362 (1994).

72. See PASTOR BONUS art. 1.

73. See Alesandro, *supra* note 25, at 6.

74. Indeed, the Supreme Legislator has referred to the new Code as the final conciliar document, "ultimo documento conciliare." See Ioannes Paulus Pp. II, *supra* note 29, at 128-29.



Pontiff, exercise competence over petitions of remedy brought by individuals who allege some injury as a result of an act of administrative power.<sup>75</sup> A general pattern in the process of hierarchical recourse involves recourse against a decision of the bishop to the appropriate Dicastery.<sup>76</sup> What follows is an attempt to elucidate the juridic norms that are designed to render administrative justice in the *communio* of the church.<sup>77</sup>

*a. judicial, legislative, and executive power*

Canon law reflects the doctrine that a unified sacred power of governance is vested in the office of the bishop by divine institution.<sup>78</sup> Canon 135, paragraph 1, of the 1983 Code states: "The power of governance is distinguished into legislative, executive and judicial."<sup>79</sup> The three functions are understood to flow from one sacred power of governance, and accordingly, canon law declines to adopt a rigid segregation of each power.<sup>80</sup> Although canon law declines to adopt a threefold separation of the powers of governance on the basis of office, the distinction of functions has long been a feature of church governance. Historical evidence indicates that at least

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75. *See id.*

76. *See id.*

77. *See* PASTOR BONUS art. 1.

78. *See* GHIRLANDA, *supra* note 28, at 255. Since the three powers are vested in the office of the bishop, the tripartite distinction ought not be considered equivalent to the modern secular notion of three separate government functions. *See* SEVERINO M. RAGAZZINI, O.F.M.CAP., LA POTESTÀ NELLA CHIESA: QUADRO STORICO-GIURIDICO DEL DIRITTO COSTITUZIONALE CANONICO 199-217 (1963); Giuseppe Lobina, *La natura giuridico-pastorale e l'ampiezza dell'esame di merito da parte dell'autorità amministrativa superiore di un provvedimento amministrativo*, 99 MONITOR ECCLESIASTICUS 238 (1974).

79. 1983 CODE c.135, § 1.

80. This understanding conflicts with the modern secular political theory that assigns each of the three functions to a separate office or branch of the government. It should be noted, however, that given the complexities of modern government, a complete separation seems neither possible nor desirable. Thus, the executive branch of a government may routinely develop rules for the administration of certain entitlements. At the same time, the case decisions of the judicial branch may have binding force of law. *See* PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 12-18 (1989).

as early as the sixth century, bishops were delegating their judicial power to separate judges.<sup>81</sup> Likewise, the exercise of executive power exercised on behalf of the bishop by the vicar general also claims ancient historical roots.<sup>82</sup> When the 1917 *Code of Canon Law* outlined the powers of governance that are proper to a bishop, it delineated legislative, judicial, and coercive powers.<sup>83</sup> The delineation, however, was not intended in a technical sense.<sup>84</sup> A distinction of functions, nonetheless, was implicit in the former Code.<sup>85</sup> Therefore, the expressed inclusion of the tripartite distinction in the 1983 Code ought not be considered as entirely novel.<sup>86</sup>

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81. See Justinian, *Novellae*, in 3 *CORPUS IURIS CIVILIS* 123 (R. Schoell & G. Kroll eds., 1929).

82. See X 1.28.3. Pursuant to 1983 CODE c.131, §§ 1-2, c.134, § 1, the power of the vicar general is ordinary and vicarious.

83. 1917 CODE c.335, § 1 (originally promulgated at *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*, 9 AAS 3 (1917)) (there is no English version as a canon in the 1917 Code specifically prohibited translation from the original Latin), specified the Latin terms “legislativa, iudiciaria, coactiva.” The corresponding canon in the present code replaces “coactiva” with “executiva,” thus reflecting the general modern view on the distinction among the powers of governance. See 1983 CODE c.135, § 1; see also 1917 CODE c.391, § 1 (explaining how the bishop exercises legislative, executive, and judicial power).

84. The division in Canon 335, § 1, of the 1917 Code was not intended to be technical in nature, but rather descriptive of the power of governance proper to a diocesan bishop. See Francisco J. Urrutia, S.J., *La potestà amministrativa secondo il diritto canonico*, in *DE IUSTITIA ADMINISTRATIVA IN ECCLESIA* 73, 90 & n.35 (Pio Fedele ed., 1984) [hereinafter Urrutia, *La potestà*]; Zenon Grochowski, *Atti e ricorsi amministrativi*, 57 *APOLLINARIS* 259, 264 (1984). The same author has also noted that “[i]f [Canon 335, § 1] stated the power of coercion alongside judicial and legislative powers, it was, in all probability, to assert those functions of episcopal power that were more contested by secular authorities for over one century.” Francisco Urrutia, S.J., *Administrative Power in the Church According to the Code of Canon Law*, 20 *STUDIA CANONICA* 253, 254 n.2 (1986) [hereinafter Urrutia, *Administrative Power*].

85. Commentators on the 1917 Code developed various schema to delineate the distinction of functions. See FELIX M. CAPPELLO, S.J., *DE CURIA ROMANA* 40-52 (1911); BENEDICT OJETTI, S.J., *DE ROMANA CURIA* 18-24 (1910). In 1925, Pope Pius XI attributed to Christ a threefold royal power: legislative, judicial, and executive. See Pius Pp. XI, *Quas primas*, 17 AAS 593, 599 (1925). For a thorough discussion of the division of the functions in the 1917 Code, see Urrutia, *La potestà*, *supra* note 84, at 75-83.

86. Cf. Kevin Matthews, *The Development and Future of the Administrative Tribunal*, 18 *STUDIA CANONICA* 1, 116 (1984) (stating that authors had

A significant aspect of the distinction of functions of the power of governance is included in Title Three, "General Decrees and Instructions," of Book One of the new Code.<sup>87</sup> Here, the Code recognizes two types of general decrees: a general decree and a general executive decree. Relying on the Thomistic definition, Canon 29 states that a general decree is a proper law given by a competent legislator to a community capable of receiving a law.<sup>88</sup> A proper law may be described as (1) abstract and general in application, (2) a norm that does not provide an answer to a specific problem, and (3) a norm in anticipation of a future circumstance.<sup>89</sup> To issue a general decree, which is proper law, requires legislative power.

Canon 31 establishes a second type of general decree which does not require legislative power but executive power.<sup>90</sup> A general executive decree is issued by one who possesses executive power within the limits of his competency.<sup>91</sup> This second type of general decree would include instructions, guidelines, and policies to interpret and apply a proper law. These might be described as supporting documents which, nonetheless, have obligatory effect since they constitute official explanations of what compliance with the law entails. While general decrees as legislative acts constitute autonomous proper law, general executive decrees comprise auxiliary documents aimed at the maintenance of proper law in the community for which they are intended.

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long preferred "to speak of division of functions").

87. See 1983 CODE cc.29-34 ("De Decretis Generalibus et De Instructionibus").

88. See *id.* c.29; 2 ST. THOMAS ACQUINAS, SUMMA THEOLOGICA 1017-18 (Fathers of the English Dominican Province trans., 1981).

89. See Willy Onclin, *L'organisation des pouvoirs dans L'Église*, in ACTES DU CONGRÈS DE DROIT CANONIQUE: CINQUANTENAIRE DE LA FACULTÉ DE DROIT CANONIQUE, PARIS, 22-26 AVRIL 1947, at 371 (1950); Willy H. Onclin, *The Church Society and the Organization of its Powers*, 27 JURIST 1, 13-14 (1967); Urrutia, *Administrative Power*, *supra* note 84, at 255-56 & n.5.

90. See Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Transmission schematum canonum consultationis causa*, 9 COMMUNICATIONES 227, 232-33 (1977).

91. See 1983 CODE c.31, § 1.

*b. the relation between executive power and administrative acts*

There is a direct relationship between the exercise of executive power and administrative acts.<sup>92</sup> The Pontifical Commission for the Revision of the Code of Canon Law considered general executive decrees and instructions to be acts of administration.<sup>93</sup> Since the same group of experts distinguished the power of governance into legislative, judicial, and executive, one might conclude that the terms “executive” and “administrative” are interchangeable. The concept of administration in the 1983 Code, however, is not unequivocal since it appears in several places throughout the Code to describe a variety of different actions. To start, one might consider the topic of Title IV of Book I, entitled “Singular Administrative Acts.”<sup>94</sup> Canon 35 states that single administrative acts include decrees, precepts, and rescripts directed toward particular individuals or juridic persons by one who possesses executive power.<sup>95</sup> First, pursuant to Canon 48, a single decree may be either a decision issued by a competent executive authority for a particular case, imposing a resolution to a controversy in accord with the norms of law, or a provision for a particular case by a competent executive authority producing some direct effect upon a specific individual or juridic person.<sup>96</sup> In either case, a single decree does not suppose, by its nature, that a petition has been made. Second, Canon 49 describes a single precept as “a decree by which an obligation is directly and lawfully imposed on a specific person or persons to do or to omit something . . . .”<sup>97</sup> A single precept presumes that some person or group has been remiss in

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92. See Klaus Mörsdorf, *De Actibus Administrativis In Ecclesia*, in *IUS POPULI DEI, MISCELLANEA IN HONOREM RAYMUNDI BIDAGOR* 9-19 (1972).

93. The Introduction to the *Schema*, circulated during the consultation, stated that general executory decrees, precepts, and instructions were of the same general nature, “indolem generalem,” as administrative acts. See Pontificia Commissio Codici Iuris Canonici Recognoscendo, *supra* note 90, at 233.

94. The Latin title, “De Actibus Administrativis Singularibus,” is translated here “Single Administrative Acts.” The word “singular” is used by Urrutia. See Urrutia, *Administrative Power*, *supra* note 84, at 257. In the Canon Law of America Society’s English translation of the Code and in the *American Commentary*, the Latin word “singularibus” is translated as “individual.”

95. See 1983 CODE c.35.

96. See *id.* c.48.

97. *Id.* c.49.

observance of the law. Third, Canon 59 supplies the two essential elements of a rescript: (1) its object is the granting of a privilege, dispensation, or other favor; and (2) it presumes that someone has made a request for such from the competent authority.<sup>98</sup> Each of the three types of single administrative acts may constitute the object of the contentious-administrative process.<sup>99</sup>

Single administrative acts must be distinguished from other understandings of administration as they appear in the code.<sup>100</sup> Regarding the financial management of public juridic persons, Canon 1276 requires that the Ordinary "carefully supervise the administration of all the goods."<sup>101</sup> Canon 1277 refers to "acts of extraordinary administration," which require consent, and to acts "of major importance," which require only consultation or advice.<sup>102</sup> The concept of administration occurs at several places to describe the coordination of activity necessary for the smooth operation of some public juridic person.<sup>103</sup> Canon 473 refers to the "administrative responsibilities" of the moderator of the diocesan curia.<sup>104</sup> Canons 363 and 371, Paragraph 2, convey an equally inclusive connotation in using the term "apostolic administration" about the operation of a particular church.<sup>105</sup> Likewise, Canon 259 employs the noun with respect to the running of a seminary.<sup>106</sup> At the same time, the noun "administrator" appears at various places throughout the code in reference to matters such as the governance of a missionary territory by an "Apostolic Administrator,"<sup>107</sup> or the care, on a temporary basis, of a

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98. *See id.* c.59, § 1.

99. *See id.* c.1732. The term "Ordinary" includes the Pope, diocesan bishops, vicars general, episcopal vicars, and certain major superiors of clerical religious communities of pontifical right. *See id.* c.134, § 1.

100. *See* Michael R. Moodie, S.J., *The Administrator and the Law: Authority and its Exercise in the Code*, 46 JURIST 43, 45-46 (1986).

101. 1983 CODE c.1276, § 1.

102. *Id.* c.1277.

103. *See generally* Frank G. Morrissey, O.M.I., *Ordinary and Extraordinary Administration: Canon 1277*, 48 JURIST 709 (1988) (explaining the evolution of Canon 1277 and its existing effects on administration).

104. *See* 1983 CODE c.473.

105. *See id.* c.363, c.371, § 2.

106. *See id.* c.259, § 1.

107. *See id.* c.368, c.371, § 2.

diocese by the "Diocesan Administrator,"<sup>108</sup> and the conduct of a parish by a "Parochial Administrator."<sup>109</sup> When the Code deals with process in Book VII, the first canon refers to both "administrative power" and "administrative tribunals."<sup>110</sup>

Pursuant to Canon 1732, in order to be contested, the particular act must be "given in the external forum outside a judicial trial, except for those given by the Roman Pontiff himself or by an Ecumenical Council."<sup>111</sup> Due to their status as proper laws, neither general decrees nor general executory decrees may be the object of the contentious-administrative process. In contrast, all single administrative acts are impugnable with the exceptions of those issued by the Roman Pontiff or an ecumenical council.<sup>112</sup>

On the basis of the foregoing discussion, the notion of administration in the 1983 Code seems to include three categories. First, this notion is utilized in reference to the coordination of various activities within a particular community in the church such as a diocese, seminary, or parish.<sup>113</sup> Second, it also describes the stewardship exercised over the temporal goods of the church such as investment, accounting and bookkeeping, and various other financial transactions.<sup>114</sup> Neither of these two categories necessarily require the exercise of executive power. Third, to issue or to execute a general executive decree or instruction, single decree, precept, or rescript constitutes an act of administration.<sup>115</sup> A necessary prerequisite to such acts is the executive power of governance.<sup>116</sup> A subgroup of the third category, the single administrative act, is the object of the contentious-administrative process, which is the subject of this Article.<sup>117</sup> Only when an administrator acts as a public official does the

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108. *See id.* cc.418-430.

109. *See id.* c.540.

110. *See id.* c.1400, § 2.

111. *Id.* c.1732.

112. *See id.*

113. *See id.* c.259, § 1, cc.419-430, c.473, § 1, c.479, § 1, c.530, c.532, c.540, § 1.

114. *See id.* cc.1254-1258, cc.1273-1289.

115. *See id.* c.29, cc.48-75.

116. Even in the case of mere execution, the executive power is at least the source of the act. *See Urrutia, Administrative Power, supra* note 84, at 260.

117. *See Grocholewski, supra* note 84, at 263-79; Moodie, *supra* note 100, at 57; Dino Staffa, *De distinctione inter iurisdictionem ordinariam et adminis-*

act become susceptible to administrative recourse.<sup>118</sup> Private acts of an administrative official such as disposing personal income to purchase a home or lending money do not constitute impugnable administrative acts.<sup>119</sup>

European civil law attempts to draw a sharp distinction between such private acts of the administrator (*actus administratoris*) and those public acts which produce some juridic effect upon a certain person (*actus administrativus*).<sup>120</sup> The latter type of act is termed a *provvedimento* in Italian civil law,<sup>121</sup> and the concept seems helpful to understand the meaning of an impugnable administrative act in the canon law.<sup>122</sup> Consistent with the concept, the impugnable administrative act has been described as: "(1) an act placed by an administrator as (2) an expression of the exercise of administrative authority which (3) by its authoritative action directly affects another's rights."<sup>123</sup>

*trativam in iure canonico*, 65 PERIODICA 5, 10 (1976).

118. See Gordon, *supra* note 16, at 376; Grochowski, *supra* note 84, at 259-60; Moodie, *supra* note 100, at 57; see also Reply of the Promoter of Justice (October 18, 1990), in ROMAN REPLIES AND CLSA ADVISORY OPINIONS 1991, at 35-38 (Kevin W. Vann & Lynn Jarrell, O.S.U., eds., 1991) (not all acts that proceed from a person who possesses administrative power can be said to be administrative acts; only those should be reckoned as administrative acts which proceed either from administrative authority or from the exercise of administrative power). This private opinion was apparently published without permission. See *Letter from the Apostolic Signatura, Protocol No. 23081/91 VAR*, in ROMAN REPLIES AND CLSA ADVISORY OPINIONS 1992, at 3-5 (Kevin W. Vann & Lynn Jarrell, O.S.U., eds., 1992).

119. See Dino Staffa, *Supremus organismus Contentioso-Administrativus in ecclesia*, 67 PERIODICA 523, 528-31 (1978).

120. See NEDJATI & TRICE, *supra* note 2, at 74; GUNTER RAAB, RECHTSSCHUTZ GEGENÜBER DER VERWALTUNG 287-89 (1978).

121. See Moodie, *supra* note 100, at 57-59.

122. For example, Grochowski has adopted the term in referring to the process of administrative recourse. See Zenon Grochowski, *La Parte resistente nei processi contenzioso-amministrativi presso la Segnatura Apostolica*, in IUSTUS IUDEX 472-89 (Klaus Lüdicke et al. eds., 1990); see also PAOLO MONETA, IL CONTROLLO GIURISDIZIONALE SUGLI ATTI DELL'AUTORITÀ AMMINISTRATIVA NELL'ORDINAMENTO CANONICO 59-110 (1973).

123. Moodie, *supra* note 100, at 58.

*c. hierarchical recourse and local administrative tribunals*

In the preparation of both the 1917 and 1983 Codes, the possibility of local administrative tribunals was considered and rejected.<sup>124</sup> As previously noted, the 1972 schema prepared by the Pontifical Commission for the Revision of the *Code of Canon Law* contained canons requiring the establishment of administrative tribunals by Episcopal Conferences.<sup>125</sup> In a subsequent draft of the schema which contained twenty-eight proposed canons on administrative procedure, the commission contemplated permitting the implementation of administrative tribunals.<sup>126</sup> When the new *Code of Canon Law* was promulgated, the provisions for the administrative tribunals were omitted.<sup>127</sup>

There are at least two significant reasons why the code sets forth a system of hierarchical recourse rather than of local administrative tribunals. First, the tribunals seem impractical since to provide the resources in terms of adequately trained personnel to sustain such an arrangement would simply be too taxing for most local churches.<sup>128</sup> Additionally, and more importantly, it would be inconsistent with the doctrine of hierarchical communion for the administrative tribunal to judge the act of the bishop. The Roman Pontiff, not an inferior

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124. For discussion of the 1917 proposal, see Ignacio Gordon, *De tribunalibus administrativis*, 57 *PERIODICA* 602, 606-07 (1968), and Kevin Matthews, *The Development and Future of the Administrative Tribunal*, 18 *STUDIA CANONICA* 1, 187 (1984).

125. See PONTIFICAL COMMISSION CODICI IURIS CANONICI RECOGNOSCENDO, SCHEMA CANONUM DE PROCEDURA ADMINISTRATIVA 14 (1972).

126. See PONTIFICAL COMMISSION CODICI IURIS CANONICI RECOGNOSCENDO, SCHEMA CODICIS IURIS CANONICI 372 (1980).

127. For reference to the administrative tribunals, see 1983 CODE c.149, § 2, c.1400, § 2.

128. In preparation for the October 1981 meeting of the Commission for the revision of the Code, the Secretariat responded to the proposal for administrative tribunals by objecting that "oftentimes experienced personnel are lacking." PONTIFICAL COMMISSION CODICI IURIS CANONICI RECOGNOSCENDO, RELATIO COMPLECTENS SYNTHESIM ANIMADVERSIONUM AB EM.MIS. ATQUE EXC.MIS. PATRIBUS COMMISSIONIS AD ULTIMUM SCHEMA CODICIS IURIS CANONICI EXHIBITARUM, CUM RESPONSIONIBUS A SECRETARIA ET CONSULTORIBUS DATIS 340-41 (1981). This was troublesome for the proposed tribunals inasmuch as the matters before the tribunal would be sensitive and complex "requiring a profound grasp of the law and of justice." *Id.*



tribunal over which the bishop in fact exercises sacred power, possesses the authority to judge an act of the bishop.<sup>129</sup> Thus, the proposal of the local administrative tribunals was rejected for practical and doctrinal reasons. Finally, it is significant that Pope John Paul II declined to implement local administrative tribunals. Respecting the authority of local Ordinaries, the Supreme Legislator affirmed the process of hierarchical recourse.<sup>130</sup>

Given the reality of *communio*, there is a presumption that one who exercises sacred power in the church does so "always observing canonical equity and keeping in mind the salvation of souls, which in the Church must always be the supreme law."<sup>131</sup> These words pertain to an aspect of the administrative process, and it is perhaps no coincidence that the Supreme Legislator chose them as the final words of the new Code. The presumption of these ultimate words helps to explain why Section I of Part V of Book VII in the Code affirms a system of hierarchical recourse, rather than one of administrative tribunals, in the juridic structure of the church.<sup>132</sup> Since the bishop is in hierarchical communion,<sup>133</sup> he is presumed to act for the good, and his single administrative decrees are not to be judged by a lesser authority. Only the Roman Curia as the representative of the Supreme Pontiff may judge the administrative acts of the bishop.<sup>134</sup>

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129. It is interesting to note in this regard that a more recent proposal for administrative tribunals by the Canon Law Society of America exempts the administrative acts of the diocesan bishop. See PROTECTION OF RIGHTS OF PERSONS IN THE CHURCH: REVISED REPORT OF THE CANON LAW SOCIETY OF AMERICA § 1 (1991).

130. See 1983 CODE cc.1732-1739.

131. *Id.* c.1752.

132. See *id.* cc.1732-1739.

133. See *id.* c.336 (stating that hierarchical communion is the union of the bishops throughout the world with the Pope as the Bishop of Rome).

134. Canon 1737 provides that one injured by an administrative decree has recourse to the hierarchical superior of the one who issued the decree. See *id.* c.1737. Since the bishops stand at the head of the hierarchical structure, only the Supreme Pontiff has the authority, through the Roman Curia, to judge the bishops. See *id.* cc.331-335 (describing the supreme power of the Roman Pontiff).

*d. hierarchical recourse and the Dicasteries of the Roman Curia*

Certain of the Dicasteries of the Roman Curia, also known as Congregations, exercise competence over petitions of remedy brought by individuals who allege some injury as a result of an act of administrative power.<sup>135</sup> These Dicasteries include the Congregation for the Doctrine of the Faith, Congregation for Oriental churches, Congregation for Divine Worship and Discipline of the Sacraments, Congregation for the Causes of the Saints, Congregation for Bishops, Congregation for the Evangelization of Peoples, Congregation for Clergy, Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, and the Congregation for Seminaries and Educational Institutions.<sup>136</sup> The 1988 Apostolic Constitution *Pastor Bonus* specifies the particular competency of a given Congregation over a recourse from the administrative decree of a bishop or supreme moderator of an institute of consecrated life.<sup>137</sup> As they represent the Roman Pontiff, the Dicasteries constitute the final level in the system of hierarchical recourse.<sup>138</sup> After the appropriate Dicastery has rendered a final decision in the case, contentious-administrative recourse may be brought to the Apostolic Signatura.<sup>139</sup>

2. Ecclesiastical administrative process

Canons 1732 through 1739 prescribe the procedure to be followed in hierarchical recourse.<sup>140</sup> From a technical perspective, re-

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135. See *supra* note 70.

136. See *PASTOR BONUS* arts. 48-116.

137. See *id.* arts. 48, 56, 62, 71, 75, 83, 85, 93, 99, 105, 115 (describing the competency of the nine Congregations).

138. See 1983 CODE c.1442; see also *PASTOR BONUS* arts. 121, 123 (stating that the Apostolic Signatura is the Supreme Tribunal and has the power to consider administrative acts issued or approved by the Dicasteries); *supra* note 70 and accompanying text (defining Dicasteries).

139. See 1983 CODE c.1445.

140. See *id.* cc.1732-1739. The 1983 Code includes a special procedure for the removal and transfer of pastors in Canons 1740-1752. See *id.* cc.1740-1752. For a discussion of the special interests of pastors based on the schema for the new Code, see Giuseppe Lobina, *De processibus administrativae indolis in dimissione religiosorum et in amotione parochorum*, 67 *PERIODICA* 681 (1978). See also THOMAS J. PAPROCKI, *VINDICATION AND DEFENSE OF THE RIGHTS OF THE CHRISTIAN FAITHFUL THROUGH ADMINISTRATIVE*

course against a single administrative act follows the process of hierarchical recourse up to, and including, the level of the Dicasteries of the Roman Curia, while the contentious-administrative process commences with the review of the Second Section.<sup>141</sup> Because the competency of the Signatura concerns violations of law, a violation in the process of hierarchical recourse would constitute appropriate matter for the Signatura's consideration and judgment. The process of hierarchical recourse may be divided into two phases.<sup>142</sup> Each phase will be discussed in turn following a preface on the church's preference for conciliatory processes.

*a. avoiding contentious process through conciliation*

Section 1 of Canon 1733 exhorts parties involved in a contentious-administrative matter to reconcile differences prior to the initiation of formal recourse against the decree.<sup>143</sup> The exhortation has roots in the sacred Scripture, and it reflects the commitment to *communio* in the church, which is to be fostered among and by all of the Christian faithful.<sup>144</sup> Recognizing the costs to individuals and to the Church that often accompany the process of hierarchical recourse, the canon suggests mediation, study of the issues, or any other suitable means through which the controversy might be eschewed or resolved.<sup>145</sup> This is not to suggest, however, that anything but an

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RECOURSE IN THE LOCAL CHURCH 86 (1991) (discussing the various powers of the hierarchic superior regarding decrees).

141. See *infra* pp. 133-133.

142. The author of this Article is indebted to Fr. Frans Daneels, O.Praem., Promoter of Justice at the Apostolic Signatura, for explaining this distinction in his lectures at the Gregorian University in Rome.

143. See 1983 CODE c.1733, § 1.

144. See *Matthew* 18:15-17; see also GHIRLANDA, *supra* note 28, at 455-56 & n.621 (stating that canon law reflects the theological mystery of communion); Francesco Coccopalmerio, *Iustitia administrativa quoad iura fidelium et quoad communionem ecclesiam*, 67 PERIODICA 663, 670 (1978) (stating that administrative justice in canon law should reflect the communion of all Christ's faithful); Zenon Grocholewski, *Giustizia amministrativa nel nuovo Codice di Diritto Canonico*, 63 ANGELICUM 333, 349 (1986) (stating that administrative justice in the 1983 Code finds its theological roots in Vatican II's theology of *communio*).

145. In this regard, see also 1983 CODE c.1446, which urges avoidance of contentious trials, and *id.* cc.1713-1716, which describe the means of avoiding ordinary judicial trial through alternate means of dispute resolution, such as conciliation and arbitration. This is consistent with a trend in civil law that fa-

equitable solution be accepted by one of the parties. To this end, the canon continues by encouraging bishops to establish either national or diocesan offices for conciliation of disputes.<sup>146</sup>

In reality, not all controversies are resolvable through alternate informal means of dispute resolution. Zenon Grocholewski has observed that sometimes structures of mediation and arbitration prove insufficient for the protection of rights.<sup>147</sup> In such cases, justice is best served through the initiation of formal recourse by a party allegedly aggrieved by an administrative act or decree.<sup>148</sup>

*b. phase one*

*i. remonstratio*

While the law urges parties to settle disputes without formal recourse, Canon 1734, Section 1, mandates that prior to making recourse, the petitioner must seek revocation or emendation of the decree from its author.<sup>149</sup> The section further exacts that the authority, who receives the written request for revocation or emendation of his own decree, must assume that the petitioner also seeks suspension of effects of the decree.<sup>150</sup> Thus, the law seeks to protect the petitioner who inadvertently omits such a specific request. Section 2 of the

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vors alternate means of dispute resolution as preferable to formal judicial proceedings. *See, e.g.*, STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION, NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 6-13, 286-404, 567-74 (3d ed. 1999) (discussing the increased use of voluntary and mandatory alternate means of resolution and the future in general).

146. *See* 1983 CODE c.1733, § 2; *see also* Grocholewski, *supra* note 144, at 342-45 (stating that bishops should foster structures of reconciliation as an alternative to administrative recourse).

147. *See* Grocholewski, *supra* note 3, at 153, 156.

148. An interesting example of a Dicastery's efforts to resolve an administrative controversy through mediation occurred in 1977 in the Diocese of Arlington, Virginia. In a parish of that diocese, a dispute arose between the new pastor and the parish council when the pastor dissolved the council. Attempts at reconciliation at the local level failed, and the parishioners brought a recourse to the Congregation for Clergy. Before accepting the recourse, the Dicastery requested that an American Bishop be appointed as a mediator. When the mediation proved fruitful, the formal recourse was rendered moot. *See* Thomas Welsh, *Good Shepherd Parish: Reconciliation Effort*, 7 *ORIGINS* 504, 504-05 (1978).

149. *See* 1983 CODE c.1734, § 1.

150. *See id.*

same Canon requires that the request for revocation or emendation be made within ten available days from the reception of legal notice of the decree.<sup>151</sup>

Section 3 of Canon 1734 lists three circumstances in which it is not necessary for a petitioner to request revocation or emendation from the author of the decree.<sup>152</sup> First, the petitioner may approach the bishop directly where the challenged decree was issued by one of his immediate subordinates such as the Vicar General, the Judicial Vicar, or a pastor.<sup>153</sup> Second, the petitioner need not make the request for revocation or emendation of a decree issued by a public authority during the process of hierarchical recourse, unless the authority was the bishop.<sup>154</sup> For example, in the case in which the Congregation for Catholic Education issues a decree which confirms the decree of a bishop to close a certain parochial school, the petitioner need not request the Congregation to revoke or modify its decree before appealing to the Apostolic Signatura. However, if the bishop issued a decree confirming the decision of the pastor to close the school, then the request must be made to the bishop before proceeding. Third, it would be unnecessary to make the request when recourse is proposed in accord with Canons 57 and 1735.<sup>155</sup>

Pursuant to Canon 57, a negative response is presumed to a petition when the superior to whom the petition was addressed fails to act within the time period prescribed by law.<sup>156</sup> Likewise, Canon 1735 fixes the time limit of thirty days in which the superior, who receives the request, must respond.<sup>157</sup> The Canon stipulates that a superior's silence to a request for revocation or modification of a decree amounts to a negative response. Neither in the case of the presumption of a negative response from silence, nor in the case of an expressed refusal of the request, must a further request for revocation or emendation be made since this would tend to immobilize the process in a multiplication of requests.

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151. *See id.* § 2.

152. *See id.* § 3.

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.* c.57, § 2.

157. *See id.* c.1735.

## ii. suspending the effects of the decree

Canon 1736 deals with several issues about the suspension of the challenged decree. First, the petition for revocation or modification of a decree suspends the effects in all those cases where hierarchical recourse suspends the effects.<sup>158</sup> For example, since hierarchical recourse from a decree that dismisses a member from an institute of consecrated life suspends the effect of the decree, a petition for revocation or modification by the member to the superior who issued the decree likewise has suspensive effect.<sup>159</sup> Second, even when it is not specifically expressed in the law, the author of the decree may voluntarily suspend it while a petitioner's request for revocation or modification is under consideration.<sup>160</sup> Moreover, if the author of the decree fails to suspend the effects within ten days of the receipt of the petitioner's request, the petitioner may seek suspension from the next hierarchical superior, who can grant suspension for grave reasons and with concern for the salvation of souls.<sup>161</sup> When suspension is granted by the author of the decree or by the next hierarchical superior, it remains in effect until recourse is made to the next hierarchical superior who must then decide whether to confirm or revoke the suspension.<sup>162</sup> Finally, if proper recourse to the hierarchical superior is not made within the statute of limitations, the suspension thereupon automatically ceases.<sup>163</sup>

c. *phase two: hierarchical recourse proper*

When some equitable resolution of a dispute between a private individual and a church official over the administrative act of the latter cannot ultimately be found, then the individual may invoke the

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158. *See id.* c.1736, § 1.

159. *See id.* c.700, c.729, c.746; *see also id.* c.1354 (providing authority for one who hands down penalty to also remit that penalty); *id.* c.1747, § 3 (prohibiting bishop from appointing another parish priest when recourse against a decree of removal is pending, but requiring that the parochial administrator fill in until the situation is resolved); *id.* c.1752 (stating the fundamental proposition that all disputes must be resolved with canonical equity).

160. *See id.* c.1734, § 1.

161. *See id.* c.1736, § 2.

162. *See id.* § 3.

163. *See id.* § 4.

process of hierarchical recourse.<sup>164</sup> In accordance with Section 2 of Canon 1737, the petitioner must propose hierarchical recourse within a peremptory period of fifteen available days from the day on which actual notice of the challenged decree was received by the petitioner.<sup>165</sup> Technically, if the statute of limitations is exhausted prior to the filing of a written petition for hierarchical recourse, the case may be refused.<sup>166</sup> Nonetheless, in the interest of justice and equity, a hierarchical superior may grant a hearing even when the statute has been tolled.<sup>167</sup>

Recognizing that the process of hierarchical recourse is sometimes complex, Canon 1738 permits parties to be represented by counsel.<sup>168</sup> Indeed, an advocate must be appointed when a petitioner lacks one and the hierarchical superior deems it necessary based on the nature of the case.<sup>169</sup> The appointment of counsel, of course, does not excuse the petitioner from being available for questions during the process.<sup>170</sup>

The hierarchical superior enjoys wide discretion in deciding a case.<sup>171</sup> Canon 1739 permits the hierarchical superior to confirm, nullify, rescind, revoke, subrogate, or obrogate the challenged decree.<sup>172</sup> Canon 1737, Section 1, recognizes the right of one who

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164. For an analysis of several cases of administrative recourse to the Dicasteries of the Roman Curia from dioceses in the United States, see James H. Provost, *Recent Experiences of Administrative Recourse to the Apostolic See*, 46 JURIST 142, 145-55 (1986).

165. See 1983 CODE c.1737, § 2.

166. See *id.* c.1736, § 4.

167. Although the hierarchical superior may grant the favor of a hearing even though the recourse was brought after the statute of limitations had expired, it would not seem, if the superior did not respond in any way, that his silence could be construed as a negative response for the purpose of having recourse to the next highest superior. To the contrary, the provision of Canon 57, Section 2, of the 1983 Code would not seem to take effect because the first section of this canon describes the case in which a petition or recourse has been "lawfully presented." See *id.* c.57, § 1. It would seem that the same reasoning would apply in the case of Canon 1435 in the 1983 Code in regard to the required remonstratio. See *id.* c.1734, § 1 (suspending the decree once relief from it has been requested from its author).

168. See *id.* c.1738.

169. See *id.*

170. See *id.*

171. See Moodie, *supra* note 100, at 48-49.

172. Confirmation of the decree, of course, upholds the decision of the lower

contends to be injured by a decree to bring recourse to the hierarchical superior for any just cause.<sup>173</sup> There are three significant elements to this provision. First, an individual who asserts some injury from a decree may bring hierarchical recourse.<sup>174</sup> Second, the permissible reasons for such recourse are wide; recourse may be brought for any "just reason."<sup>175</sup> Third, the recourse is directed to the hierarchical superior of the one who issued the decree.<sup>176</sup> It may be filed either with the hierarchical superior or with the author of the decree who then transmits it to the superior. The same canon permits that in cases in which recourse does not automatically suspend the effects of the challenged decree, the hierarchical superior can order such suspension.<sup>177</sup>

For example, a pastor who has been removed from his office by the bishop would be a competent individual to bring hierarchical recourse against the decision of the ecclesiastical authority. The pastor might assert just reason on the ground that, in removing him from office, the bishop did not act in accordance with Canons 1740 through 1747, which govern the removal of pastors.<sup>178</sup> Specifically, the pastor might allege that the bishop, before taking action, failed to follow the prescribed procedure of Canon 1742. Pursuant to that canon, the bishop must discuss the matter with two other pastors from a permanent group, specifically selected for this purpose, prior to removing the pastor.<sup>179</sup> The recourse would be directed to the hierarchical

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authority.

*Declaration of nullity* means that the decree itself is invalid due to some violation of law or technical defect.

*Recission* and revocation do not address the validity of the decree, but simply withdraw it and make it unenforceable.

*Amendment* of the decree leaves the original decree in force, but with modifications. Subrogation replaces the original decree with a new one.

*Obrogation* abolishes or abrogates the original decree by issuing a new one contrary to the former one.

PAPROCKI, *supra* note 140, at 86.

173. *See* 1983 CODE c.1737, § 1.

174. *See id.*

175. *Id.*

176. *See id.*

177. *See id.* § 3.

178. *See id.* cc.1740-1747.

179. *See id.* c.1742, § 1. The members of this permanent group are selected by the presbyteral council from a group proposed by the bishop. *See id.*



superior of the bishop, in this case the Congregation for Clergy as the appropriate Dicastery of the Roman Curia. The pastor could file the petition either with the Dicastery, or with the bishop for transmission. The law provides that recourse against such action does not automatically carry suspensive effect, although the bishop would be barred from appointing a new pastor until his decree has been confirmed by the Dicastery.<sup>180</sup>

### B. American Administrative Law

#### 1. Constitutional background: the separation of powers

The investigation of the theoretical foundations of American administrative justice begins with the fundamental legal document—the United States Constitution. At the outset, two general characteristics of the Constitution seem noteworthy. First, the Constitution is supreme in relation to any other law or government policy.<sup>181</sup> Second, it creates a national government by the federation of each of the fifty states which have their own constitutions and statutes. Suffice it to say that the relationship between the federal government and the states has been, and continues to be, one of the central issues of American political and legal experience.<sup>182</sup> Although each of the

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180. *See id.* c.1747, § 3.

181. Clause 2 of Article VI of the Constitution provides that “[t]his Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

182. For a description of how the federal state powers issue affected the drafting of the federal Constitution by the First Congress, see *Historical Note on the Formation of the Constitution*, in *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION XXXV-XLI* (Lester S. Jayson et al. eds., 1973) [hereinafter *Historical Note*]. Section 9 of Article I of the Constitution is devoted to the restraints upon the national government. It contains eight clauses restricting or prohibiting legislation affecting areas such as the suspension of the writ of habeas corpus, the enactment of bills of attainder or ex post facto laws, and the granting of preference to the ports of one state over those of another. *See* U.S. CONST. art. I, § 9; *see also, e.g.*, *Morgan v. Louisiana*, 118 U.S. 455, 467 (1886) (holding that restraints of Section 9 of Article I were not applicable to a Louisiana statute that imposed a quarantine tax); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that federal courts lack jurisdiction to decide whether a state may take private property for public use). Section 10 of Article I enumerates the powers denied to the States

states has its own system of administrative justice, the subject at hand concerns federal administrative justice. It is characteristic of modern states to distinguish three broad powers of governance: legislative, executive, and judicial.<sup>183</sup> The analytical utility of the distinction can be detected in the political theory of Aristotle.<sup>184</sup> The theory's modern expression appears in the works of John Locke and Montesquieu.<sup>185</sup> The political disciples of these philosophers, particularly those who framed the United States Constitution, adopted and refined the notion to lay the cornerstone of constitutional government.<sup>186</sup> Although it is manifested in a variety of forms, the quintessence of the modern theory is to safeguard against excessive

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such as the inability to enter treaties with foreign nations, the minting of money, and the enactment of bills of attainder and ex post facto laws. *See* U.S. CONST. art. I, § 10; *see also, e.g.,* Julliard v. Greenman (Legal Tender Case), 110 U.S. 421, 446-47 (1884) (upholding congressional authority to make U.S. Treasury notes a legal tender for payment of private debts); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323-25 (1866) (invalidating a portion of the Missouri State Constitution as a bill of attainder and an ex post facto law). *See generally* TRIBE, *supra* note 7, at 401-545 (setting forth examples of judicial review of state regulations and analyzing the conflicts between state and federal laws). Regarding federal judicial review of state administrative matters, *see Younger v. Harris*, 401 U.S. 37 (1971), holding that federal courts must refrain from adjudicating requests for injunctive relief arising from an ongoing state criminal investigation, and *Ohio Civil Rights Commission v. Dayton Christian School, Inc.*, 477 U.S. 619 (1986), holding that the *Younger* abstention rule also applies to state administrative proceedings.

183. *See generally* M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (2d ed. 1998) (analyzing three centuries of Western constitutional thought and recognizing the balancing of governmental power as the mechanism for democracy). *See also* NEDJATI & TRICE, *supra* note 2, at 14-15 (discussing the doctrine of separation of powers as a system of checks and balances so that power is distributed among different bodies to create a "real, living democracy").

184. Aristotle delineates specific roles for the king and generals, the legislative council, and the courts of law. *See* ARISTOTLE, *Constitution of Athens*, in *THE COMPLETE WORKS OF ARISTOTLE* 2341, 2367 (Jonathan Barnes ed., 1984).

185. *See* JOHN LOCKE, *An Essay Concerning the True Original, Extent, and End of Civil Government*, in *TWO TREATISES OF GOVERNMENT* 267, 364-65 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); MONTESQUIEU, *DE L'ESPRIT DES LOIX* 63-77 (1955).

186. *See generally* STRAUSS, *supra* note 80, at 12-18 (discussing the organization of the Constitution around the notion of separation of powers).

powers in any one branch or office of government.<sup>187</sup> The applied theory attempts to establish a system of checks and balances so that one who makes a rule is not at the same time charged with implementing it, nor is the legislator or executive commissioned to judge the rule's application to particular circumstances.<sup>188</sup>

Even if one accepts the division of governmental power into three main functions, it does not follow that the exercise of the functions must be rigidly segregated.<sup>189</sup> In many countries that subscribe to the separation of powers, rulemaking authority subsists in all three branches.<sup>190</sup> The executive branch may commonly develop rules for the administration of government entitlements such as social security pensions, veterans' benefits, and health care insurance. At the same time, the interpretations and applications of the rules by the judicial branch may have binding force of law on like cases. Given the complexities of modern government, the separation of powers is not absolute.

The Framers of the Constitution applied the tripartite separation by creating three distinct, yet interrelated, branches of government. The first three Articles of the Constitution confer the legislative, executive, and judicial powers on the three distinct structures.<sup>191</sup> Article I fixes the legislative power of the federal government dividing it between a bicameral Congress: the Senate and the House of Representatives.<sup>192</sup> Article II authorizes the election of a chief executive,

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187. See generally *id.* at 14 (explaining that the separation of powers doctrine invokes fundamental principles of fairness and justice); HARRY STREET & RODNEY BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 31 (5th ed. 1985) (noting that French philosopher Montesquieu and his followers advocated tripartite systems to protect individual liberties); TRIBE, *supra* note 7, at 18 (discussing separation of powers as a political theory for controlling government against a feared tendency to take excessive power).

188. See STREET & BRAZIER, *supra* note 187, at 31.

189. See *id.* at 31-32.

190. See *id.* at 32-33; STRAUSS, *supra* note 80, at 504-07.

191. See U.S. CONST. arts. I, II, III.

192. Section 1 of Article I establishes the Congress as the national legislative body, which possesses only those limited powers granted to it by the Constitution. See U.S. CONST. art. I, § 1. Section 8 of the same Article lists the principal powers of Congress as, *inter alia*, to levy taxes; to make expenditures for national defense and the general welfare; to regulate interstate and foreign commerce; to borrow money; to coin and regulate money and punish counterfeiting; to establish national rules for matters concerning bankruptcy; to estab-

the president, who exercises vast and somewhat undefined power.<sup>193</sup> Article III establishes the United States Supreme Court as the ultimate judicial power.<sup>194</sup> A system of “checks and balances” serves as

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lish a Post Office; to construct highways; to set a policy for immigration; to declare war; and to govern all federal territories, including but not limited to the District of Columbia. *See id.* § 8. In addition to listing the chief powers of Congress, Section 8 further empowers Congress to “make all Laws which shall be necessary and proper” to the operation of the federal government. *Id.* Thus, the Constitution grants a wide implied power to Congress to do what is “necessary and proper” so that the government functions. *Id.*; *see also* TRIBE, *supra* note 7, at 224-25 (discussing Congress’s exercise of Article I, Section 8 powers and its effect on the other branches of government).

193. Section 1 of Article II simply states that “[t]he executive Power shall be vested in a President of the United States of America.” U.S. CONST. art. II, § 1. In *Myers v. United States*, 272 U.S. 52, 118 (1926), the Supreme Court, accepting a proposition originally proffered by Alexander Hamilton, held that the president, unlike the Congress, could exercise power from sources not enumerated in the Constitution, so long as the Constitution did not expressly forbid it. The president’s power over foreign affairs seems settled. *See, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (expressing that the president enjoys plenary power over the conduct of foreign affairs). Although the president does not exclusively dominate domestic affairs, he is without doubt a powerful chief executive officer with broad powers to execute the laws of the land. *Compare In re Debs*, 158 U.S. 564, 599 (1895) (holding that President Cleveland could order the trains to move during the strike of 1895 in order to insure mail delivery), *with Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (holding that President Truman acted unconstitutionally when he seized the steel mills to avert a strike during the Korean War). It falls to Congress to pass legislation that establishes administrative agencies. The president, however, may propose legislation and enjoys a limited veto power over acts passed by Congress. Moreover, as the chief executive officer, the president has the ultimate authority for the administration of most domestic programs. Further, he appoints and removes many heads of administrative agencies. *See* STRAUSS, *supra* note 80, at 161-64.

194. Section 2 of Article III of the Constitution requires that the federal courts exercise the judicial power only to resolve “Cases” and “Controversies” that arise under the Constitution, laws, and treaties of the United States. U.S. CONST. art. III, § 2; *see, e.g.*, *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (holding that Congress cannot grant jurisdiction to a federal court to decide a matter that fails to constitute an actual “case or controversy”); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (illustrating that the Supreme Court exercises appellate jurisdiction over a state court determination of a treaty, statute, or the Constitution of the United States); *Young v. New York City Transit Auth.*, 903 F.2d 146, 162 (2d Cir. 1990) (finding that in challenging a law which banned panhandling, plaintiffs failed to allege an actual case or controversy since no one had been arrested pursuant to the law). Perhaps the most important power of the federal courts is the power to interpret the Con-

an appurtenant to the theory of the separation of powers. Although the two houses of Congress pass legislation, the president is able to veto a law.<sup>195</sup> A veto may be overturned by a two-thirds vote of both houses of Congress.<sup>196</sup> In overseeing the various executive departments of the government, the president depends upon Congress for adequate funding.<sup>197</sup> If the president acts in a seriously illegal manner, he or she is susceptible to impeachment and trial by the legislative branch of the government.<sup>198</sup> Among the powers of the chief executive is the appointment of federal judges, including the Justices of the Supreme Court, but these appointments must be approved by the Senate.<sup>199</sup> Once the legislative branch assents to a judicial appointment, the judge sits for a life term so as not to be susceptible to political influence in rendering decisions on cases.<sup>200</sup>

Such a power to appoint is still subject to review by the courts. In *Mistretta v. United States*,<sup>201</sup> the Supreme Court considered whether Congress delegated excessive power when it established the United States Sentencing Commission with power to promulgate binding sentencing guidelines for all categories of federal offenses.<sup>202</sup> The structure of the commission was somewhat novel in

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stitution and to invalidate any law that fails to comport with it. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). As to the organization of the federal judiciary, the Constitution is almost completely silent. The structure and size of the federal courts, as well as their jurisdiction, is left to Congress. See *Historical Note*, *supra* note 182, at 583-93, 629-761. For the classical treatment on the drafting of the Constitution and the judicial power, see CHARLES A. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1912).

195. See U.S. CONST. art. I, § 7, cl. 2.

196. See *id.* § 7, cls. 2-3.

197. See *id.* §§ 8-9. At least since 1921, the president has had the primary responsibility for preparing the national budget, and, consequently, the chief executive officer wields a great amount of power in the programming of federal expenditures. See *TRIBE*, *supra* note 7, at 194.

198. See U.S. CONST. art. II, § 4 (providing that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors").

199. See *id.* § 2, cl. 2.

200. See *id.* art. III, § 1.

201. 488 U.S. 361 (1989).

202. See *id.*; see also *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding a statute which empowered the judicial branch to appoint a special prosecutor to investigate the executive branch); *Amalgamated Meat Cutters v. Connally*, 337

that, pursuant to the statute by which it was created, it referred to the commission "as an independent commission in the judicial branch."<sup>203</sup> In upholding the unusual arrangement, the Court reasoned that the statute did not unduly strengthen the judicial branch since the federal judges who comprise the commission reflect the accumulated wisdom and experience in creating policy on sentences.<sup>204</sup> Contrary to the reasoning of the *Mistretta* majority, Justice Scalia argued in dissent that the delegation in question so commingled separate government functions as to create "a new Branch altogether, a sort of junior varsity Congress."<sup>205</sup> To make the legislation constitutional would require repudiating the formalistic distinctions of the separation of powers as envisioned by the architects of the Constitution.<sup>206</sup> While this may seem convenient in the short term, as it relieves Congress of the duty of passing legislation to establish sentences, over the long term it runs the risk of seriously jeopardizing the system of checks and balances and its underlying rationale that too much power ought not be concentrated in one branch of the federal government.<sup>207</sup>

## 2. Administrative state

Even at the time of the framing of the Constitution, it was evident that the national government would need certain subsidiary agencies to administer specific programs.<sup>208</sup> Early drafts of the Constitution specified a number of departments each to exercise a particular area of competence.<sup>209</sup> Instead, the Framers ultimately

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F. Supp. 737 (D.D.C. 1971) (upholding a broad grant of power to the president to set limits on wages and prices).

203. Sentencing Reform Act of 1984, 28 U.S.C. § 991(a) (1994).

204. See *Mistretta*, 488 U.S. at 395-97.

205. *Id.* at 427 (Scalia, J., dissenting); see also *Morrison*, 487 U.S. at 733-34 (Scalia, J., dissenting) (stating that the president's need for control and discretion in such matters is central to the proper functioning of the executive branch).

206. See *Mistretta*, 488 U.S. at 413-27.

207. See *id.* at 427.

208. See FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. REP. NO. 77-2, at 7-8 (1941).

209. See *id.* at 8; see also LEONARD DUPRE WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 10 (1948) (discussing President Washington's management of problems among different departments).

decided to emphasize a unitary presidency with full executive power.<sup>210</sup> At the same time, the Framers invested the Congress with significant power to shape the national government.<sup>211</sup> The first Congress promptly established Departments of State, Treasury, War and Navy, and Justice to be headed by individuals appointed by the president with congressional approval.<sup>212</sup> While the general characteristics are set forth in the Constitution, the drafters omitted to identify the institutions that administer the particular programs. Declining to adopt a blueprint specifying cabinet departments in the constitutional text, the drafters rather empowered Congress to outline the shape of the government by any "necessary and proper" law.<sup>213</sup> The separation of powers constitutes the principal constraint on Congress's judgment as to which administrative agencies are necessary and proper to the varied work of the federal government. Essentially, the Congress passes legislation that creates and funds the various departments of the federal bureaucracy. By his or her appointments and broad policies, the president oversees and directs the function of each administrative agency. The federal courts assure that each agency administers its particular area of competency in conformity with the provisions of the Constitution and other federal law. Any single agency then is in some respect subordinate to each of the three main branches of the government.

Since Franklin Roosevelt's "New Deal," the number, size, and authority of American administrative agencies has increased in ways in which the Framers of the Constitution could not have envisioned. Indeed, the administrative agencies, so often referred to by initials rather than their full titles, are often said to constitute a veritable alphabet soup. To start, there are the major cabinet departments of the executive branch of the government. Presently there are thirteen such departments: Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, Transportation, Treasury, and State.<sup>214</sup> Each

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210. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 546-58 (1833).

211. See *id.* at 329-488.

212. See S. REP. NO. 77-2, at 8.

213. U.S. CONST. art. I, § 8, cl. 18.

214. See STRAUSS, *supra* note 80, at 87.

of these enormous administrative entities is headed by a secretary appointed by the president.<sup>215</sup> Under each of the departments are departmental bureaus. For example, the Animal and Plant Health Inspection Service and the Forest Service both fall under the jurisdiction of the Department of Agriculture; the Food and Drug Administration and the Social Security Administration answer to Health and Human Services; and the Customs Service and the Internal Revenue Service are offshoots of the Treasury Department. The departmental bureaus tend to be apolitical in the sense that they are generally staffed and operated by nonpolitical appointees.<sup>216</sup>

Occasionally, Congress has created an administrative office similar to a departmental bureau, but which answers directly to the president rather than to a department. A prominent example is the Environmental Protection Agency which is authorized to enforce the major federal environmental legislation. Such agencies tend to be highly technocratic, but because they report to the president, they cannot be said to be free from political influence.<sup>217</sup> When Congress wishes to establish an administrative office at the greatest distance from the president, it may employ the form of the independent regulatory agency. The major regulatory agencies include the Civil Aeronautics Board, the National Labor Relations Board, the Federal Maritime Commission, the Federal Communications Commission, the Federal Elections Commission, the Equal Employment Opportunity Commission, the Nuclear Regulatory Commission, and the Securities and Exchange Commission. These commissions exhibit quite complex and varying structures of internal government and function. Generally, they operate under very broadly drawn statutes that afford them enormous powers over their particular areas of expertise.<sup>218</sup> Administrative agency decision making may be divided into three broad categories: (1) rulemaking, (2) formal adjudication, and (3) informal processes. The first two models are set forth in the APA.<sup>219</sup> The APA does not address informal processes, however, which represent the most frequent form of agency decision making.

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215. *See id.*

216. *See id.* at 88-89.

217. *See id.* at 89-90.

218. *See id.* at 91-92.

219. 5 U.S.C. § 551 (1994).



### 3. Rules and rulemaking

The APA divides administrative action into two broad categories of adjudication and rulemaking. When more than several parties are affected, the creation of a law through administrative rulemaking is more desirable than the creation of a law through adjudication.<sup>220</sup> The APA defines a rule as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization procedure or practice requirements of an agency . . . ."<sup>221</sup> Rulemaking is analogous to legislation in that a rule is generally applied to all persons who fall within its provisions, and it is applied prospectively, declaring a standard for future conduct. In contrast, adjudication involves the resolution of issues which normally involve factual situations which have occurred at some prior point in time. Agency adjudication involves a party, allegedly injured by an administrative action, who seeks a process for formulating "order."<sup>222</sup> An order applies immediately to named persons and to specific factual issues, although as with case law an order may have precedential value. Administrative rulemaking is sometimes referred to as a "quasi-legislative" function, while agency adjudication is said to involve a "quasi-judicial" function.<sup>223</sup>

All federal rules and regulations are promulgated in the *Federal Register*, which is published every working day of the year. The proper publication of administrative rules and regulations constitutes constructive notice of their effect in law.<sup>224</sup> The *Code of Federal Regulations* is an annual, indexed compilation of all federal rules and

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220. See STRAUSS, *supra* note 80, at 134.

221. 5 U.S.C. § 551(4). The APA defines "rulemaking" as an "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5).

222. An "order," according to the APA, is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." *Id.* § 551(6). "Adjudication" is simply defined as an "agency process for the formulation of an order." *Id.* § 551(7).

223. See *Mistretta*, 488 U.S. at 410 n.33 (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)).

224. See, e.g., *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (finding that publication of a rule in the *Federal Register* has force of law and constitutes constructive notice).

regulations promulgated by administrative agencies. Administrative rules may be divided into four types: substantive, procedural, interpretative, and housekeeping.<sup>225</sup> Substantive rules are the most significant of the four types since they identify appropriate standards of future conduct, have "the force and effect of law," and are "rooted in a grant of power by the Congress."<sup>226</sup> In the promulgation of substantive rules, an administrative agency, in effect, exercises legislative power. The power of the agencies is not without limitation, however.

A challenge to the Secretary of the Interior's exercise of such power was brought in the case of *In re Permanent Surface Mining Regulation Litigation*.<sup>227</sup> In this case, various interested persons filed suit in the circuit court arguing that the general grant of rulemaking authority contained in the Surface Mining Act did not include a grant to the secretary to issue substantive laws.<sup>228</sup> To the contrary, the appeals court held that administrative agencies do possess general rulemaking authority.<sup>229</sup> Moreover, the court stated a preference for rulemaking over adjudication since rulemaking is a more efficient and effective means of regulation than case by case adjudication.<sup>230</sup> Thus, rules which are properly promulgated and within the scope of authority of the administrative agency have the force and effect of law.<sup>231</sup> The principle that a properly promulgated rule has the same effect as a statute applies not only to substantive rules but to procedural rules as well.<sup>232</sup> Procedural rules identify the procedural steps that an agency must follow in the exercise of its rulemaking and adjudicatory functions.<sup>233</sup> In contrast, interpretative rules clarify or explain existing law rather than create new law. Standing alone, interpretive rules do not have the force and effect of law. Finally,

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225. See 44 U.S.C. § 1505 (1994).

226. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

227. 653 F.2d 514 (D.C. Cir. 1981).

228. See *id.* at 516, 523.

229. See *id.* at 524, 527.

230. See *id.* at 525.

231. See *id.* at 524-25.

232. See *id.*

233. See *Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986) (holding that an agency must follow its own procedural rules, and it may not deviate from them in order to achieve what it perceives to be justice).

housekeeping rules deal with relatively minor executive-type administrative matters.

Section 553 of the APA sets forth the procedural obligations which must be observed in the rulemaking process.<sup>234</sup> Essentially, this involves a notice-and-comment process. Notice of proposed rules must be published in the *Federal Register*, and it must contain certain information as to the nature and substance of the proposal as well as the proper manner for public comment.<sup>235</sup> The comment provision aims at affording the opportunity for public participation when a rule "is likely to have a substantial impact on the public."<sup>236</sup> The basic rulemaking procedure prescribed by section 553 is referred to as "informal rulemaking." Subsequent to publication of the notice of rulemaking, the agency must "give interested persons an opportunity to participate through submission of written [comments containing] data, views, or arguments."<sup>237</sup> The administrative agency is not required to hold oral hearings under this section.<sup>238</sup> When the agency has considered the public comments, it must issue, along with the promulgated rule, a statement of the basis and purpose of the rule.<sup>239</sup> Sometimes language in a statute requires "formal

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234. See 5 U.S.C. § 553 (1994).

235. General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

*Id.* § 553(b).

236. 1 C.F.R. § 305.76-5 (1993).

237. 5 U.S.C. § 553(c).

238. See *id.*

239. See *id.*; see also *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (holding that the function of statement of basis and purpose in informal rulemaking is to enable the reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did").

rulemaking” procedures in which case the agency is obliged to conduct a public hearing on the record after proper notification.<sup>240</sup>

The general rulemaking provision of section 553 permits several significant exceptions to the notice-and-comment requirement. First, the requirement does not apply to interpretive, procedural, or household rules, unless expressly mandated by the statute in question.<sup>241</sup> Accordingly, only substantive rules fall under the requirement. Second, the section exempts the rulemaking process from the notice-and-comment requirement in situations where the administrative agency determines that the requirement is “impracticable, unnecessary, or contrary to the public interest.”<sup>242</sup> Upon judicial review, the agency’s “good-cause” finding will be closely scrutinized.<sup>243</sup> Third, the notice-and-comment requirement does not apply to military or foreign affairs.<sup>244</sup> Finally, all proprietary matters including “public property, loans, grants, benefits, or contracts” need not conform with the requirement.<sup>245</sup> The broad proprietary exemptions have been criticized since the government uses the spending power to pursue a

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240. *See* *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 241 (1973) (holding that when a statutory requirement of a hearing is ambiguous, a strong presumption of informal rulemaking exists).

241. “Except when notice or hearing is required by statute, this subsection does not apply—(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . .” 5 U.S.C. § 553(b)(3)(A). Moreover, “a matter relating to agency management or personnel . . . .” is exempted. *Id.* § 553(a)(2).

242. *Id.* § 553(b)(3)(B).

Except when notice or hearing is required by statute, this subsection does not apply . . . . (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

*Id.*

243. *See, e.g., New Jersey v. EPA*, 626 F.2d 1038, 1049-50 (D.C. Cir. 1980) (holding that despite a time pressure to promulgate standards under the Clean Air Act, agency rules approving state plans required notice and public comment); *see also* Ellen R. Jordan, *The Administrative Procedure Act’s “Good Cause” Exception*, 36 ADMIN. L. REV. 113 (1984) (cataloging the “good cause” decisions and postulating that “[a]gencies should only use ‘good cause’ procedures to frame narrow solutions to the most pressing regulatory problems”).

244. *See* 5 U.S.C. § 553(a)(1).

245. *Id.* § 553(a)(2).

wide variety of social objectives, and the effect of the section 553 exemption is to immunize many important policy decisions from public participation.<sup>246</sup>

#### 4. Formal adjudication

The APA defines adjudication as the "agency process for the formulation of an order."<sup>247</sup> Since the procedures employed by administrative agencies to adjudicate individual claims or cases are diverse, any general description of administrative adjudication is subject to numerous exceptions and qualifications.<sup>248</sup> Essentially, the procedures followed may be described as either "formal adjudication" or "informal adjudication."<sup>249</sup> Pursuant to the APA, formal adjudication applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . ."<sup>250</sup> Thus, the APA per se does not require formal adjudication; only if another statute besides the APA mandates a formal hearing on the record will the administrative agency be bound to conduct the formal adjudication process. Formal adjudications pursuant to the APA are sometimes called "full hearings," "evidentiary hearings," or "trial-type hearings."<sup>251</sup> Sections 554, 556, and 557 of the APA establish the general procedural specifications for formal administrative adjudication. These procedures do not apply to the vast majority of petitions for remedy against administrative action which fall into the category of informal adjudication.

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246. See 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 588-96 (2d ed. 1978).

247. 5 U.S.C. § 551(7).

248. In 1983, almost 400,000 cases were brought to administrative law judges for potential adjudication. The great majority of these were hearings on welfare and disability benefits conducted by the Social Security Administration. See Jeffrey S. Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. B. NEWS & J. 383, 384 (1984).

249. See *id.* at 387.

250. 5 U.S.C. § 554(a).

251. In regard to the latter of these terms, it must be noted, however, that there are significant differences between agency adjudications and court trials.

*a. stage I: prehearing process*

The first stage in the proceedings of formal adjudication is the most fruitful time for settlement and mediation. Parties to formal adjudication are always encouraged to settle their cases prior to the formal hearing.<sup>252</sup> In 1990, Congress amended the APA to allow administrative agencies to explore and use alternate dispute resolution such as mediation, conciliation, fact-finding, mini-trials, and arbitration.<sup>253</sup> A party, however, may not be compelled by an agency to participate in alternate dispute resolution procedures.<sup>254</sup> Although the head of an administrative agency may preside at a formal adjudication, in practice the conduct of the proceeding is almost always delegated to a hearing officer.<sup>255</sup> The officer who conducts the formal adjudication is known as an Administrative Law Judge (ALJ). Administrative Law Judges are appointed to perform the judicial function of the agency, and they may not be assigned duties that would conflict with their judicial role.<sup>256</sup> They are tenured employees who may be removed or disciplined only for good cause.<sup>257</sup> They are delegated broad powers to control the proceedings including issuing subpoenas, administering oaths, ruling on offers of evidence, disposing of all procedural requests, reaching findings of fact, and rendering an initial decision in the case.<sup>258</sup>

The prehearing process is designed so that the parties receive proper notice and appropriate opportunity for discovery.<sup>259</sup> Other interested parties are afforded the opportunity to intervene if their participation will not unnecessarily complicate the proceeding and if their point of view will not be represented by the named parties and

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252. See Administrative Dispute Resolution Act, Pub. L. No. 101-552, § 2, 104 Stat. 2736, 2736 (1990) (authorizing and encouraging federal agencies to use mediation).

253. See 5 U.S.C. §§ 571-583.

254. See *id.* § 572(a) (“An agency may use a dispute resolution proceeding . . . if the parties agree . . .”).

255. See *id.* § 573(a).

256. See *id.* § 3105.

257. See *id.* § 7521(a).

258. See *id.* § 556(c).

259. See *id.* § 554(b).

the agency staff.<sup>260</sup> The APA provides that persons entitled to notice of a hearing shall be timely informed of: (1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted.<sup>261</sup>

The named parties in an administrative adjudication are generally the private individuals and corporations that the agency action affects.<sup>262</sup> In addition to the named parties, modern courts have granted a wide spectrum of interest groups the right to be represented in administrative adjudication including groups claiming various forms of technological, economic, consumer, aesthetic, and ecological injury.<sup>263</sup> To establish a right to intervene in agency proceedings a party must be able to show an "injury in fact" and that the interest sought to be protected falls within the "zone of interests" regulated by the statute.<sup>264</sup> All parties to a proceeding have discovery rights to gain the necessary information to prove their case.<sup>265</sup> Discovery rights may be enforced through the use of the agency's subpoena power to compel the presence of a witness at a hearing, or *duces tecum*, to compel the production of certain documents.<sup>266</sup> A statement by a party showing the relevance of the evidence sought may be requested by the agency, but once a valid request has been made, the issuance of a subpoena is automatic.<sup>267</sup> An agency subpoena is

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260. *See id.* § 554(c)(1).

261. *See id.* § 554(c)(1)-(3).

262. *See id.* § 554(b).

263. *See, e.g., Nat'l Welfare Rights Org. v. Finch*, 429 F.2d 725, 738-39 (D.C. Cir. 1970) (permitting welfare recipients and their state and national organizations to intervene in an administrative hearing of the Department of Health, Education and Welfare).

264. *See id.* 734-35.

265. *See* 5 U.S.C. § 555(d).

266. *See id.*

267. *See id.*

enforceable in a court of law.<sup>268</sup> Moreover, an individual may have access to government files under the Freedom of Information Act.<sup>269</sup>

*b. stage II: formal hearing*

The formal hearing on the record affords the opportunity for a party to present evidence in support of a claim. Generally, any evidence offered is admissible.<sup>270</sup> The party who brings the petition for remedy against the administrative action normally bears the burden of proof.<sup>271</sup> Pursuant to section 556(d), "the proponent of . . . [an] order has the burden of proof" and an order may not be issued "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence."<sup>272</sup> The general rule is that a case must be proved, not by clear and convincing evidence or evidence beyond a reasonable doubt, but by a preponderance of the evidence.<sup>273</sup>

The APA provides that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious

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268. Agency subpoenas [sic] authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

*Id.*

269. *See id.* § 552.

270. *See id.* § 556(d).

271. *See id.*

272. *Id.* An exception has been made when a respondent to the National Labor Relations Board asserts an affirmative defense to a complaint. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400 (1983).

273. *See Steadman v. SEC*, 450 U.S. 91, 104 (1981). However, in some cases such as the deportation of aliens, the government may be required to meet a clear and convincing evidentiary standard. *See, e.g., Woodby v. INS*, 385 U.S. 276, 285 (1966) (noting that "the Court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence").



evidence."<sup>274</sup> Thus, the general rule is that any relevant evidence, including hearsay, is admissible in administrative proceedings without regard to the rules of evidence that apply to civil litigation in federal court.<sup>275</sup> The agency is not permitted to rely on evidence that has not been introduced into the record.<sup>276</sup> Under section 556(e) of the APA, "[t]he transcript of testimony and exhibits . . . constitutes the exclusive record for decision."<sup>277</sup>

Under the APA, a party to an evidentiary hearing is entitled "to conduct such cross-examination as may be required for a full and true disclosure of the facts."<sup>278</sup> The difficult question for the ALJ is when cross-examination will facilitate the full and true disclosure of the facts of the case. In general, cross-examination is permitted to challenge the credibility of a witness or to test the accuracy and completeness of testimony.<sup>279</sup> The ALJ must draw a line between unlimited cross-examination and a reasonable opportunity to test opposing evidence.<sup>280</sup>

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274. 5 U.S.C. § 556(d).

275. *Cf.* FED. R. EVID. 802 (stating that hearsay is generally not admissible although there are many large exceptions to the general prohibition). Some states follow the so called "residuum rule," which requires that the administrative decision be based on at least some evidence that is not hearsay. *See, e.g.,* Carroll v. Knickerbocker Ice Co., 113 N.E. 507, 509 (N.Y. 1916) (reversing decisions of the Workmen's Compensation Commission that rested solely on hearsay). *But see* Richardson v. Perales, 402 U.S. 389, 409-10 (1971) (stating that the residuum rule does not apply to findings of federal agencies).

276. *See* 5 U.S.C. § 556(e).

277. *Id.*; *see also* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 881 (1st Cir. 1978) (holding that an administrator's reliance on materials outside the record violated the APA).

278. 5 U.S.C. § 556(d).

279. *See id.*; *see also, e.g.,* Wirtz v. Baldor Elec. Co., 337 F.2d 518, 525 n.12 (D.C. Cir. 1964) (citing the legislative history of the APA).

280. *See* 5 U.S.C. § 556(d); *see also, e.g.,* Bush v. Apfel, 34 F. Supp. 2d 1290, 1296 (N.D. Okla. 1999) (stating that the ALJ is permitted to "exercise discretion and refuse to issue a subpoena where cross-examination is not 'reasonably necessary to the full development of the case'").

*c. stage III: decision making*

Section 557(b) describes three types of decisions made by ALJs in various situations.<sup>281</sup> First, when a hearing must be conducted on the record and an ALJ hears the case in place of the agency head, then the ALJ renders an “initial decision” which becomes final unless appealed to the agency head.<sup>282</sup> Second, in specific cases or by a general rule, certain administrative agencies may require that the entire record developed by the ALJ be certified to the agency for its decision. In such cases, the ALJ “recommend[s] a decision.”<sup>283</sup> Third, in certain types of proceedings, such as those through which a license is to be granted, the agency itself issues a “tentative decision” which will become final after a period of time.<sup>284</sup> The delay is used to evaluate the effects of the decision.<sup>285</sup> The APA provides that

[a]ll decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—(A) findings and conclusions, and the reasons or basis therefor [sic], on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof.<sup>286</sup>

The requirement that findings of fact and conclusions of law be stated is intended to insure that the ALJ will carefully evaluate the evidence and consider the discretionary choices.<sup>287</sup> Moreover, in the absence of a record of the ALJ’s findings and conclusions, the court would find it difficult to examine an agency order when a party elects to seek judicial review.<sup>288</sup>

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281. *See* 5 U.S.C. § 557(b).

282. *Id.*

283. *Id.*

284. *Id.* § 557(b)(1).

285. *See id.* § 558(c).

286. *Id.* § 557(c).

287. *See id.* § 558(c).

288. *See Dunlop v. Bachowski*, 421 U.S. 560, 571 (1975) (holding that the secretary’s statement of reasons should include the ground of the decision and essential facts).

### 5. Informal administrative process

While the APA sets forth procedural models for rulemaking and formal adjudication, these do not apply to the largest and most important category of administrative decision making. Informal adjudication constitutes the great bulk of the exercise of administrative authority by the federal government.<sup>289</sup> Such adjudications are not required to be determined on the record after a formal hearing, and they are not subject to any of the provisions of the APA with the exception of "ancillary matters."<sup>290</sup> Section 555(e) requires an agency to give prompt notice and explanation of the denial of any application, petition, or other request.<sup>291</sup> The general omission to specify procedural safeguards for the vast majority of administrative decisions seems justified on three grounds. First, the costs, time, and resources necessary to subject every case to formal adjudication would be prohibitive. Second, given the particularity of agency matters, the drafters of such procedures would no doubt encounter enormous difficulty in designing a generally applicable and just procedure. Third, to require trial-type procedural safeguards at the agency decision-making level would be to establish a kind of lower-level judiciary whose decisions would continue to be subject to review by the federal courts. To thus duplicate the judicial function would seem to totally eviscerate the doctrine against the delegation of judicial power.

### III. THE JURIDIC STRUCTURES AND PROCEDURAL LAW OF THE APOSTOLIC SIGNATURA AND THE SUPREME COURT

This Part describes the juridic structures and procedural law of the Apostolic Signatura and the Supreme Court. When either of the supreme tribunals reviews an act of administrative power, it

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289. See *United States v. Hardage*, 663 F. Supp. 1280, 1287 (W.D. Okla. 1987).

290. See, e.g., *Citizens Nat'l Bank of Maplewood v. Saxon*, 249 F. Supp. 557, 559 (E.D. Mo. 1965).

291. See 5 U.S.C. § 555(e). "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person *made in connection with any agency proceeding.*" *Id.* (emphasis added).

scrutinizes the record to insure that no procedural error has been committed by the authority who posited the administrative act.<sup>292</sup> Natural justice requires that a party directly affected by an act of administrative power have notice and the opportunity to be heard.<sup>293</sup> Additionally, more specific procedural requirements, of course, are stipulated in both canon law and United States federal law. Upon determining that an egregious error in procedure occurred in the case under review, the supreme tribunal acts to correct the wrong.<sup>294</sup>

This section first discusses the general structure of the Apostolic Signatura by examining its constitutional division into three pertinent sections and the specific rules set forth in the *Normae Speciales*. The section will then examine the structure of the United States federal judiciary pursuant to Article III of the Constitution. Next the section will detail the procedural issues at the Second Section by examining its limitations in hearing certain cases. Finally the section will explain the procedural issues of the United States Supreme Court by analyzing the particular requirements of standing, timing, fundamental due process, and competency.

### A. *The Structure of the Apostolic Signatura*

#### 1. General structure

The Apostolic Constitution *Pastor Bonus* recognizes three Tribunals: the Sacred Penitentiary, the Roman Rota, and the Apostolic Signatura.<sup>295</sup> The Sacred Penitentiary, in fact, does not function as a

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292. See *PASTOR BONUS* art. 123, § 1; STRAUSS, *supra* note 80, at 81-82.

293. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (noting that the “elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”).

294. See *PASTOR BONUS* art. 123, § 2; TRIBE, *supra* note 7, at 19.

295. This order reflects a historical perspective since the Sacred Penitentiary was established first. Over the course of time the need for specialization required the creation of the other two tribunals. The current version of *Pastor Bonus* adopts the order first recognized in 1908 in *SAPIENTI CONSILIO* art. 7-19 (originally promulgated at *Ordo servandus in sacris Congregationibus Tribunalibus, Officiis Romanae Curiae*, 40 ASS 36 (1908)), and in 1917 *CODE* c.258, § 1. In 1967, *Regimini Ecclesiae Universae* shifted the order by placing

true tribunal. Instead, as Regimini Ecclesiae Universae (1967) had affirmed, the competence of the Sacred Penitentiary "comprises all things which concern the internal forum, including the non-sacramental forum, and accordingly, this tribunal grants favors, absolutions, dispensations, commutations, sanctions, and condonations for the internal forum."<sup>296</sup> Moreover, the general procedural requirements stipulated in the 1983 Code do not apply to the functioning of the Sacred Penitentiary.<sup>297</sup>

In contrast, the Roman Rota serves as the ordinary judicial appeals tribunal.<sup>298</sup> Pursuant to Canon 1444, the Rota accepts cases in the third instance when the sentences of the two lower judicial tribunals have failed to comport.<sup>299</sup> The Rota also hears appeals from cases in the second instance when the ordinary judicial tribunal of the first instance has passed a sentence, and the appellant elects to appeal to Rome rather than to the local court of appeal.<sup>300</sup> Additionally, the Rota hears cases in the first instance as stipulated by law and at the request of the Roman Pontiff.<sup>301</sup>

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the Apostolic Penitentiary after the other two tribunals. See REGIMINI ECCLESIAE UNIVERSAE art. 112 (originally promulgated at Paulus Pp. VI, *Constitution Apostolica de Romana Curia: "Regimini Ecclesiae Universae"*, 59 AAS 885 (1967)).

296. REGIMINI ECCLESIAE UNIVERSAE art. 112; see also PASTOR BONUS art. 117.

297. See Zenon Grocholewski, *I tribunali apostolici*, in 1 LE NOUVEAU CODE DE DROIT CANONIQUE/THE NEW CODE OF CANON LAW ACTES DU V<sup>o</sup> CONGRÈS INTERNATIONAL DE DROIT CANONIQUE/PROCEEDINGS OF THE 5TH INTERNATIONAL CONGRESS OF CANON LAW 458 (1986).

298. See 1983 CODE c.1443. See generally Edward M. Egan, *Appeal in Marriage Nullity Cases: Two Centuries of Experiment and Reform*, in CANON LAW SOCIETY OF AMERICA, PROCEEDINGS OF THE FORTY-THIRD ANNUAL CONVENTION 132, 135-38 (1981) (noting that the Roman Rota looks over local tribunals throughout the world).

299. See 1983 CODE c.1444, § 2. When two lower tribunals have passed conforming sentences, the matter is considered *res judicata*. See *id.* cc.1641-1644. The Rota does not serve as the tribunal of third instance in Spain where, by way of exception, such cases may be entertained by the Spanish Rota. See Pius Pp. XII, *Motu Proprio De Rota Nuntiaturae Apostolicae in Hispania Denuo Constituenda*, 39 AAS 155 (1947); see also J.L. Acebal Luján, *Normas para la ejecución de la carta apostólica m.p. <<Iusti Iudicis>>*, 48 REVISTA ESPAÑOLA DE DERECHO CANONICO 607-18 (1991) (explaining the role of the Spanish Rota as the tribunal of third instance).

300. See 1983 CODE c.1444, § 1.

301. See *id.* c.1444, § 2, c.1405, § 3.

Article 122 of the Apostolic Constitution *Pastor Bonus* divides the Apostolic Signatura into three sections.<sup>302</sup> The so-called "First Section" is the supreme tribunal of ordinary justice in the church dealing with specific judicial actions regarding the judges or decisions of the Roman Rota and other judicial tribunals.<sup>303</sup> The "Second Section" is the supreme tribunal of administrative justice dealing with conflicts between private persons and an administrative authority.<sup>304</sup> With the suppression of the proposed administrative tribunals, it is also the only administrative tribunal. In its "Third Section," the Apostolic Signatura functions as a department or congregation of justice.<sup>305</sup> It seems less than accurate to describe the Third Section as a tribunal since it deals with the general administration of justice in the church rather than a petition for remedy against the decree of a judicial or administrative authority.<sup>306</sup>

Following the promulgation of *Regimini Ecclesiae Universae* in 1967, several commentators opined that a system of double jurisdiction had been introduced.<sup>307</sup> It has further been observed that the creation of the Second Section compliments the process of

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302. See *PASTOR BONUS* art. 122.

303. See *id.* arts. 41-44.

304. See Ignacio Gordon, S.J., *Origine e sviluppo della giustizia amministrativa nella Chiesa*, in *DE IUSTITIA ADMINISTRATIVA IN ECCLESIA* 14, 15 n.2a (Pio Fedele ed., 1984).

305. See *PASTOR BONUS* arts. 48-61.

306. After identifying the First Section as the "Supreme Tribunal of ordinary jurisdiction" ("Supremo Tribunale della giurisdizione ordinaria") and the Second Section as the "Supreme Tribunal for the contentious-administrative process" ("Supremo Tribunale contenzioso-amministrativo"), Grocholewski refers to the Third Section as the "*congregazione della giustizia*." Zenon Grocholewski, *I Tribunali*, in *LA CURIA ROMANA NELL COST. AP. "PASTOR BONUS"* 395, 406, 412 (Piero Antonio Bonnet & Carlo Gullo eds., 1990).

307. See, e.g., Zenon Grocholewski, *La Sectio Altera della Segnatura Apostolica con particolare riferimento alla procedura in essa seguita*, in *DE IUSTITIA ADMINISTRATIVA IN ECCLESIA* 23 (1984) (originally published in 54 *APOLLINARIS* 104-06 (1981)); Gordon, *supra* note 16, at 311; see also PATRICK VALDRINI, *CONFLITS ET RECOURS DANS L'ÉGLISE* 65 (1978) (stating that the Second Section is similar to certain European systems of administrative law that employ separate administrative tribunals); Giuseppe Lobina, *La giustizia amministrativa*, in *LA LEGGE PER L'UOMO: UNA CHIESA AL SERVIZIO* 397 (E. Cappellini ed., 1979) (stating that a system of double jurisdiction had been introduced).

hierarchical recourse in the church as an "addition" or "supplement."<sup>308</sup> Pursuant to the 1983 Code, the Second Section of the Apostolic Signatura serves as the supreme administrative tribunal in the church.<sup>309</sup> Section 2 of Canon 1445 provides that

[t]his same tribunal deals with controversies which arise from an act of ecclesiastical administrative power, and which are lawfully referred to it [as well as] with other administrative controversies referred to it by the Roman Pontiff or by departments of the Roman Curia, and with conflicts of competence among these departments.<sup>310</sup>

Since up to the level of the Apostolic Signatura the church maintains a system of hierarchical recourse, one may pose the question as to what extent the innovation constitutes a true system of double jurisdiction. As it remains an open question, several observations seem in order.

First, although the 1983 Code confirms the coexistence of a distinct structure and process for administrative justice along with that provided for judicial matters within the Apostolic Signatura, the present structure of the Apostolic Signatura fails to constitute a system of double jurisdiction in an absolute sense.<sup>311</sup> Essentially, the

308. The innovation of *Regimini Ecclesiae Universae* was not to create an alternate to the already existing structures of recourse in the church, but in Grocholewski's words, "it constitutes a certain addition, a certain supplement to hierarchical recourse, in the sense that one is able to bring an appeal only after a negative result in hierarchical recourse." Grocholewski, *supra* note 307, at 23-24. Another view considers the Second Section as an organ of "special jurisdiction." See Ermanno Graziani, *De Supremi Organismi Contentioso-administrativi natura*, 67 PERIODICA 537, 539 (1978); Arcangelo Ranaudo, *Considerazioni su alcuni aspetti dell'attività amministrativa canonica*, 93 MONITOR ECCLESIASTICUS 332 (1968).

309. See Grocholewski, *supra* note 297, at 406.

310. 1983 CODE c.1445, § 2.

311. Following the innovation introduced by *Regimini Ecclesiae Universae*, there was also discussion as to whether the Second Section constituted a special administrative tribunal or simply a special section of the ordinary judicial tribunal. The two opinions were expounded upon at the symposium held in honor of the first centenary of the Faculty of Canon Law at the Pontifical Gregorian University. The first opinion was set forth by Graziani. See Graziani, *supra* note 308, at 537-45. A statement of alternate opinion can be found in Gunther Raab, *Dialogus*, 67 PERIODICA 572 (1978). Subsequently, the position that the Second Section coexists as a distinct tribunal in the Apostolic Sig-

Signatura remains one body or tribunal with the same college of judges and officials performing judicial and administrative functions depending on the particular case. Unlike a true system of double jurisdiction, the supreme administrative tribunal of the church is not a completely separate and distinct organ from the supreme judicial tribunal.<sup>312</sup>

Second, since the innovation of *Regimini Ecclesiae Universae* in 1967, it has become clear that the Second Section is a tribunal of limited competency.<sup>313</sup> Although *Regimini Ecclesiae Universae* spoke of both "appeal" and "recourse" to the Second Section, Pastor Bonus employs only the latter term.<sup>314</sup> The reason for the omission in the new Apostolic Constitution seems to be the desire for more technical precision in defining the object of the process in the Second Section.<sup>315</sup> In Canons 1628 through 1640 of the 1983 Code, the term "appeal" refers only to the judicial process.<sup>316</sup> Instead, the use of "recourse" in Pastor Bonus signifies exception taken from a decree in the contentious-administrative process.<sup>317</sup> Third, the church's system of hierarchical recourse is thought to originate from the mystery of hierarchical communion.<sup>318</sup> This profound theological reason sustains the omission of a system of national administrative tribunals from both the 1917 Code and 1983 Code.<sup>319</sup> The creation of the Second Section at the Apostolic Signatura was not intended to abrogate hierarchical recourse, but only to serve as a supplement to the system at the level of the Roman Curia.<sup>320</sup> Pursuant to Pastor Bonus, the Apostolic Signatura constitutes one of the Dicasteries of the

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natura seems to have received at least tacit endorsement by several leading experts. See, e.g., Gordon, *supra* note 304, at 16-17; Grocholewski, *supra* note 307, at 24-25; see also ERMANNÒ GRAZIANI, *DE IUSTITIA ADMINISTRATIVA* 81-93, 95-102 (1973) (quoted in Grocholewski, *supra* note 307, at 24).

312. See LABANDEIRA, *supra* note 20, at 716-23.

313. For a comprehensive discussion of the competency of the Second Section, see GIUSEPPE LOBINA, *LA COMPETENZA DEL SUPREMO TRIBUNALE DELLA SEGNETURA APOSTOLICA, CON PARTICOLARE RIFERIMENTO ALLA "SECTIO ALTERA" E ALLA PROBLEMATICA RISPETTIVA* 104-06 (1971).

314. See PASTOR BONUS arts. 19, 123.

315. See Grocholewski, *supra* note 297, at 408.

316. See 1983 CODE cc.1628-1640.

317. See PASTOR BONUS art. 123, § 1.

318. See *id.*

319. See *supra* pp. 103-104.

320. See Grocholewski, *supra* note 307, at 23.



Roman Curia.<sup>321</sup> Although the Signatura enjoys competence over recourse from the decisions of the other Dicasteries, like the French Court of Cassation, it functions not as a superior court, but as a complement to the function of the Dicasteries.<sup>322</sup>

## 2. Specific structure

### a. officials

While the Apostolic Constitution *Pastor Bonus* prescribes the general structure of the Apostolic Signatura, more specific rules appear in the *Normae Speciales* issued by Pope Paul VI on March 23, 1968.<sup>323</sup> When the *Normae Speciales* were approved by Pope Paul VI, Article I contemplated a college of twelve Cardinals named to the Apostolic Signatura by the Supreme Pontiff.<sup>324</sup> The fact that the college was composed of cardinal judges attested to the dignity of the supreme tribunal. Given the gravity of the work of the Signatura—doubts posed to it that pertain to important legal issues in the church and that derive from sentences of the Roman Rota, the Roman Congregations and any other body in the church—such a composition seemed justified.<sup>325</sup>

Moreover, there was a practical reason for the selection of cardinals as judges, as they are generally men of great and diverse ecclesiastical knowledge and experience.<sup>326</sup> As the work of the Second

321. See *PASTOR BONUS* art. 2, § 1.

322. See *id.* art. 1, § 1. According to Article 121, the Signatura is one Dicastery, which functions as both the Supreme Tribunal (Arts. 122-123, i.e. First and Second Sections), and the administrative organ which sees to the proper administration of justice in the church (Art. 124, Third Section). See *id.* arts. 121-124.

323. See *NORMAE SPECIALES* (originally promulgated at *Normae speciales in Supremo Tribunali Signaturae Apostolicae ad experimentum servandae post Constitutionem Apostolicam Pauli PP. VI "Regimini Ecclesiae Universae,"* 59 *PERIODICA* 75 (1970)); 1 IGNACIO GORDON, S.J., & ZENON GROCHOLEWSKI, *DOCUMENTA RECENTIORA CIRCA REM MATRIMONIALEM ET PROCESSUALEM* 372-98 (1977); *Supremum Tribunal Signaturae Apostolicae*, 53 *APOLLINARIS* 249-80 (1970).

324. See *NORMAE SPECIALES* art. 3.

325. See *NORMAE SPECIALES* arts. 17-21.

326. For a discussion of the suitability of Cardinals as judges, see Grochowski, *supra* note 307, at 19, 64-66.

Section involved increasingly complex questions of administrative law, it seemed desirable to include experts in administrative law among the college of judges.<sup>327</sup> Certain general provisions of Pastor Bonus seemed to envision some flexibility in the composition of the college of judges.<sup>328</sup> Following the promulgation of Pastor Bonus, the Holy Father, in fact, added the names of several bishops to the college of judges who are experts in administrative law.<sup>329</sup> The names of all the members of the college of judges are listed in the *Anuario Pontificio*.<sup>330</sup> As opposed to the Roman Rota which has a permanent college of judges, the judges of the Apostolic Signatura are convened as necessary on an ad hoc basis.<sup>331</sup> All members of the college of judges are, of course, invited to attend the plenary sessions of the Signatura.<sup>332</sup>

The Sovereign Pontiff selects a bishop, generally a member of the College of Cardinals, to serve as prefect who governs the work of the Apostolic Signatura.<sup>333</sup> To assist the prefect, a secretary is appointed, who advises the judges and who, de facto, functions to coordinate the work of the Signatura.<sup>334</sup> In addition, there is the promoter of justice, defender of the bond, substitute promoter of justice, and substitute defender of the bond.<sup>335</sup> Other personnel include a

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327. See Zenon Grocholewski, *La Segnatura Apostolica nell'attuale fase di evoluzione*, in *DILEXIT IUSTITIAM, SCRIPTA IN HONOREM AURELII SABATTANI, CURANTIBUS Z. GROCHOLEWSKI ET V. CÁRCEL ORTÍ* 218-25 (1984); see also Grocholewski, *supra* note 297, at 402-04 (arguing that the addition of experts in canon law as judges is necessary to deal with the complexity of the issues).

328. See, e.g., PASTOR BONUS art. 3, § 1 ("Unless they have a different structure in virtue of their specific nature or some special law, the dicasteries are composed of the cardinal prefect or the presiding archbishop, a body of cardinals and of some bishops . . ."); *id.* art. 3, § 2 ("According to the specific nature of certain dicasteries, clerics and other faithful can be added to the body of cardinals and bishops."); see also Grocholewski, *supra* note 297, at 402-03.

329. See Segretaria di Stato, *Diarium Romanae Curiae*, 83 AAS 630, 631 (1991); see also Grocholewski, *supra* note 297, at 403 (explaining that the need for an expert knowledge of canon law led to the addition of bishops, who are not also members of the College of Cardinals, to be appointed judges).

330. See ANNUARIO PONTIFICIO PER L'ANNO 2000, at 1296 (2000).

331. See *id.*

332. See *id.*

333. See NORMAE SPECIALES art. 1, § 1.

334. See *id.* § 4.

335. See *id.* art. 2.

chancellor, archivist, protocollist, and various notaries and consultants.<sup>336</sup> The consultants are of two grades: *votantes* and *referendarii*.<sup>337</sup> Although the two types perform the same service of writing opinions, technically only the voters have a vote in the *Congressus*.<sup>338</sup>

Pastor Bonus also stipulates that procurator-advocates be appointed at the Apostolic Signatura such as those who serve at the Roman Rota.<sup>339</sup> These procurator-advocates are to be employed in cases of hierarchical recourse, and they must be nominated by the cardinal secretary of state.<sup>340</sup> The procurator-advocates who serve the Roman Curia do not play the same adversarial role as attorneys in the American civil courts. Although they represent the interests of a certain party in the specific dispute, the primary function of the procurator-advocates is to assist the tribunal in ascertaining the truth.<sup>341</sup> The role then must be seen as less contentious than that of their counterparts in the American judicial system.

*b. parties*

In the contentious-administrative process at the Second Section of the Apostolic Signatura, three distinct postures emerge. In the first, recourse is brought against a decree that has been confirmed by a Dicastery of the Roman Curia.<sup>342</sup> Alternatively, the recourse concerns a decree that has been reformed by the Dicastery.<sup>343</sup> Finally, recourse may be taken against a decree originating from the Dicastery itself.<sup>344</sup> The petitioner in the contentious-administrative process before the Second Section is any private person or juridic person who alleges an injury as a result of the administrative act of

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336. *See id.*

337. Translated here respectfully as "voters" and "referends." *Id.* art. 3.

338. *See id.* art. 12.

339. *See* PASTOR BONUS arts. 183-185.

340. *See* Grochowski, *supra* note 10, at 12-13.

341. For a discussion of how the process before the Second Section is a search for truth rather than one of satisfying individual interests, see Renato Baccari, *La giustizia amministrativa canonica in funzione partecipativa*, in 1 STUDI IN ONORE DI PIETRO AGOSTINO D'AVACK 174-75 (1976).

342. *See* Grochowski, *supra* note 122, at 474.

343. *See id.* at 474-75.

344. *See id.* at 471.

an ecclesiastical superior.<sup>345</sup> The allegedly injured party must first have posed hierarchical recourse to the Dicastery of the Roman Curia designated as the hierarchical authority of the one who issued the challenged decree.<sup>346</sup> After the Dicastery has rendered its decision, the petitioner may make a recourse against that decision to the Second Section on the ground of a violation of law.<sup>347</sup> A decree of the Apostolic Signatura requires that the petitioner demonstrate a direct connection with the allegedly adverse effect of the challenged administrative act.

Certain requirements must be met before a decision will be reviewed. The following case is an illustration of such requirements and how they are met.<sup>348</sup> The decree resulted from a case in which a group of the faithful brought a petition for remedy against the administrative act of the Archbishop which ordered the demolition of a certain parish church.<sup>349</sup> Upon hierarchical recourse, the Congregation for Clergy declared that the decision should be left to the Archbishop's discretion in light of the pastoral and financial exigencies that led to his decision.<sup>350</sup> The group then sought to bring a petition for remedy to the Second Section.<sup>351</sup> During the contentious-administrative process at the Second Section, consultation with the

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345. The English word "petitioner" is used for the Latin "recurrens." "Petitioner" is also used very often in American administrative justice to designate the party who challenges the administrative decision. For a general discussion of the role of the petitioner before the Second Section, see LABANDEIRA, *supra* note 20, at 746-47, and Zenon Grocholewski, *L'autorità amministrativa come ricorrente alla Sectio Altera della Segnatura Apostolica*, 55 *APOLLINARIS* 752 (1982).

346. See *PASTOR BONUS* art. 123, § 1.

347. See *id.*; Grocholewski, *supra* note 307, at 45-51.

348. See *Supremum Tribunal Signaturae Apostolicae, Prot. N. 17477/85 C.A., Archdioecesis X., Demolitionis Ecclesiae S.E. (Consilium pro Servanda Ecclesia paroeciali S.E. - Congregatio pro Clericis), Incid.: recursus adversus decretum reiectionis ex parte Congressus huius Supremi Tribunalis - Rosalius Iosephus Castillo Lara, Ponens (21 November 1987)*, 20 *COMMUNICATIONES* 88 (1988) [hereinafter *Decision of the Apostolic Signatura, 21 November 1987*].

349. See *Pontificia Commissio Codici Iuris Canonici Authentice Interpretando, Responsiones ad proposita dubia*, 80 *AAS* 1818 (1988).

350. See *Decision of the Apostolic Signatura, 21 November 1987, supra* note 348, at 89.

351. See *id.* at 89-90.

Pontifical Commission for the Authentic Interpretation of the Code of Canon Law determined that the group lacked "active legitimation" as a group. However, the Second Section stated that the individual persons could enjoy active legitimation to propose a recourse "provided that the gravamen is actually suffered."<sup>352</sup> The Signatura itself then decided that as individuals they lacked active legitimation because they failed to meet this condition.<sup>353</sup> The group had failed to demonstrate a "personal, direct and current" interest in the challenged act.<sup>354</sup> Hence, the Commission resolved the question about the group as a group, and the Signatura decided about the individuals in the group. As previously stated, the petitioner can be a private person or a juridic person.<sup>355</sup> The Commission seemed to reason that since the group did not constitute a juridic person, the members would have to approach the Signatura as private persons.<sup>356</sup>

A major question in the process before the Second Section concerns whether the inferior authority who issued the originally challenged decree, or the Dicastery which reviewed the decree, constitutes the resisting party.<sup>357</sup> A 1970 Decision of the Apostolic Signatura determined that it is the inferior authority, and not the Dicastery, who remains the resisting party.<sup>358</sup> To the contrary, numerous authors have argued that in certain cases the resisting party is the Dicastery which issued the challenged decree.<sup>359</sup> The thesis has

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352. Pontificia Commissio Codici Iuris Canonici Authentice Interpretando, *supra* note 349, at 1818-19.

353. See *Decision of the Apostolic Signatura, 21 November 1987, supra* note 348, at 91.

354. *Id.*

355. See *supra* note 345 and accompanying text.

356. For a critical discussion of this issue, see HAYWARD, *supra* note 3, at 131-39. The author notes that, inter alia, the decision could have the effect of denying administrative recourse at the Apostolic Signatura to many groups and associations with legitimate complaints. See *id.* at 135.

357. See Grochowski, *supra* note 122, at 471-73.

358. See *Iurisprudentia Supremi Tribunalis Signaturae Apostolicae, Responsa, Declarationes: 11, Declaratio de recursu adversus decisionem Dicasterii Curiae Romanae*, 60 PERIODICA 349 (1971).

359. See, e.g., LABANDEIRA, *supra* note 20, at 749-51; Enrico Bernardini, *L'istituzione della Sectio Altera del Supremo Tribunale della Segnatura Apostolica*, in IUS POPULI DEI, MISCELLANEA IN HONOREM RAYMUNDI BIDAGOR 75-76 (1972); Carmel De Diego-Lora, *El control judicial del gobierno central de la Iglesia*, 11 IUS CANONICUM 349 (1971).

some merit especially in the cases when the Dicastery has either reformed the decree of the inferior authority or when a new decree originates from the Dicastery. It is difficult to suggest that the inferior authority is the resisting party when it is not the author of the challenged decree under consideration at the Second Section.<sup>360</sup> Zenon Grocholewski has suggested a solution that both the inferior authority and the Dicastery be considered together as the resisting party.<sup>361</sup>

### *B. Structure of the U.S. Federal Judiciary*

Pursuant to Article III of the Constitution, the "judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."<sup>362</sup> With some notable exceptions, the inferior federal courts are organized along geographic rather than subject-matter lines.<sup>363</sup> At the first level of the federal judiciary are the district courts.<sup>364</sup> An appeal from the district courts is made to the second level or circuit courts of appeal.<sup>365</sup> Appeals from the circuit courts may be heard by the third and highest level of the judicial structure, the Supreme Court.<sup>366</sup>

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360. See LABANDEIRA, *supra* note 20, at 749-51; see also Grocholewski, *supra* note 122, at 472-73 (discussing relationships between the inferior authority and the Dicastery).

361. See Grocholewski, *supra* note 122, at 486.

362. U.S. CONST. art. III, § 1, cl. I. For a systematic overview of the federal courts, see PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973).

363. Special courts include the Tax Court, the Patent Court, the Claims Court, the Court of International Trade, and the bankruptcy courts. A special circuit court, the United States Court of Appeals for the Federal Circuit, is an appellate court for these trial courts, with the exception of the bankruptcy courts whose decisions are appealed to the appropriate geographic circuit court. See BATOR ET AL., *supra* note 362, at 47-49; FANNIE J. KLEIN, *FEDERAL AND STATE COURT SYSTEMS—A GUIDE* 187 (1977).

364. See KLEIN, *supra* note 363, at 179.

365. See *id.* at 172.

366. See *id.* at 171; JOSEPH F. SPANIOL, HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, *THE UNITED STATES COURTS: THEIR JURISDICTION AND WORK* 4 (1989).

## 1. United States district and circuit courts

The United States is presently divided into ninety-four judicial districts based on geography, with a number of federal district judges appointed to hear cases in each district.<sup>367</sup> The district court is the ordinary trial court in the federal judicial system.<sup>368</sup> The judge presides over the trial which often includes a jury comprised of citizens empowered to hear evidence and reach findings of fact.<sup>369</sup> Juries are not employed in administrative matters so that the federal judge alone almost invariably hears and decides administrative cases.<sup>370</sup> A decision of a district court affects the individual case being litigated, and it has only minor precedential impact beyond the parameters of the particular controversy.

Sitting over the district courts, there are twelve circuit courts of appeal in the United States.<sup>371</sup> The eleven geographic circuits vary in size and include whatever district courts lie within their boundaries.<sup>372</sup> The District of Columbia Circuit exercises jurisdiction over that small geographic area and over certain types of questions and cases designated by Congress.<sup>373</sup> Each circuit is comprised of a number of Article III judges.<sup>374</sup> The circuit court hears all the appeals from the United States district courts within its circuit, as well as certain cases that, by means of particular statutory provision, may be brought directly from a federal agency bypassing the federal district court.<sup>375</sup> In contrast to the Supreme Court which chooses the

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367. At the time of this writing, there are over 630 federal district judges appointed by the president and approved by the Senate to hear cases throughout the ninety-four judicial districts. See 28 U.S.C. § 133 (2000).

368. See KLEIN, *supra* note 363, at 179.

369. See *id.* at 182.

370. See Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1195 (1992). An administrative agency's ability to impose certain serious penalties and confinement under some circumstances constitutes an exception to the general policy. Professor Jaffe has argued that in such cases a jury trial may be required. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 109-15 (1965).

371. See KLEIN, *supra* note 363, at 172-73.

372. See *id.*

373. See BATOR ET AL., *supra* note 362, at 47.

374. At the present time, there are approximately 179 courts of appeal judges. See 28 U.S.C. § 44.

375. Particular statutes sometimes place the first level of judicial review of

cases it will hear, an appeal to the circuit court subsists by the right of the parties to the controversy.<sup>376</sup>

The general practice of the circuit judges is to sit in panels of three to hear cases.<sup>377</sup> Sometimes, the judges of a particular circuit may sit en banc to rehear an appeal from the tribunal, especially when another tribunal of judges in the same circuit reached a conflicting decision on a similar issue.<sup>378</sup> All cases are briefed by the opposing parties, and subsequently, oral arguments are held on the important legal issues.<sup>379</sup> Following oral argument, the circuit judges may decide the case by issuing a published opinion, or alternatively, by rendering a nonpublished decision.<sup>380</sup> The written opinions of the circuit court hold precedential value for the entire geographic area of the circuit so that a circuit court decision must be followed by a district court within its region.<sup>381</sup> For a federal administrative agency entrusted with regulating some national interest, this arrangement means that a circuit court decision in New York by the United States Court of Appeals for the Second Circuit may conflict with a decision by the United States Court of Appeals for the Ninth Circuit in a near to identical case involving the same agency in San Francisco. Such conflicts between the circuits can only be resolved by appeal to the United States Supreme Court.<sup>382</sup> By reason of special statute and its proximity to the federal agencies, the United States Court of Appeals

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administrative decisions in the circuit courts, where a formal record and elaborate findings of fact have resulted from the administrative process itself. For a discussion of the need to avoid multiple levels of judicial review, see David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 5-7 (1975). See generally HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 173-95 (1973) (critiquing the federal system of judicial review of administrative action).

376. See 28 U.S.C. § 636(c)(3) (1994 & Supp. IV 1999).

377. See KLEIN, *supra* note 363, at 173.

378. See *id.* at 174.

379. See *id.* at 170 (discussing procedures used by the Supreme Court).

380. For a general description of appellate practice, see ROBERT J. MARTINEAU, *MODERN APPELLATE PRACTICE, FEDERAL AND STATE CIVIL APPEALS* (1983). See also PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* (1976) (giving an overview of the appellate processes at the state and federal levels).

381. See CARRINGTON ET AL., *supra* note 380, at 147.

382. See *id.* at 158.



for the District of Columbia tends to hear many more administrative-law cases than the other circuits, and consequently, its judges are considered to have developed a special expertise. This is not to suggest that the other circuit courts are in any way obliged to follow the decisions of the D.C. Circuit. Although the D.C. Circuit has been able to build up a corpus of administrative-law decisions, the Supreme Court has not been reluctant to reverse the D.C. Circuit on numerous occasions.<sup>383</sup>

## 2. United States Supreme Court

The United States Supreme Court constitutes the supreme administrative tribunal for the nation.<sup>384</sup> It is composed of nine Justices who hear all cases en banc.<sup>385</sup> Under Article III of the Constitution, it has "appellate Jurisdiction, both as to Law and Fact, with such exceptions and under such regulations as Congress shall make."<sup>386</sup> Although Congress has the power to limit the jurisdiction of the Supreme Court, it has conferred on the Court wide discretion as to what appeals it will hear.<sup>387</sup> Virtually all reviews of administrative decisions at the Supreme Court require that the petitioner file for a "writ of certiorari" from the Court.<sup>388</sup> A writ of certiorari seeks to persuade the Court to review a lower court decision by advancing reasons of legal importance that merit review.<sup>389</sup> Among the most

383. See Antonin Scalia, *Vermont Yankee: the APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 360-62.

384. See ROBERT L. STERN & EUGENE GRESSMAN, *SUPREME COURT PRACTICE FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES* (7th ed. 1993) (explaining the history, procedures, and purpose of the Supreme Court).

385. See *id.*

386. U.S. CONST. art. III, § 2; see also Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 n.13 (1953) (discussing the power of Congress to limit the jurisdiction of federal courts).

387. See generally 28 U.S.C. §§ 1251-1259 (1994) (providing for original jurisdiction in addition to discretionary appellate jurisdiction). See also U.S. CONST. art. III, cl. 2 (providing constitutional grant of jurisdiction).

388. For a general description of the writs of certiorari and mandamus, as well as injunctive relief, in the administrative process, see JAFFE, *supra* note 370, at 165-93.

389. The opposing party may argue that review is unnecessary, since whether the decision below was correct or not, the petition fails to raise any

persuasive reasons is that two different circuit courts have reached conflicting decisions in similar cases. Generally, when a writ simply alleges that a lower court erred in law or in fact, the Supreme Court refuses to hear the case.<sup>390</sup> In order for a writ of certiorari to issue, four of the nine Justices on the Court must agree.<sup>391</sup> The focus of the Court's jurisdiction is to decide significant legal issues rather than to resolve particular controversies.<sup>392</sup>

If a petition for certiorari is granted, the case will be fully briefed and oral argument will take place in front of the nine Justices.<sup>393</sup> Once the Justices have reached a decision, a written opinion is published.<sup>394</sup> The Court need not be, and very often is not, unanimous in its decisions; a five-member majority is sufficient to determine any particular issue.<sup>395</sup> The Court's decisions carry precedential authority for all other courts and agencies of the government.<sup>396</sup> It is important to distinguish between the holding of the Court on a particular issue and the reasons (*dicta*) set forth in the Court's decisions which justify the holding. Only holdings, and not *dicta*, constitute legal precedent, although the latter may give indications of the Court's view on future controversies.

One of the implications of the Supreme Court's certiorari practice is to render it unlikely that an appeal of an administrative

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significant legal question that merits the Court's attention. *See generally* STERN & GRESSMAN, *supra* note 384, at 370-76 (detailing the procedures by which the Supreme Court grants certiorari).

390. *See id.*

391. The Supreme Court grants less than five percent of the writs. *See The Supreme Court, 1985 Term, Part IV—Leading Cases*, 100 HARV. L. REV. 100, 304 (1986). In the 1999-2000 Term the Supreme Court heard eighty-one cases taken from 8445 petitions. *See Statistical Recap of Supreme Court's Workload During Last Three Terms*, 69 U.S.L.W. 3134 (2000). The numbers used in the rest of the article are taken from the 1983 Term as the best source detailing a breakdown of the cases heard by the Supreme Court is the one cited herein, see Strauss, *supra* note 11.

392. *See* STERN & GRESSMAN, *supra* note 384, at 162-207.

393. *See id.* at 533-609.

394. *See id.* at 628-29.

395. *See id.* at 1-9.

396. *See generally* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (stating the need for uniformity in interpreting the Constitution and that the Supreme Court is the judicial body that has ultimate power to determine the meaning of laws).

decision is to be heard.<sup>397</sup> The pyramid of federal appellate review increases in steepness at each superior level. While an appeal from the decision of a district court or agency to a circuit court will ordinarily be permissible as a matter of legal right, an appeal to the Supreme Court is discretionary.<sup>398</sup> As a result, the circuit courts of appeal, in effect, amount to the final expositors of federal administrative law within their geographic area.<sup>399</sup>

### C. Procedural Issues at the Second Section

The procedural issues at the Second Section tend to revolve around the tribunal's competency. By statute, the Second Section exercises a limited competency over cases to correct a violation of law of either a procedural or substantive nature.<sup>400</sup> Thus, due process often depends on what the Second Section determines with regard to its competency to hear a given case.

#### 1. Competence of the First and Third Sections

While the subject of this study is the Second Section, the jurisdictional parameters of that Section are more clearly delineated by a discussion of the proper competency of the other two sections. The First Section is the supreme tribunal of ordinary jurisdiction in the Catholic Church.<sup>401</sup> Article 122 of Pastor Bonus establishes six competencies which belong to the First Section.<sup>402</sup> Two of the six

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397. For example, in 1983, the circuit courts issued a total of 5572 published decisions. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 69 (1985). There were over 4000 writs of certiorari filed, but the Supreme Court heard only approximately 150 cases. See *The Supreme Court 1983 Term—Leading Cases*, 98 HARV. L. REV. 87, 307 (1984). For a description of the central problems with the Supreme Court's practice and proposed remedies, see SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE, A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (1986).

398. Consequently, some have argued that there is need for a new national federal court to sit as an intermediary between the circuit courts and the Supreme Court. See, e.g., Thomas E. Baker & Douglas D. McFarland, *The Need for a New National Court*, 100 HARV. L. REV. 1400 (1987).

399. See Strauss, *supra* note 11, at 1112-13.

400. See PASTOR BONUS arts. 45-47.

401. See *id.* arts. 41-44.

402. See *id.* art. 122, 1°-4°; see also 1983 CODE c.1445, § 1 (containing a similar, but not identical provision).

competencies are contained in Number 1 of Article 122.<sup>403</sup> First, the First Section hears complaints of nullity against the sentences of the Roman Rota.<sup>404</sup> A complaint of nullity can claim either remediable or irremediable nullity.<sup>405</sup> Canon 1620 lists eight reasons why a sentence is vitiated by irremediable nullity.<sup>406</sup> In the case of irremediable nullity, for a trial to be valid, it must be repeated in its entirety. Canon 1622 identifies six reasons for remediable nullity.<sup>407</sup> If the First Section should declare a sentence of the Roman Rota null, the case must be remanded to the Rota for the imposition of a new sentence.<sup>408</sup> Second, the First Section entertains petitions of *restitutio in integrum* against the sentences of the Roman Rota. Paragraph 1 of Canon 1645 permits total reinstatement of a case against a *res judicata* sentence when there is clear proof that the sentence is

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403. See PASTOR BONUS art. 122, 1°.

404. See 1983 CODE c.1444, cc.1628-1640.

405. See *id.* c.1620, c.1622.

406. A judgment is null with a nullity which cannot be remedied, if:  
1° it was given by a judge who was absolutely non-competent;  
2° it was given by a person who has no power to judge in the tribunal in which the case was decided;  
3° the judge was compelled by force or grave fear to deliver judgment;  
4° the trial took place without the judicial plea mentioned in can. 1501, or was not brought against some party as respondent;  
5° it was given between parties of whom at least one has no right to stand before the court;  
6° someone acted in another's name without a lawful mandate;  
7° the right of defense was denied to one or other party;  
8° the controversy has not been even partially decided.

*Id.* c.1620.

407. A judgment is null with a nullity which is simply remedial if:  
1° contrary to the requirements of can. 1425, § 1, it was not given by the lawful number of judges;  
2° it does not contain the motives or reason for the decision;  
3° it lacks the signatures prescribed by law;  
4° it does not contain an indication of the year, month, day and place it was given;  
5° it was founded on a judicial act which is null and whose nullity has not been remedied in accordance with can. 1619;  
6° it was given against a party who, in accordance with can. 1593, § 2, was lawfully absent.

*Id.* c.1622.

408. See *id.* cc.1628-1640, cc.1645-1648.

unjust.<sup>409</sup> Paragraph 2 of the same canon recognizes five manifest injustices upon which reinstatement may be granted.<sup>410</sup> It is interesting to note that Number 1 of Article 122 omits the mention of the phrase "and other recourses," which is contained in the parallel provision of Canon 1445.<sup>411</sup>

A third area of the First Section's competency is identified in Number 2 of Article 122.<sup>412</sup> The First Section adjudicates recourses in cases concerning the status of persons to which cases the Roman Rota denies a new examination.<sup>413</sup> Cases involving the status of persons, especially those pertaining to the separation of spouses, never become *res judicata*.<sup>414</sup> Number 3 of Article 122 recognizes two more competencies in the First Section.<sup>415</sup> Fourth, the Section

409. The legal principle of *res judicata* assures that matters which have been definitively decided will not be relitigated. It is an ancient principle which stems from Roman law. Cicero, in his famed defense of Sulla, extolled the principle even though it was, in that instance, not advantageous to his client's interest. See CICERO, *Oratio pro Sulla*, in CICERO: THE SPEECHES 262, 283 (Louis E. Lord trans., 1937). Thus the well-known axiom states that "it is more important that what has been adjudicated be lasting than be just" ("*magis expedit res iudicatas esse firmas quam esse iustas*").

410. Injustice is not, however, considered clearly established unless:

1° the judgement is so based on evidence which is subsequently shown to be false, that without this evidence the dispositive part of the judgment could not be sustained;

2° documents are subsequently discovered by which new facts demanding a contrary decision are undoubtedly proven;

3° the judgement was given through the deceit of one party to the harm of the other;

4° a provision of a law which was not merely procedural was evidently neglected;

5° the judgement runs counter to a preceding decision which has become an adjudged matter.

1983 CODE c.1645, § 2.

411. See *id.* c.1445, § 1, 1° ("[Com]plaints of nullity, petitions for total reinstatement and other recourses against rotal judgements [*sic*].") (emphasis added).

412. See PASTOR BONUS art. 122, 2°.

413. See *id.* 1° (stating that the First Section may entertain "complaints of nullity and petitions for total reinstatement against judgments of the Roman Rota").

414. See 1983 CODE c.1643.

415. See PASTOR BONUS art. 122, 3° (providing that the First Section may investigate "exceptions of suspicion and other proceedings against judges of the Roman Rota arising from the exercise of their functions").

investigates exceptions of suspicion against the judges of the Roman Rota. While in practice such cases are rare due to the prudence of Rotal judges, questions of consanguinity or affinity, such as mentioned in Canon 1448, would be examples of what pertains to the fourth competence.<sup>416</sup> Fifth, the First Section may investigate "other cases" against Rotal judges in matters pertaining to the exercise of their office. For example, Canon 1456 prohibits judges from accepting gifts, and Canon 1457 considers violations of secrecy and the hearing of cases out of malice or in a negligent manner.<sup>417</sup> Finally, Number 4 of Article 122 confers on the First Section the competence to decide conflicts of competence between tribunals which are not subject to the same tribunal of appeal.<sup>418</sup> This does not necessarily mean the Roman Rota, but may also refer, for example, to a conflict between two different tribunals of two different countries.

Article 124 of *Pastor Bonus* may be said to establish a Third Section of the Apostolic Signatura which has four areas of competence.<sup>419</sup> First, Number 1 of Article 124 commissions this Section to exercise vigilance over the right administration of justice in the church.<sup>420</sup> In what way is this broad charge to exercise vigilance to be understood? It is not a police power. Rather, it must be a general supervision of the administration of justice in the church. Additionally, Number 1 authorizes the Third Section to supervise the work of procurators and advocates.<sup>421</sup> Second, in fulfillment of Number 2 of Article 124, the Third Section is to decide the petitions brought to the Apostolic See as to whether a case should be heard before the Roman Rota.<sup>422</sup> By the same number and article, the Third Section is

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416. In addition to consanguinity and affinity, 1983 CODE c.1448 mentions conflicts of interest that arise for the judge due to serving as a guardian or trustee, close friendship, great animosity, and desire for profit.

417. *See id.* cc.1456-1457.

418. *See PASTOR BONUS* art. 122, § 4 (providing for the First Section to decide "conflicts of competence between tribunals which are not subject to the same appellate tribunal").

419. *See Grochowski, supra* note 297, at 412-13.

420. *See PASTOR BONUS* art. 124, 1° ("To exercise vigilance over the correct administration of justice, and, if need be, to censure advocates and procurators.").

421. *See id.*

422. *See id.* § 2 ("[T]o deal with petitions presented to the Apostolic See for obtaining the commission of a case to the Roman Rota or some other favour

competent to decide the petition of other graces relative to the administration of justice.<sup>423</sup> This provision does not appear in the 1983 Code, and its inclusion in Pastor Bonus may indicate an intention to correct the omission in the 1983 Code. Third, Number 3 of Article 124 empowers the Third Section of the Apostolic Signatura to extend the relative competence of inferior tribunals in the church.<sup>424</sup> This is an extension of competence for cases of the first grade. For example, in the case of a refugee, the Third Section might extend or "prorogate" the competence of the domestic tribunal in the host nation to hear a case technically under the jurisdiction of a tribunal in the country from which the refugee has fled. The extension of competence would be particularly warranted in the event that the refugee's homeland has suppressed the church or refused one of the parties access to the process.

The power of extending jurisdiction also applies to cases of appeal.<sup>425</sup> A distinction must be drawn between prorogation of competence and Pontifical commission. To start, the Signatura has the ordinary power to extend competence of an ordinary first instance tribunal to hear a case in the second instance.<sup>426</sup> This differs somewhat from the approval of designation of a first instance tribunal according to 1983 Code, Canon 1438, Number 2.<sup>427</sup> In addition, the Signatura may also extend the competence of an ordinary appeal tribunal to hear a case in the second instance coming from a tribunal whose cases it normally does not hear.<sup>428</sup> This involves relative

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relative to the administration of justice.").

423. *See id.*

424. *See id.* § 3 ("[T]o prorogate the competence of lower tribunals."). To "prorogate" competence means to extend or expand it in order for a tribunal to hear a certain case. Canon law stipulates absolute and relative incompetence. Relative incompetence results from a territorial defect, and it may be prorogated. *See* 1983 CODE c.1407, § 2. Absolute incompetence results from the grade of the tribunal, the dignity of the parties, or the quality of the issue, and it renders the decision of the tribunal invalid. *See id.* c.1440; *see also* LAWRENCE G. WRENN, *Book VII, Processes, in THE CODE OF CANON LAW: A TEXT AND COMMENTARY* 945, 952 (James A. Corriden et al. eds., 1985) (discussing the differences between relative incompetence and absolute incompetence).

425. *See* 1983 CODE c.1417, § 2.

426. *See id.* c.1439, § 1.

427. *See id.* c.1438, § 2.

428. *See id.* c.1444, § 2.

incompetence. Finally, the Signatura has a special faculty from the Roman Pontiff to grant competence to ordinary tribunals to judge a case in the third instance in place of the Roman Rota.<sup>429</sup> This involves a tribunal that is absolutely incompetent by reason of grade. Pursuant to Article 124, Number 2, the granting of such a Pontifical commission constitutes a grace.<sup>430</sup> Fourth, Number 4 of Article 124 authorizes the Third Section to promote and to approve the erection of interdiocesan tribunals.<sup>431</sup> Consistent with *Regimini Ecclesiae Universae*, the various competencies and duties of the Holy See are to be distributed throughout the Roman Curia in an appropriate manner. In accord with the doctrine of *Lumen Gentium*, pursuant to which the bishop is the prime judge in his diocese, the Signatura does not erect tribunals.<sup>432</sup> Instead, in the language of *Pastor Bonus*, it "promotes and approves" them.<sup>433</sup> Certainly, the initiative and co-operation of the local bishops is presupposed. This Number also concerns approving the designation of an appellate-level tribunal.<sup>434</sup> In light of the four areas of competency, the Third Section is not actually a tribunal; rather, it is something similar to a ministry or congregation of justice. Its function is not judicial, but administrative in the broad sense of the term. It is the "Congregation of Justice" which exercises administrative power in the conduct of justice.<sup>435</sup>

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429. *See id.*

430. *See* PASTOR BONUS art. 124, § 2.

431. *See id.* § 4 ("[T]o grant its approval to tribunals for appeals reserved the Holy See, and to promote and approve the erection of interdiocesan tribunals."). The Holy See signifies the jurisdiction of the Pope and the Roman Curia.

432. *See* Betti, *supra* note 37, at 726.

433. *See* PASTOR BONUS art. 124, § 4.

434. *See* 1983 CODE c.1438, § 2.

435. *See* Grochowski, *supra* note 297, at 412. Pursuant to Articles 121 and 124 of Pastor Bonus, the right administration of justice in the church permits the utilization of administrative procedure in certain marriage nullity cases. *See* PASTOR BONUS arts. 121, 124; Raymond L. Burke, *La procedura amministrativa per la dichiarazione di nullità del matrimonio*, in 1 PROCEDIMENTI SPECIALI NEL DIRITTO CANONICO, STUDI GIURIDICI XXVII, at 93 (1992).



## 2. Competency of the Second Section

### a. violation of law

While the 1983 *Code of Canon Law* defines the object of the Second Section's competency as an act of administrative power, Pastor Bonus specifies that the tribunal examine the challenged act to determine if a violation of law exists.<sup>436</sup> With the advent of Pastor Bonus, the competence of the Second Section was more accurately defined than it had been in Canon 1445. Section 1 of Article 123 of Pastor Bonus specifies that the supreme administrative tribunal "adjudicates recourses lodged within the peremptory limit of thirty useful days against singular administrative acts whether issued by the dicasteries of the Roman Curia or approved by them, whenever it is contended that the impugned act violated some law either in the decision-making process or in the procedure used."<sup>437</sup> Whereas the 1983 Code simply speaks of "contentions legitimately referred" to the Second Section, the Apostolic Constitution requires that the administrative act is alleged to have violated the law.<sup>438</sup>

The language of Pastor Bonus regarding the concept of a violation of law reflects a certain evolution.<sup>439</sup> Article 106 of Regimini Ecclesiae Universae permitted recourse from an administrative act "as often as it is contended that the act itself violates some law."<sup>440</sup>

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436. This competence had previously been determined in Regimini Ecclesiae Universae, *supra* note 295, at 921-22. It was then stated in a 1969 decision of the Signatura. See *Iurisprudencia Supremi Tribunalis Signaturae Apostolicae, Sectio Altera, I, Decisiones: 6 - De remotione a paroecia*, 60 PERIODICA 332 (1971). Sabbatani indicates that only the elements that constitute an administrative act fall within the competence of the Second Section. See Aurelio Sabbatani, *Iudicium de legitimitate actuum administrativorum a Signatura Apostolica peractum*, 16 IUS CANONICUM 231, 232 (1972). With a somewhat different focus, Gordon proffers that the so-called "principle of legality" includes a consideration of the alleged harm or injury to a private person who brings the recourse against the administrative act. See Ignacio Gordon, S.J., *De obiecto primario competentiae 'Sectionis Alterius' Supremi Tribunalis Signaturae Apostolicae*, 68 PERIODICA 511, 521 (1979).

437. PASTOR BONUS art. 123, § 1.

438. See Grocholewski, *supra* note 307, at 54.

439. See Grocholewski, *supra* note 297, at 407-08.

440. REGIMINI ECCLESIAE UNIVERSAE art. 106 ("quoties contendatur actum ipsum legem aliquam violasse").

In Article 96 of the *Normae Speciales*, the recourse is allowed "as often as a violation of law is alleged."<sup>441</sup> Shortly after the introduction of the concept of the violation of law, the Pontifical Commission for the Interpretation of the Decrees of the Second Vatican Council clarified that a violation of law signifies an error in proceeding or in deciding.<sup>442</sup> Pastor Bonus states that an administrative act may be challenged before the Apostolic Signatura "as often as it is disputed as to whether the impugned act may have violated any law in deciding or proceeding."<sup>443</sup> It would seem that the violation of law may be either procedural or substantive. At the same time, it is clear that the Second Section does not consider the overall merits of a case.<sup>444</sup> In keeping with the concept of *communio*, the local Ordinary is afforded a wide ambit of discretionary power.<sup>445</sup> Moreover, the proper hierarchical superior to the local Ordinary is the competent Dicastery, and it belongs to the Dicastery to consider questions of merit.<sup>446</sup> Even in such a consideration, however, the Ordinary who exercises prudence, and does not act in an arbitrary and capricious manner, will be upheld.<sup>447</sup>

Although Pastor Bonus limits the competence of the Second Section to the investigation of whether a law has been violated either in deciding or proceeding, the jurisdictional parameters seem to remain broad in scope. The Second Section may review any violation of law "be it of *divine law*, natural or positive, be it of *ecclesiastical law*, written or custom," committed in the exercise of administrative power.<sup>448</sup>

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441. *NORMAE SPECIALES* art. 96 ("quoties allegetur legis violatio").

442. See Pontificia Commissio Decretis Concilii Vaticani, *II Interpretandis*, 63 AAS 330 nn.3, 4 (1971) ("pro violatione legis intelligi errorem iuris sive in procedendo sive in decernendo" ("for a violation of law is understood an error of law whether in proceeding or deciding")); José M. Pinto Gomez, *Verba 'error iuris sive in procedendo sive in decernendo' in responso Pontificiae Commissionis Interpretationis*, 67 PERIODICA 649 (1978).

443. PASTOR BONUS art. 123, § 1 ("quoties contendatur num actus impug-natus legem aliquam in decernendo vel in procedendo violaverit").

444. The response of the Pontificia Commissio Decretis Concilii Vaticani, *supra* note 442, at 330 n.4, clearly states that the merits are not considered.

445. See Matthews, *supra* note 86, at 150-53.

446. See Sabattani, *supra* note 436, at 232-33.

447. See *id.* at 231, 242.

448. Grocholewski, *supra* note 307, at 25.

*b. legitimate interest and subjective rights*

The broad interpretation of the violation of law seems consistent with the protection of subjective rights. Various authors have discussed the relationship between the concept of a violation of law and of the subjective right of an individual.<sup>449</sup> A subjective right may be said to be some particular entitlement attaching to an individual which may be vindicated at law when violated. For example, prior to dismissal from the religious institute, a member in final vows is entitled to a certain procedural protection.<sup>450</sup> If the institute dismissed the member because some aspect of required procedure was neglected, such negligence would constitute a violation of law.<sup>451</sup> Dino Cardinal Staffa seems, in fact, to identify a violation of law with a violation of some right.<sup>452</sup> Eduardo Labandeira concurs, noting that a challenged administrative act is almost always linked to the violation of a subjective right.<sup>453</sup> The same author holds that it is a question of focus as to whether the principal question depends on the legitimacy of some act or on a violation of some right.<sup>454</sup>

Since Italian law draws a distinction between a subjective right and a legitimate interest, it has been suggested that the distinction be introduced into ecclesiastical administrative proceedings.<sup>455</sup>

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449. See, e.g., LABANDEIRA, *supra* note 20, at 724-45 (discussing the object of contentious-administrative recourse in the church and subjective rights); Matthews, *supra* note 86, at 148-50; Staffa, *supra* note 119, at 523-24; Heinrich Straub, *De obiecto primario competentiae supremi organismi contentioso-administrativi*, 67 PERIODICA 547 (1978).

450. See 1983 CODE cc.694-704.

451. See *id.* c.696, § 1.

452. See Staffa, *supra* note 119, at 523 (speaking of "violatio legis seu iuris" ("violation of law or right")). But see Straub, *supra* note 449, at 553 (arguing that not every violation of law constitutes a violation of some subjective right).

453. See LABANDEIRA, *supra* note 20, at 739-45.

454. See *id.* at 157.

455. See, e.g., GIUSEPPE LOBINA, LA COMPETENZA DEL SUPREMO TRIBUNALE DELLA SEGNETURA APOSTOLICA CON PARTICOLARE RIFERIMENTO ALLA 'SECTIO ALTERA' E ALLA PROBLEMATICA RISPETTIVA 104-06 (1971); Raffaele Coppola, *Annotazioni in margine all'interpretazione autentica sulla giurisdizione di legittimità nel diritto canonico*, 85 IL DIRITTO ECCLESIASTICO 381 (1974); Raffaele Coppola, *Riflessioni sulla istituzione della Seconda Sezione della Segnatura Apostolica*, 43 APOLLINARIS 361 (1970); Arcangelo Ranaudo, *Brevi considerazioni su l'oggetto primario' della competenza spettante alla 'Sectio Altera' della Segnatura Apostolica*, 105 MONITOR

Theoretically, a subjective right is understood as “an interest directly guaranteed by law to an individual, [while] a legitimate interest is defined as ‘an individual interest closely connected with a public interest and protected by law only through legal protection . . . .’” of such a public interest.<sup>456</sup> Under the Italian arrangement, legal rights are vindicated in the ordinary judicial tribunal, but legitimate interests must be introduced into the separate administrative system.<sup>457</sup> For example, a suit for breach of contract by a private individual against some public organ of the state falls under the jurisdiction of the civil courts.<sup>458</sup> Alternatively, if an individual were to bring an action against the same public organ on the ground that the individual was unfairly excluded from a process of competitive bidding in awarding a contract, then the individual must seek redress in the administrative forum.<sup>459</sup>

Many experts oppose the introduction of the distinction between a legitimate interest and a subjective right into the church’s jurisprudence.<sup>460</sup> To start, both in theory and in application the distinction is somewhat precarious. Where does one draw the line between an individual’s legitimate interest and one’s subjective right? Perhaps more importantly, the distinction does not seem to serve the special nature and ends of canon law. In ecclesiastical law, all rights of the faithful, as they are ordered to the salvation of souls, should be protected. The creation of the Second Section of the Apostolic Signatura, with competence over controversies between private individuals

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ECCLESIASTICUS 102 (1980).

456. MAURO CAPPELLETTI ET AL., *THE ITALIAN LEGAL SYSTEM* 81 (1967) (quoting ZANOBINI, *CORSO DI DIRITTO AMMINISTRATIVO* 185, 187 (1958-59)); see also Michel Bonnet, *De origine distinctionis ‘ius-interesse’*, 67 *PERIODICA* 640 (1978).

457. See CAPPELLETTI ET AL., *supra* note 456, at 81.

458. See *id.*

459. See *id.* at 81-82.

460. See, e.g., GRAZIANI, *supra* note 311, at 111-14; Grocholewski, *supra* note 307, at 26-28; Gordon, *supra* note 16, at 349-78; Gordon, *supra* note 436, at 503-42; Paolo Moneta, *Nova configuratio obiecti primarii competentiae supremi organismi contensioso-amministrativi*, 67 *PERIODICA* 566 (1978) (where he seems to reverse an earlier opinion expressed in I IL CONTROLLO GIURISDIZIONALE SUGLI ATTI DELL’AUTORITÀ AMMINISTRATIVA NELL’ORDINAMENTO CANONICO 245-61 (1973)); Dino Staffa, *Giurisdizione ordinaria e giurisdizione amministrativa*, 48 *APOLLINARIS* 441-47 (1975); Staffa, *supra* note 119, at 525-33; Straub, *supra* note 449, at 547-57.

and public organs of the church, was not intended to imply that the rights and interests proper to this forum deserve any less protection or attention than those proper to the ordinary judicial forum.<sup>461</sup>

*c. merits of the case*

Ambiguity remains about what constitutes the merits of the case. From a comparative perspective, American administrative law draws distinctions between determinations of law and findings of fact. The merits of the case typically involve a mix of the issues of law and fact.<sup>462</sup> To determine whether a law has been violated in deciding would sometimes seem to require that factual issues be examined. Such an examination seems to lead directly to reflection on the overall merits of the case. Three decisions of the Apostolic Signatura, discussed below, indicate that it is sometimes necessary to examine the merits of the case in order to determine whether a violation of law was committed.

In the first case, the cardinal secretary of state exceptionally granted the special faculty to the Signatura the power to judge the merits of the case in which a professor had been dismissed from his position at a Catholic university on the ground that he plagiarized his course notes.<sup>463</sup> The professor had pursued the process of hierarchical recourse to the level of the Congregation for Catholic Universities and Seminaries, which confirmed the decree of dismissal.<sup>464</sup> Bringing recourse to the Second Section, the dismissed professor contended that the administrative decree was both unlawful and unjust.<sup>465</sup> The Supreme Administrative Tribunal held, first, that the dismissal violated the law in the way it had been issued and in the legal basis for the dismissal.<sup>466</sup> Second, the tribunal held that the administrative act by which the professor was dismissed had been based on insufficient evidence as to whether plagiarism actually

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461. See LABANDEIRA, *supra* note 20, at 714-15.

462. See STREET & BRAZIER, *supra* note 187, at 580-82.

463. See *Supremum Tribunal Signaturae Apostolicae, Romana, Dimissionis a munere docendi, 27 Ottobre 1984 - Emmo Ratzinger, Ponente*, 96 IL DIRITTO ECCLESIASTICO 260 (1985) [hereinafter *Decision of the Apostolic Signatura, October 27, 1984*].

464. See *id.* at 263.

465. See *id.* at 261.

466. See *id.* at 264-68.

existed and as to whether the professor had been promoted on the basis of the allegedly plagiarized notes.<sup>467</sup> Serving as *Ponens* in this exceptional case, Cardinal Joseph Ratzinger, a man not unfamiliar with the academic world, seemed to transcend the issue of a violation of law and reached the merits to declare the decision unjust.<sup>468</sup> Although the Signatura declared that a violation of law in deciding existed, it considered the facts of the case to reach this conclusion.<sup>469</sup>

The second case involved a dispute between a diocese and a monastery in a different diocese over the ownership of certain sacred objects of art.<sup>470</sup> The issue was whether title to the property had passed to the diocese when the two monasteries that held the property within the diocese became defunct, or to the monastery in the separate diocese.<sup>471</sup> The Congregation for Religious awarded the property to the monastery.<sup>472</sup> The Apostolic Signatura held that the Congregation's determination constituted a violation of law.<sup>473</sup> This determination was based on the merits of the case through an examination of the relevant canon law, Spanish civil law, and the original contract regarding the deposited property.<sup>474</sup>

A third case involved the claim by a Confraternity that a decree of a diocesan bishop unlawfully removed certain Papal favors granted to it in 1526.<sup>475</sup> The Congregation for the Clergy affirmed

467. See *id.* at 268-70.

468. For further discussion of the case, see Gianpaolo D. Montini, *Il risarcimento del danno provocato dall'atto amministrativo illegittimo e la competenza del Supremo Tribunale della Segnatura Apostolica*, in *LA GIUSTIZIA AMMINISTRATIVA NELLA CHIESA* 194 (1991), and Joaquin Llobell, *Il <<petitum>> e la <<causa petendi>> nel ricorso contenzioso-amministrativo canonico. Profili sostanziali ricostruttivi alla luce della Cost. Ap. <<Pastor Bonus>>*, 3 *IUS ECCLESIAE* 146 (1991).

469. See *Decision of the Apostolic Signatura, October 27, 1984, supra* note 463, at 260.

470. See Tribunal Supremo de la Signatura Apostolica (Prot. N. 122230/80 C.A. - Legionen), *Derechos (Violación de la ley en la decisión de un Dicasterio Romano), Sentencia definitiva de 22 de agosto de 1987*, 47 *REVISTA ESPAÑOLA DE DERECHO CANÓNICO* 269 (1990) [hereinafter *Decision of the Apostolic Signatura, August 22, 1987*].

471. See *id.* at 269-70.

472. See *id.* at 270.

473. See *id.* at 274.

474. See HAYWARD, *supra* note 3, at 178-79.

475. See Tribunal Supremo de la Signatura Apostolica, *Derechos (Violación*

the bishop's decree.<sup>476</sup> To decide in the Confraternity's favor, the Second Section conducted a full inquiry into the intricate historical question of the case. Yet, in announcing its decision the Apostolic Signatura stated that it had not reached the merits of the case, but had only decided whether the Congregation had committed a violation of law in proceeding or deciding.<sup>477</sup> The three cases indicate that upon occasion such a determination cannot be reached without a consideration of the merits of a particular case.<sup>478</sup>

#### d. damages

Pastor Bonus expanded the competency of the Apostolic Signatura by permitting it to award damages.<sup>479</sup> Section 2 of Article 123 of Pastor Bonus determines when damages may be awarded in the Second Section: "In these cases, apart from the judgment concerning legitimacy, it is also able to decide, if the petitioner requests it, concerning the reparation of damages inflicted through an illegitimate act."<sup>480</sup> The section is consistent with the provision of damages in Canon 128.<sup>481</sup> The canon requires that the damages, which are to be compensated for, be unlawfully caused.<sup>482</sup> This follows from the fundamental moral principle that one must make restitution for one's unjust actions.<sup>483</sup> It has been argued that mere negligence in the placement of an administrative act will not suffice.<sup>484</sup> Rather, in

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*de la ley en la decisión de un Dicasterio Romano), Sentencia de 29 de Septiembre de 1989 - Alphonsus Stickler Ponens, 48 REVISTA ESPAÑOLA DE DERECHO CANÓNICO 307-23 (1991) [hereinafter Decision of the Apostolic Signatura, September 29, 1989].*

476. See *id.* at 307-08.

477. See *id.* at 319.

478. See HAYWARD, *supra* note 3, at 170-80; LABANDEIRA, *supra* note 20, at 729-34.

479. See PASTOR BONUS art. 123, § 2.

480. *Id.* For a discussion of damages in the 1983 Code in general, see Pio Ciprotti, *Il risarcimento del danno nel progetto di riforma del Codice di Diritto Canonico*, 37 EPHEMERIDES IURIS CANONICI 175 (1981).

481. 1983 CODE c.128.

482. See *id.*

483. See Richard A. Hill, S.J., *Title VII—Juridic Acts*, in THE CODE OF CANON LAW: A TEXT AND COMMENTARY 92 (James A. Corriden et al. eds., 1985).

484. See Jozef Krukowski, *Responsibility for Damage Resulting from Illegal Administrative Acts in the Code of Canon Law of 1983*, in 1 LE NOUVEAU CODE DE DROIT CANONIQUE/THE NEW CODE OF CANON LAW ACTES DU V°

order to merit the award of damages, the administrative act must have been motivated by some type of malicious intent to harm.<sup>485</sup> Neither Canon 128 nor Article 123 of Pastor Bonus contain any such requirement. To the contrary, they simply posit the possibility of damages as a result of the wrongful administrative act.<sup>486</sup> The damages contemplated may apparently be money damages or some other type of restitution.<sup>487</sup> The question of the kind of damages to be awarded is complicated in the canonical order in which the injury to be compensated involves a moral evil such as damage to an individual's reputation as a result of an unlawfully posited administrative act.<sup>488</sup> Clarification may be desirable through future norms.<sup>489</sup>

*e. other competencies*

Finally, Section 3 of Article 124 of Pastor Bonus entrusts the Second Section with competence: "[the Second Section] also handles other administrative controversies, which are referred to it by the Roman Pontiff or a Dicastery of the Roman Curia, and also conflicts regarding competence between the same Dicasteries."<sup>490</sup> Just as the First Section, the supreme tribunal of ordinary jurisdiction, resolves conflicts of competence between inferior tribunals, the Second

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CONGRÈS INTERNATIONAL DE DROIT CANONIQUE/PROCEEDINGS OF THE 5TH INTERNATIONAL CONGRESS OF CANON LAW 231-42 (Michel Theriault & Jean Thorn eds., 1986).

485. *See id.*

486. *See* 1983 CODE c.128; PASTOR BONUS art. 123.

487. *See* Grocholewski, *supra* note 297, at 409; *see also* Ignacio Gordon, S.J., *La responsabilità dell'amministrazione pubblica ecclesiastica*, 98 MONITOR ECCLESIASTICUS 384, 419 (1973).

488. Prior to the promulgation of Pastor Bonus, a somewhat unusual case raised the question of damages. *See Decision of the Apostolic Signatura, October 27, 1984, supra* note 463, at 491. After deciding that the petitioner, a professor, had been unlawfully and unjustly dismissed from his position at a Catholic university, the Apostolic Signatura determined that the petitioner was entitled to damages and further held that a specific financial sum should be determined by the appropriate office of the Roman Curia. *See id.* at 270. Subsequently, the College of Cardinals informed the Apostolic Signatura that the determination of the amount of damages belonged to the Signatura itself. *See Decree of the Apostolic Signatura of June 1, 1985*, 96 IL DIRITTO ECCLESIASTICO 261 (1985).

489. *See* Grocholewski, *supra* note 297, at 410.

490. PASTOR BONUS art. 123, § 3.



Section, the supreme administrative tribunal, must decide conflicts of competency between Dicasteries of the Roman Curia.<sup>491</sup>

#### *D. Procedural Issues at the U.S. Supreme Court*

Unlike the contentious-administrative process at the Apostolic Signatura, judicial review of an administrative decision at the Supreme Court does not involve a specialized section of the tribunal. Rather, the Supreme Court hears an administrative case in the same manner as it hears any other appeal. Judicial review of administrative decisions raises procedural issues regarding standing, timing, fundamental due process, and competency.

##### 1. Standing requirements

A person must have "standing" to challenge an administrative decision in a court of law.<sup>492</sup> The standing requirement finds its basis in both the Constitution and in statute.<sup>493</sup> Article III, Section 2 of the Constitution limits the federal judicial power to "cases" and "controversies."<sup>494</sup> A person does not present an Article III case or controversy unless the person has a direct personal interest in the administrative act which he or she challenges.<sup>495</sup> A reviewing court will not entertain administrative actions in the abstract.<sup>496</sup> Instead, a person seeking judicial review must show a personal injury,<sup>497</sup> from which he has suffered an adverse affect and which injury is "fairly traceable" to the administrative act,<sup>498</sup> and for which the relief sought shall likely remedy the harm caused by the administrative act.<sup>499</sup>

In addition to the constitutional basis of the standing requirement, Congress may create standing in a person or class where it

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491. *See id.*

492. *See Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 151 (1970).

493. *See U.S. CONST.* art. III, § 2; 5 U.S.C. § 702 (1994).

494. *U.S. CONST.* art. III, § 2, cl. 1.

495. *See BERNARD SCHWARTZ, ADMINISTRATIVE LAW* 496-97 (3d ed. 1991).

496. Justice Oliver Wendell Holmes once referred to such an action as "a mere declaration in the air." *Giles v. Harris*, 189 U.S. 475, 486 (1903).

497. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

498. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 161 (1981).

499. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

would not ordinarily exist.<sup>500</sup> The APA provides that a person “adversely affected or aggrieved by agency action within the meaning of the relevant statute” may obtain judicial review.<sup>501</sup> The following case is an illustration of such standing concerns.

The Supreme Court, in *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>502</sup> upheld the right of competitors to challenge administrative actions that have an adverse effect on the competitive market.<sup>503</sup> The Court reduced the law of standing to two questions: (1) has the complaint alleged an “injury in fact”<sup>504</sup>; and (2) is “the interest sought to be protected by the complainant arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>505</sup> In recent years, Congress has relied on its statutory power to expand the limits of the standing requirement. Individuals and organizations with environmental complaints, for example, may often bring an action for review on the basis of aesthetic concern.<sup>506</sup>

*a. taxpayer standing*

An early decision of the Supreme Court held that the interest of a federal taxpayer was “[too] remote” to establish standing.<sup>507</sup> In a 1968 case, *Flast v. Cohen*,<sup>508</sup> a taxpayer was permitted to challenge a federal appropriations and spending measure on the ground that the taxpayer had a “personal stake in the outcome.”<sup>509</sup> The *Flast* Court promulgated a two-pronged test with which to evaluate the nexus between a taxpayer and the claim sought to be adjudicated.<sup>510</sup> First,

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500. See *TRIBE*, *supra* note 7, at 112.

501. 5 U.S.C. § 702.

502. 397 U.S. 150 (1970).

503. See *id.* at 157.

504. *Id.* at 152.

505. *Id.* at 153.

506. See National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970); see also *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (holding that failure to allege a concrete injury, including an aesthetic injury, to it or its members resulted in a lack of standing for the Sierra Club).

507. See *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923).

508. 392 U.S. 83 (1968).

509. *Id.* at 99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

510. See *id.* at 102.

the challenged administrative action must be based on the government's power to tax and spend for the general welfare. Second, the action must be challenged as a specific constitutional limitation on the taxing and spending power.<sup>511</sup> Several more recent cases suggest that the Court will not always apply the *Flast* test liberally. The Supreme Court held in *Valley Forge Christian College v. Americans United*<sup>512</sup> that taxpayers did not have standing to challenge an agency action that gave an unneeded federal building to a religious school.<sup>513</sup> Likewise, in *United States v. Richardson*,<sup>514</sup> the Court refused to recognize the standing of taxpayers to challenge a federal statute, which granted secrecy to certain expenditures incurred by the Central Intelligence Agency.<sup>515</sup>

*b. zone of interests*

The Supreme Court has interpreted section 702 of the APA to reach the limits of Article III of the Constitution.<sup>516</sup> The section permits any person who can meet the constitutional requirements of injury in fact, causation, and remediability to sue.<sup>517</sup> Nonetheless, the words "within the meaning of a relevant statute" impose a prudential requirement that the complainant fall within the "zone of interests" protected or regulated by the statute that the complainant alleges has been violated.<sup>518</sup>

Consistent with its holding in *Flast*, the Supreme Court, in *Clarke v. Securities Industry Ass'n*,<sup>519</sup> allowed standing to a trade association to challenge an agency action that had the effect of relaxing statutory restrictions in the marketplace.<sup>520</sup> The Court held that any person aggrieved by an agency action has standing, if an injury in fact has been alleged, and if that injury touches on the zone of interests to be protected by the statute or constitutional guarantee in

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511. *See id.* at 102-03.

512. 454 U.S. 464 (1982).

513. *See id.* at 486-87.

514. 418 U.S. 166 (1974).

515. *See id.*

516. *See* 5 U.S.C. § 702.

517. *See id.*

518. *Barlow v. Collins*, 397 U.S. 159, 164-65, 168 (1970).

519. 479 U.S. 388 (1987).

520. *See id.*

question.<sup>521</sup> Moreover, the Court instructed that in applying the zone of interests test, courts should broadly interpret the relevant statute so that the class of persons who may challenge an agency action is not unduly restricted.<sup>522</sup> A post-*Clarke* decision, however, indicates that the Supreme Court has decided to apply the zone of interests test more strictly. In *Air Courier Conference v. American Postal Workers Union*,<sup>523</sup> the Court refused to grant standing to the postal workers union that wished to challenge the decision of the post office to allow competition by private interests in certain areas of the postal service.<sup>524</sup> The union maintained that by forsaking its monopoly over postal services, the post office caused an injury to the union members since the post office would need to employ fewer workers.<sup>525</sup> The Court held that because Congress, when it granted a monopoly to the postal service, had not intended to protect jobs of postal workers, the union's claim fell outside the zone of interest protected by the statute.<sup>526</sup>

## 2. Timing of judicial review

Even if a party has met standing requirements, one who comes into federal court seeking a remedy against some exercise of administrative power will find the matter dismissed if the petition for remedy has been brought at the wrong time.<sup>527</sup> Two complementary doctrines, exhaustion and ripeness, are designed to prevent inefficient judicial intervention in the administrative process.<sup>528</sup>

### *a. exhaustion requirement*

If judicial review is sought while an agency administrative proceeding is still underway, a federal court will dismiss the action on the ground that the plaintiff has failed to exhaust the available ad-

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521. *See id.* at 401-03.

522. *See id.* at 399-400.

523. 498 U.S. 517 (1991).

524. *See id.*

525. *See id.* at 527-28.

526. *See id.* at 530.

527. *See* 5 U.S.C. § 704.

528. *See* *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967); *Myers v. Bethlehem*, 303 U.S. 41, 50-51 (1938).

ministrative remedies.<sup>529</sup> The APA states that federal review is available after "final agency action, for which there is no other adequate remedy."<sup>530</sup> In a classic case on the exhaustion requirement, *Myers v. Bethlehem Shipbuilding Corp.*,<sup>531</sup> the Supreme Court ruled that a company charged with unfair labor practices had to exhaust its remedies with the National Labor Relations Board (NLRB) prior to judicial review, despite the company's claim that to participate in an administrative hearing would cause irreparable financial harm.<sup>532</sup> The Court has recognized some exceptions to the exhaustion requirement, such as a claim that an agency lacks jurisdiction over the matter at issue,<sup>533</sup> or that an administrative remedy is plainly inadequate to the injury alleged.<sup>534</sup> On the whole, however, the Court has been slow to create exceptions and has striven to maintain the doctrine.<sup>535</sup> Pursuant to the exhaustion doctrine, an individual must pursue an appeal if it is available within the agency structure prior to filing suit in federal court.<sup>536</sup> Typically, the decision of an ALJ must first be appealed to the agency head or director before a federal court will entertain it.

*b. ripeness requirement*

The concept of exhaustion needs to be distinguished from that of judicial ripeness. The exhaustion doctrine emphasizes the position of the party seeking review. Essentially, the doctrine asks whether the party is seeking to circumvent administrative review, or whether the dictates of the matter in controversy require immediate judicial attention. In contrast, the ripeness requirement is concerned primarily with the ability of the court to resolve an issue without further determination by the administrative agency. For example, an issue might be ripe for judicial review because further factual development by

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529. See *Abbott Labs.*, 387 U.S. at 149; *Myers*, 303 U.S. at 50.

530. 5 U.S.C. § 704.

531. 303 U.S. 41 (1938).

532. See *id.* at 47.

533. See *Leedom v. Kyne*, 358 U.S. 184, 189-90 (1958).

534. See *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989).

535. See *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980).

536. See *id.* at 243.

the agency is unnecessary.<sup>537</sup> Thus, although the concept of exhaustion overlaps somewhat with that of ripeness, the exhaustion requirement is procedural in nature, while the ripeness requirement reflects more prudential substantive judgments by the court.

### 3. Fundamental due process

#### *a. notice and the opportunity to be heard*

The Fifth and Fourteenth Amendments to the United States Constitution provide that the federal and state governments shall not deprive a person of "life, liberty or property without due process of law."<sup>538</sup> As Justice Felix Frankfurter observed, the notion of fundamental due process finds its roots in the very origins of the American law.<sup>539</sup> In the development of the American legal tradition, the principle was considered to be one of natural justice and universal obligation ultimately rooted in the divine law.<sup>540</sup> Thus, it is an old established principle of the law that "a party is not to suffer in person or in purse without an opportunity of being heard."<sup>541</sup> In the words of the Supreme Court, the "elementary and fundamental requirement

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537. See *Abbott Labs.*, 387 U.S. at 148-49 (finding that the question at issue turned entirely on congressional intent, and both parties stipulated agency findings were unnecessary); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967) (finding that further fact-finding by the agency was essential prior to judicial review).

538. U.S. CONST. amends. V, XIV; see JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985); BERNARD SCHWARTZ & H.W.R. WADE, *LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES* 23 (1972); Todd D. Rakoff, *Brock v. Roadway Express, Inc., and the New Law of Regulatory Due Process*, 1987 SUP. CT. REV. 157.

539. See *Caritativo v. California*, 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting) ("*Audi alteram partem*—hear the other side!—a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause."); see also *In re Andrea B.*, 405 N.Y.S.2d 977, 981 (Fam. Ct. 1978) ("When we speak of *audi alteram partem*—hear the other side—we tap fundamental precepts that are rooted deep in American legal history.").

540. See *Rex v. Univ. of Cambridge*, 93 Eng. Rep. 698, 704 (K.B. 1723) ("[E]ven God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?" (quoting *Genesis* 3:9-11)).

541. *Painter v. Liverpool Gas Co.*, 111 Eng. Rep. 478, 484 (K.B. 1836).

of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>542</sup> Essentially, fundamental or procedural due process in the American legal system constitutes the requirement of notice and the opportunity to be heard.<sup>543</sup>

*b. legislative versus adjudicatory functions*

Within the context of American administrative justice, a fundamental distinction is drawn between rulemaking and adjudication for the purposes of due process, or to put it another way, between the legislative and judicial functions exercised by administrative agencies. The distinction is evident from a comparison of two early cases, *Londoner v. Denver*<sup>544</sup> and *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*.<sup>545</sup> In *Londoner*, the agency had ordered the paving of streets and assessed the cost upon abutting land owners in proportion to the amount of property they owned.<sup>546</sup> The Supreme Court held that "due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard."<sup>547</sup> *Bi-Metallic* involved a decision by the State Board of Equalization to increase the assessed value of all property by forty percent. The Supreme Court held that no hearing was necessary prior to the promulgation of the general rule. In writing for the majority in *Bi-Metallic*, Justice Holmes distinguished it from *Londoner* on the ground that in *Londoner* "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds," while *Bi-Metallic* dealt "with the principle upon which all the assessments in a county had been laid."<sup>548</sup>

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542. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

543. See SCHWARTZ & WADE, *supra* note 538, at 23; see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 (1951) (Douglas, J., concurring) ("Notice and opportunity to be heard are fundamental to due process of law.").

544. 210 U.S. 373 (1908).

545. 239 U.S. 441 (1915).

546. See *Londoner*, 210 U.S. at 375-76.

547. *Id.* at 385.

548. *Bi-Metallic*, 239 U.S. at 446.

Thus, in *Londoner*, the agency act involved quasi-judicial functions in adjudicating a claim that an individual taxpayer had been unjustly assessed.<sup>549</sup> By contrast, *Bi-Metallic* involved the agency in a quasi-legislative function, in which the agency undertook the promulgation of a general rule.<sup>550</sup> To paraphrase Justice Holmes: If the results in this case had been reached as it might have been by the state legislature passing a new tax law, no one would suggest that due process was violated unless every person affected had been allowed the opportunity to be heard.<sup>551</sup> The crux of the distinction seems to be whether the administrative action is based on a matter of general policy or on individual grounds. The distinction between legislative and adjudicative functions in the exercise of administrative power has been criticized by authors who consider the difference to be more conceptual than real.<sup>552</sup> Notwithstanding the criticism, the Supreme Court, in *United States v. Florida East Coast Railway*,<sup>553</sup> expressly followed the distinction to determine when due process must be provided.<sup>554</sup> When administrative action involves an adjudicatory function, in contrast to a legislative function, which could deprive a person of liberty or property, the Constitution requires due process.<sup>555</sup>

*c. extent of due process*

Even if the administrative action falls under the constitutional guarantee of due process, it does not follow that a party must be

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549. See *Londoner*, 210 U.S. at 383-84.

550. See *Bi-Metallic*, 239 U.S. at 441-42.

551. See *id.* at 444.

552. See Barry B. Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 11, 115 (1972); Brice McAdoo Clagett, *Informal Action-Adjudication-Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 78; Nathaniel L. Nathanson, *Davis, Administrative Law Treatise*, 70 YALE L.J. 1210, 1211 (1961) (book review).

553. 410 U.S. 224 (1973).

554. See *id.* at 245; see also *Phila. Co. v. SEC*, 175 F.2d 808, 818 (D.C. Cir. 1948), *vacated as moot*, 337 U.S. 901 (1949) (holding that the SEC could not circumvent the hearing requirement by making a rule that applied only to one company).

555. See 5 U.S.C. § 556 (1995) (requiring a hearing in certain rulemaking situations).



afforded a trial-type hearing. Circuit Judge Henry Friendly culled the elements which constitute the panoply of due process. They include the right to: (1) have an unbiased tribunal; (2) receive notice of the proposed administrative action and the grounds asserted for it; (3) present arguments against the proposed administrative action; (4) present evidence and to call witnesses; (5) know opposing evidence prior to the hearing; (6) cross-examine adverse witnesses; (7) receive a decision based exclusively on the evidence; (8) be represented by counsel; (9) have the tribunal compile a formal record; (10) receive a written statement of the findings of fact and reasons upon which the decision is based; (11) public attendance; and (12) judicial review.<sup>556</sup> Although the APA requires a full trial-type hearing in certain circumstances, the Supreme Court has interpreted the Constitution to guarantee only prior notice and the opportunity to be heard in the vast majority of administrative adjudications.<sup>557</sup> Supreme Court precedent discloses only a few standards by which to determine the extent of the process that is due.<sup>558</sup> Indeed, the Court has plainly stated, "due process is flexible and calls for such procedural protections as the particular situation demands."<sup>559</sup>

i. deprivation of liberty: deportation

It is the normal practice for an ALJ to preside over an administrative adjudication. The APA, however, permits "the conduct of specified classes of proceedings . . . by or before boards or other employees specially provided for by or designated under statute."<sup>560</sup> In the 1950 case, *Wong Yang Sung v. McGrath*,<sup>561</sup> the Supreme Court considered the use of this so-called "saving provision" by the Immigration and Naturalization Service (INS) in deportation hearings.<sup>562</sup> Although the INS had provided by its own regulation that immigrant inspectors should preside at deportation hearings, the Supreme Court held that the INS procedure did not fall under the APA saving

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556. See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-95 (1975).

557. See 5 U.S.C. § 556.

558. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

559. *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

560. 5 U.S.C. § 556(b).

561. 339 U.S. 33 (1950).

562. See *id.*

provision because it was not a statute authorized by Congress.<sup>563</sup> Responding to the Court's decision in *Wong*, Congress passed the Immigration and Nationality Act of 1952,<sup>564</sup> which provided that the INS could appoint special inquiry officers rather than ALJs to adjudicate deportation hearings. Of more long-lasting significance in the *Wong* decision was the Supreme Court's determination that deportation constituted a deprivation of liberty which invoked the protection of the due process guarantee.<sup>565</sup>

ii. deprivation of property: welfare

In *Goldberg v. Kelly*,<sup>566</sup> the Supreme Court considered the question of whether the state of New York could withdraw federally-funded welfare benefits from a recipient without providing a trial-type hearing.<sup>567</sup> Conceding that the welfare benefits were an "entitlement" which fell under the Due Process Clause's deprivation of property, the state was willing to provide a welfare recipient the opportunity for consultation with an agency officer and submission of written views prior to suspension of the benefits.<sup>568</sup> In its fullest application of due process guarantees to an act of administrative power, the Supreme Court ruled that the removal of the entitlement required full protection under the Due Process Clause.<sup>569</sup>

iii. balancing the interests

In contrast to its 1970 holding in *Goldberg*, more recently the Supreme Court has tended to restrict the right to full procedural protection in cases alleging an injury caused by some administrative act.<sup>570</sup> Only five years following *Goldberg*, the Court held in *Mathews v. Eldridge*<sup>571</sup> that federal disability benefits could be cut

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563. *See id.* at 52-53.

564. Pub. L. No. 82-414, § 242(b), 66 Stat. 209 (1952) (codified as amended at 8 U.S.C. § 1252(b) (1994)). These special inquiry officers are often called immigration judges.

565. *See Wong*, 339 U.S. at 50-51.

566. 397 U.S. 254 (1970).

567. *See id.*

568. *See id.* at 254-55, 261-62, 268.

569. *See id.* at 267-71.

570. *See Mathews v. Eldridge*, 424 U.S. 319, 349 (1974).

571. 434 U.S. 319 (1974).

off without a prior hearing.<sup>572</sup> Forsaking an absolute rule, the Court set forth a balancing test to determine the amount of procedure to which an aggrieved person was entitled under the Due Process Clause:

[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>573</sup>

Clearly, the balancing test affords reviewing courts a great amount of leeway in determining whether an individual was afforded the requisite due process in a given situation. It has been suggested, in fact, that the *Eldridge* test applied to the facts of *Goldberg* could have required a different result.<sup>574</sup>

Perhaps, the most persuasive reason in support of the Supreme Court's curtailment of the extent of due process is a pragmatic one. In the words of Judge Friendly,

if all the safeguards of the Administrative Procedure Act were to be applied to the denial, withdrawal or curtailment of welfare, medical, and unemployment payments, and other benefits . . . the United States would be buried under an avalanche of paper . . . if indeed enough reporters to type the records could be found.<sup>575</sup>

Precursing the decision in *Eldridge*, the Judge went on to comment that "[i]f due process is interpreted as a mechanical yardstick, unalterable regardless of time, place, and circumstances, it may make government unworkable."<sup>576</sup> He concluded that the "Constitution

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572. *See id.* at 319.

573. *Goldberg*, 397 U.S. at 335. The test has been followed in subsequent cases. *See United States v. Raddatz*, 447 U.S. 667, 677 (1980).

574. *See* SCHWARTZ, *supra* note 495, at 276-77.

575. Henry J. Friendly, *Foreword to SCHWARTZ & WADE*, *supra* note 538, at xviii.

576. *Id.* at xix.

does not require full judicialization in every conceivable case.”<sup>577</sup> For the vast majority of challenged administrative adjudications, the Supreme Court prescribes only notice and the opportunity to be heard.

#### 4. Subject-matter jurisdiction

Similar to the contentious-administrative process in the church, the judicial review of an administrative act by a federal court depends on legislative authorization. The first question of competency is whether the court possesses subject-matter jurisdiction over the particular dispute.<sup>578</sup> A second question concerns the scope of the court’s reviewing power.<sup>579</sup> Whether or not a federal court possesses jurisdiction over the subject matter of a dispute in order to exercise judicial review of an administrative action depends on statutory authorization and sovereign immunity.<sup>580</sup> Additionally, the exhaustion and standing requirements must be met prior to judicial review in a federal court.

##### *a. statutory authorization*

The appellate jurisdiction of the federal courts is entirely statutory, and without authorization from the Congress, a federal court may not review an exercise of administrative power.<sup>581</sup> Three possibilities exist. First, pursuant to the APA, if Congress has established a “special statutory review proceeding relevant to the subject matter,” the party files a petition in the court specified by the statute.<sup>582</sup> This first possibility is generally referred to as “statutory review.”<sup>583</sup> Second, the APA stipulates that if Congress has omitted to specify

577. *Id.*

578. *See* U.S. CONST. art. III, § 2.

579. *See generally* SCHWARTZ & WADE, *supra* note 538, at 226-40 (discussing scope of judicial review as limited to four main issues: fact, law, procedure, and discretion).

580. *See id.*

581. *See* STRAUSS, *supra* note 80, at 740. It should be noted that in no case does the APA create federal jurisdiction. Sections 702 and 703 of the APA, rather, serve as guidelines. *See* 5 U.S.C. §§ 702-703 (1994); *see also* Califano v. Sanders, 430 U.S. 99 (1977) (holding that the APA does not constitute an implied grant of subject-matter jurisdiction to review agency action).

582. 5 U.S.C. § 703.

583. *Id.*

jurisdiction, an aggrieved party may employ "any applicable form of legal action" in a "court of competent jurisdiction."<sup>584</sup> This second possibility is known as "nonstatutory review," although as will be shortly discussed, the designation is somewhat misleading since the general federal jurisdiction statute applies.<sup>585</sup> Third, if Congress expressly precludes judicial review in the relevant statute, courts are bound to follow such expressed preclusion as long as the preclusion comports with the Constitution.<sup>586</sup>

Most statutes creating federal agencies indicate the procedure for obtaining judicial review of agency decisions.<sup>587</sup> For the large regulatory agencies, this is usually by appeal to the courts of appeal, often to the District of Columbia Circuit, and sometimes by an action in federal district court.<sup>588</sup> In all cases, the Supreme Court is the final judge of an appeal from an exercise of administrative power.<sup>589</sup> Once Congress has established statutory review, the review of the administrative act must be brought in the specified court and procedure.<sup>590</sup>

The second possibility when one looks to the governing statute to determine what Congress has provided on the availability of judicial review is statutory silence. Even when Congress has not expressly provided for judicial review, the Supreme Court has not interpreted the absence of statutory authority to preclude review.<sup>591</sup> In *Stark v. Wickard*, several producers of milk brought an action against the decision of the secretary of agriculture to fix milk prices in the Boston area.<sup>592</sup> The milk producers claimed in federal district court that the exercise of administrative power was beyond the power delegated to the secretary.<sup>593</sup> The district court dismissed the milk producers' complaint on the ground that judicial review was not

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584. *Id.*

585. *See id.*

586. *See id.* § 704.

587. *See* *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411, 411-12 (1965).

588. *See id.*

589. *See id.* at 412.

590. *See id.* at 419.

591. *See Stark v. Wickard*, 321 U.S. 288, 319 (1944).

592. *See id.* at 296-99.

593. *See id.* at 289.

available in the absence of expressed statutory provision.<sup>594</sup> The Court of Appeals for the District of Columbia Circuit affirmed.<sup>595</sup> The Supreme Court reversed the lower court's decision.<sup>596</sup> The Court held that the absence of expressed statutory authority by Congress does not preclude judicial review of an administrative act.<sup>597</sup>

Writing for the majority in *Stark*, Justice Reed reasoned that "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction."<sup>598</sup> The exercise of the federal court's general jurisdiction pursuant to federal law applied to administrative action for several reasons.<sup>599</sup> First, to preclude judicial review would be to leave an aggrieved individual in the position of having no recourse against an unjust or illegal administrative act since there is no forum other than the courts to hear the complaint.<sup>600</sup> Moreover, pursuant to the "ultra vires" doctrine, an agency power is circumscribed by the authority granted to the agency by statute.<sup>601</sup> When an agency acts beyond the parameters of statutory authority, the courts may properly review an administrative act to protect an individual interest against an agency excess.<sup>602</sup>

In a dissenting opinion, Justice Felix Frankfurter argued that in the absence of an expressed provision for judicial review, the federal courts should not entertain complaints brought by individuals against agency action.<sup>603</sup> He argued, "[t]here is no such thing as a common law of judicial review . . . ."<sup>604</sup> According to Justice Frankfurter, for the federal courts to rely on the general jurisdiction to hear petitions of remedy from administrative acts amounted to the judicial creation

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594. *See id.*

595. *See Stark v. Wickard*, 136 F.2d 786, 789 (D.C. Cir. 1943).

596. *See Stark*, 321 U.S. at 311.

597. *See id.* at 308.

598. *Id.* at 309.

599. *See id.* at 309-10.

600. *See id.* at 309.

601. *See id.*

602. *See id.* at 310.

603. *See id.* at 314-19 (Frankfurter, J., dissenting).

604. *Id.* at 312 (Frankfurter, J., dissenting).

of its own jurisdiction.<sup>605</sup> This view, however, has been rejected since it suggests that individuals aggrieved by administrative acts are powerless to seek a remedy unless Congress expressly authorizes it.<sup>606</sup>

The third possibility is that Congress has included a provision in the relevant statute which precludes judicial review.<sup>607</sup> The Immigration and Nationality Act, for example, states that the decisions of the INS in deportation cases "shall be final."<sup>608</sup> In *Shaughnessy v. Pedreiro*,<sup>609</sup> the Supreme Court interpreted "the ambiguous word 'final' in the 1952 Immigration Act as referring to the finality in administrative procedure rather than as cutting off the right to judicial review in whole or in part."<sup>610</sup> To bolster its interpretation, the Court noted that under the APA "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved . . . is entitled to judicial review thereof."<sup>611</sup> Thus, in *Shaughnessy*, the Supreme Court afforded the deported alien the right to judicial review of the INS decision to deport him.<sup>612</sup>

Consistent with the *Shaughnessy* approach, the Supreme Court has narrowly construed statutory preclusion provisions so as to establish a presumption of reviewability.<sup>613</sup> The presumption is rebutted only when clear and convincing evidence demonstrates congressional intent to preclude judicial review of a particular agency action.<sup>614</sup> In *Traynor v. Turnage*,<sup>615</sup> the Court held that review was

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605. See *id.* at 317-19 (Frankfurter, J., dissenting).

606. See *id.* at 314-15 (Frankfurter, J., dissenting).

607. See *United States v. Erika*, 456 U.S. 201 (1982) (upholding a statute which absolutely precluded judicial review of exercises of administrative power in cases concerning certain government benefits).

608. 8 U.S.C. § 1252(b) (1994).

609. 349 U.S. 48 (1955).

610. *Id.* at 51.

611. 5 U.S.C. § 702 (1994).

612. See *Shaughnessy*, 349 U.S. at 51-52.

613. See, e.g., *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 799 (1985) (holding that administrative agency's decision under the Civil Service Retirement Act was reviewable).

614. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 136 (1967) (holding that judicial review of administrative regulations was not prohibited by Federal Food, Drug, and Cosmetic Act); see also *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 680-81 (1986) (holding that Congress did not intend to preclude judicial review of the amount of benefits payable under Part B of

not precluded even when a statute precluded judicial review of the decisions of the Veterans Administration (VA) "on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . ."<sup>616</sup> There, an alcoholic veteran sought to reverse a decision of the VA, which denied him rehabilitation.<sup>617</sup> Despite the fact that the statute provided that such VA decisions were "final and conclusive and no . . . court of the United States shall have power or jurisdiction to review" them,<sup>618</sup> the Court allowed judicial review on the ground that an earlier federal statute, the Rehabilitation Act of 1973, prohibited discrimination against handicapped persons.<sup>619</sup> Since Congress passed both statutes, it would have been necessary for the preclusion provisions in the VA statute to apply specifically to the Rehabilitation Act.<sup>620</sup>

The Supreme Court again demonstrated the presumption of judicial review in *McNary v. Haitian Refugee Center*.<sup>621</sup> The Haitian Refugee Center, on behalf of a class of alien farm workers, alleged a pattern of due process violations on the part of the U.S. Attorney General in determinations of amnesty under federal law.<sup>622</sup> Pursuant to the Special Agricultural Workers Program of the 1986 Immigration Reform and Control Act,<sup>623</sup> the Attorney General was empowered to grant temporary residency to illegal alien farm workers who had performed ninety days of agricultural work in the United States between June 1, 1985, and May 1, 1986. The Attorney General objected to the suit on the ground that the matter was not yet ripe for judicial review.<sup>624</sup> To the contrary, the Supreme Court ruled for the class of farm workers holding that a "strong presumption" of judicial

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the Medicare program).

615. 485 U.S. 535 (1988).

616. *Id.* at 539 (citing 38 U.S.C. § 211(a) (repealed 1991)).

617. *See id.*

618. *Id.* at 539 n.3 (quoting 38 U.S.C. § 211(a) (repealed 1991)).

619. *See id.* at 552; *see also* Rehabilitation Act of 1973, 87 Stat. 355 (1973) (current version as amended at 29 U.S.C. § 791 (1994)).

620. *See Traynor*, 485 U.S. at 543.

621. 498 U.S. 479 (1991).

622. *See id.* at 479, 487-88.

623. 8 U.S.C. § 1160(a) (1994).

624. *See McNary*, 498 U.S. at 483, 491-92.



review of administrative action exists when due process deprivations are alleged.<sup>625</sup>

Contrary to the presumption of reviewability, the Supreme Court has occasionally inferred a statutory preclusion of review even though Congress omitted to include a preclusion provision in the statute.<sup>626</sup> In *Morris v. Gresette*,<sup>627</sup> the Supreme Court refused to allow judicial review of a decision of the U.S. Attorney General not to object to a state plan to implement voting rights on the ground that time was of the essence.<sup>628</sup> Judicial review would interfere with the congressional intent that the voting rights plan be implemented quickly and not infringe on state autonomy.<sup>629</sup> Likewise, in *Block v. Community Nutrition Institute*,<sup>630</sup> the Court refused a consumer group's request for judicial review of an agency decision to fix milk prices.<sup>631</sup> When Congress expressly allowed wholesale buyers of milk to seek judicial review, the Court inferred that Congress intended to preclude consumers.<sup>632</sup>

Despite these exceptions, the Supreme Court has adopted a strong policy in favor of judicial review even in the face of preclusion provisions.<sup>633</sup> To interpret preclusion provisions literally might infringe on the basic constitutional right to due process. As Justice Brandeis stated: "The supremacy of law demands that there shall be opportunity to have some court decide . . . whether the proceeding in which facts were adjudicated was conducted regularly."<sup>634</sup> Although the Supreme Court has never explicitly ruled in this vein, it seems that the fundamental right to due process in American constitutional

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625. *See id.* at 499.

626. *See, e.g.,* *Switchmen's Union v. Nat'l Mediation Bd.*, 320 U.S. 297, 305-06 (1943) (holding that Board's certification of representation for collective bargaining not judicially reviewable). *But see* *Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958) (holding that Board's determination of unit appropriate for collective bargaining is reviewable).

627. 432 U.S. 491 (1977).

628. *See id.* at 504-05.

629. *See id.* at 504.

630. 467 U.S. 340 (1984).

631. *See id.* at 347.

632. *See id.*

633. *See* *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

634. *Id.* (Brandeis, J., concurring).

law would not permit Congress to absolutely insulate the exercise of administrative power from judicial review.

*b. sovereign immunity*

The doctrine of sovereign immunity prohibits a private individual from suing the government, except when and to the extent that the government has consented to be sued.<sup>635</sup> It stems from the medieval principle that “the King can do no wrong.”<sup>636</sup> The modern justification for the doctrine rests in the fact that the relief sought by an individual would result in an “intolerable burden on governmental functions, outweighing any consideration of private harm.”<sup>637</sup> The doctrine exerts an influence over administrative justice since petitions for remedy brought by private citizens against government officials constitute the crux of judicial review.<sup>638</sup> At issue is the immunity of the federal government.

In 1976, Congress passed legislation under which the federal government waived its sovereign immunity in all suits seeking relief other than money damages.<sup>639</sup> This law governing the liability of the federal government for claims of relief has been incorporated into the APA. Section 702 of the APA permits an individual suffering an injury due to administrative action to seek judicial review by naming the United States as a defendant in an action for relief other than for money damages, such as injunctive or declaratory relief.<sup>640</sup> Pursuant to section 703, the action may be brought against the United States, the agency, or an appropriate administrative officer even when statutory review procedures are absent or inadequate.<sup>641</sup> Moreover, section 704 permits judicial review of “final agency action for which there is no other adequate remedy in a court . . . .”<sup>642</sup> Although the federal government has not waived its immunity to suits for money

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635. See *Alden v. Maine*, 527 U.S. 706 (1999).

636. See Kelly H. Armitage, *It's Good to be King (At Least it Used to Be and Could Be Again): A Textualist View of Sovereign Immunity*, 29 STETSON L. REV. 599, 662 (2000).

637. *Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969).

638. See *id.* at 1319.

639. See 5 U.S.C. §§ 702-703 (1994).

640. See *id.* § 702.

641. See *id.* § 703.

642. *Id.* § 704.

damages, the term "money damages" is narrowly construed. It signifies only money compensation for damages suffered; it does not prevent specific relief such as restitution or declaratory judgment that might compel the defendant to pay a money judgment.<sup>643</sup>

### 5. Standard of judicial review

Perhaps the most critical issue in determining the relationship between the federal judiciary and the administrative agencies is the extent of the court's power to substitute its judgment for that of the agency. This issue is often referred to as the "scope" or "standard" of judicial review. The standard of judicial review depends on the precise sort of administrative action, which is being challenged, upon judicial review. A case generally presents both questions of law and questions of fact that must be answered by the ALJ in reaching the decision. Both agency fact-finding and determinations of law are subject to judicial review, but the standard of review differs for factual and legal determinations.<sup>644</sup> The APA and judicially created standards of review rely on phrases such as "substantial evidence" and "arbitrary and capricious."<sup>645</sup> Because the meaning of such phrases remains somewhat ambiguous and lacks a definite precision, the Supreme Court has afforded judges a great deal of flexibility to respond to the equities of individual fact patterns.<sup>646</sup> Although reviewing courts are often deferential to agency determinations, a basic premise of judicial review remains that the rule of law is preferable to unfettered agency discretion.<sup>647</sup>

#### *a. findings of fact*

A question of basic fact is one that can be made without knowledge of the applicable law. Who did what, when, and where are simple kinds of questions of fact. Questions of fact increasingly involve complex scientific or technical information based on expert testimony. While these determinations belong to the jury in a trial, most often the ALJ resolves both the factual and legal issues in an

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643. See *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

644. See STRAUSS, *supra* note 80, at 244-61.

645. See *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 466 (1997).

646. See *id.*

647. See STRAUSS, *supra* note 80, at 261-64.

administrative hearing.<sup>648</sup> Like the jury, the ALJ must weigh the credibility of the witnesses and other evidence on the record to reach a finding of fact. Pursuant to the APA, a factual finding should be set aside by a reviewing court only if it is unsupported by “substantial evidence” on the “whole record.”<sup>649</sup> Substantial evidence constitutes relevant evidence that “a reasonable mind might accept as adequate to support a conclusion.”<sup>650</sup> Under the substantial evidence standard, a court should not substitute its finding for that of the agency; rather, even if a court disagrees with the agency finding of fact, the court must affirm the finding as long as the finding is reasonable.<sup>651</sup> The phrase “whole record” means that a finding of fact is reasonable if one considers the entire record. The Supreme Court has indicated that Congress intended the phrase to favor a stricter review of agency fact-finding.<sup>652</sup> However, the whole record requirement more often means that if a case is a close one with evidence on both sides, the agency finding of fact will be upheld.<sup>653</sup> Thus, the substantial evidence on the whole record test makes for affirmance of administrative fact-finding in almost every case, and only when there is simply no credible evidence to support the finding will a court substitute a contrary finding.<sup>654</sup>

Sometimes a court employs different language for the standard of review for a finding of fact, setting it aside only if it is “clearly erroneous.”<sup>655</sup> According to the Supreme Court, “[a] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.”<sup>656</sup> Comparing the substantial evidence and clearly erroneous standards, some commentators assert that the latter allows the reviewing court broader

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648. *See id.*

649. *See* 5 U.S.C. § 706(2)(E).

650. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

651. *See Am. Textile Mfr. Inst. v. Donovan*, 452 U.S. 490, 540-41 (1981).

652. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493-96 (1951).

653. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78 (1989).

654. *See id.* at 378.

655. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948).

656. *Id.* at 395.

authority.<sup>657</sup> Other commentators consider the standards to be slightly different linguistic formulations of the same basic guideline.<sup>658</sup> In this view, the two standards “are, in practice, so nearly alike that only the scholastic mind of the hyper-critical law review writer presumes to see any real difference between them.”<sup>659</sup> Whether a real difference exists between the terms or not, the notion or sense of fairness seems to be the underlying concern. As one commentator put it, “the judge may—indeed must—reverse if as he conscientiously sees it the finding is not fairly supported by the record; or to phrase it more sharply, the judge must reverse if he cannot conscientiously escape the conclusion that the finding is unfair.”<sup>660</sup>

*b. conclusions of law*

An administrative agency frequently must determine the meaning of statutes, its own regulations, and other sources of law in order to resolve an adjudication between an individual and the agency.<sup>661</sup> Such determinations of law are generally given strong deference upon judicial review.<sup>662</sup> The Supreme Court exhibited strong deference to an agency’s legal conclusions in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>663</sup> In this case, the Environmental Protection Agency (EPA) adopted a rule which interpreted the term “stationary source” in the Clean Air Act to refer to an entire manufacturing plant, rather than an individual device in the plant.<sup>664</sup> The effect of the EPA rule was to measure the entire amount of air pollution caused by a manufacturing plant.<sup>665</sup> The rule allowed the

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657. See, e.g., Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 88-89 (1945).

658. See, e.g., Michael J. Pender, *Judicial Review of PTO Patentability: Determinations Under the Substantial Evidence Standard of Review*, 82 J. PAT. & TRADEMARK OFF. SOC’Y 431, 444-45 (2000).

659. Arthur T. Vanderbilt, *Introduction*, 30 N.Y.U. L. REV. 1267, 1268 (1955).

660. Louis L. Jaffe, *Judicial Review: “Substantial Evidence on the Whole Record”*, 64 HARV. L. REV. 1233, 1325 (1951) (referring to Justice Frankfurter’s opinion in *Universal Camera*, 340 U.S. at 488).

661. See STRAUSS, *supra* note 80, at 140.

662. See *id.* at 261-71.

663. 467 U.S. 837 (1984).

664. See *id.* at 840.

665. See *id.*

manufacturer to install new sources of pollution in the plant as long as it removed another source of pollution of equal or greater contamination.<sup>666</sup> In upholding the EPA rule, the Supreme Court prescribed two inquiries that a reviewing court should conduct when considering an agency's conclusions of law.<sup>667</sup> First, the reviewing court must determine whether "Congress has directly spoken to the precise question at issue."<sup>668</sup> In other words, the reviewing court must determine whether the statute has a plain meaning. If the agency interpretation of the statute differs from the plain meaning intended by Congress, the court must reverse the conclusion and substitute the correct interpretation.<sup>669</sup> Second, if the statute has no plain meaning, the court should inquire as to whether the agency interpretation is "permissible" or a "reasonable interpretation."<sup>670</sup> Since *Chevron* involved a highly technical environmental problem, the facts of the case lent themselves to judicial deference towards the agency interpretation.<sup>671</sup>

*c. administrative discretion*

In addition to the interpretation of statutes, reviewing courts are very often called upon to review an agency's exercise of discretion. Indeed, discretion is at the heart of administrative power.<sup>672</sup> Administrative discretion signifies the power possessed by an official or agency to choose among a number of possible courses of action. As one commentator has indicated, "[w]ithout judicial control, purely personal power, whether in the hands of a contemporary administrator or the caliph of the Arabian knights, tends by its very nature to be arbitrary."<sup>673</sup> Section 706 of the APA provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of

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666. *See id.*

667. *See id.* at 842-43.

668. *Id.* at 842.

669. *See id.* at 843.

670. *Id.* at 843-44.

671. *But see* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971) (stating that the exemption for actions committed to agency discretion does not apply when other law exists).

672. *See* SCHWARTZ, *supra* note 495, at 652-53.

673. *Id.* at 653-54.

discretion.”<sup>674</sup> For the purpose of judicial review, the three terms—arbitrary, capricious, and abuse of discretion—are equivalent.

In *Citizens to Preserve Overton Park v. Volpe*, the Supreme Court held that in reviewing an exercise of discretion, a court must engage in a “substantial inquiry,” although an agency decision is entitled to a “presumption of regularity.”<sup>675</sup> The Court suggested a four-step analysis.<sup>676</sup> First, the reviewing court must ask whether the agency decision meets the *Chevron* criteria.<sup>677</sup> Second, the court must determine whether the agency decision considered “all of the relevant factors.”<sup>678</sup> The third step in the analysis is the crux of review of administrative discretion. Even if the agency exercised discretion within the parameters of *Chevron* and considered all the correct factors, the reviewing court should find an abuse of discretion if the agency committed a “clear error of judgment.”<sup>679</sup> Finally, the reviewing court must also consider whether the agency followed the correct procedures when it exercised discretion.<sup>680</sup> As with the case of fact-finding and conclusions of law, the courts have shown considerable deference to agency discretion.<sup>681</sup> As then Circuit Judge Antonin Scalia expounded in *Association of Data Processing Service Organizations v. Board of Governors of the Federal Reserve System*,<sup>682</sup> the difference between the substantial evidence and the arbitrary and capricious standards is that in the former the reviewing court seeks support for factual finding in the record, while in the latter the court poses the same quality of question to the nonfactual conclusions.<sup>683</sup> Essentially, upon judicial review, the court inquires whether the administrative decision is reasonable and meets the requirements of fundamental fairness. Confronted with an

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674. 5 U.S.C. § 706(2)(A) (1996).

675. See *Volpe*, 401 U.S. at 415.

676. See *id.* at 415-17.

677. See *id.* at 415-16.

678. *Id.* at 416. But see *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 645-46 (1990) (holding that failure to consider every potentially relevant area of concern did not render an administrative decision arbitrary and capricious).

679. *Volpe*, 401 U.S. at 416.

680. See *id.* at 417.

681. See STRAUSS, *supra* note 80, at 239-71.

682. 745 F.2d 677 (D.C. Cir. 1984).

683. See *id.* at 683.

administrative decision that, in its judgment, falls outside the parameters of reasonableness and fairness, the federal court will reverse the decision and remand to the agency for appropriate action.

*d. de novo review*

While the standard of judicial review usually depends on the distinction between law and fact, the Supreme Court has held that when the challenged agency decision is based on either a constitutional or jurisdictional issue, the appropriate standard is *de novo* review. The doctrine originates from the 1920 case of *Ohio Valley Water Co. v. Ben Avon Borough*,<sup>684</sup> in which the Court ruled that a judicial tribunal must reach its own independent judgment when an exercise of administrative power resulted in the taking of private property by a public utility in violation of the due process clause of the Constitution.<sup>685</sup> The so-called *Ben Avon* doctrine requires full judicial review when a constitutional issue is raised.<sup>686</sup> However, many commentators have maintained that the *Ben Avon* doctrine has died gradually through numerous inconsistent Supreme Court decisions.<sup>687</sup> Nonetheless, the Supreme Court has never expressly overruled the doctrine, and federal courts continue to apply it.<sup>688</sup>

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684. 253 U.S. 287 (1920).

685. *See id.* at 289.

686. *See id.*

687. *See, e.g.,* Leslie A. Glick, *Independent Judicial Review of Administrative Rate-Making: The Rise and Demise of the Ben Avon Doctrine*, 40 *FORDHAM L. REV.* 305, 306-07, 314 (1971). For an inconsistent decision, see *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940).

688. *See* Glick, *supra* note 687, at 313 n.32, 314. *See generally* *California v. Southland Royalty Co.*, 436 U.S. 519, 525-26 (1978) (upholding an administrative interpretation of the Natural Gas Act on the ground that the interpretation was reasonable); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936) (holding that courts must review constitutional issues independently from the findings of the Secretary of Agriculture); *Pichotta v. City of Skagway*, 78 F. Supp. 999, 1004 (D. Alaska 1948) (stating that when a case presents an issue of constitutional law, the reviewing court may determine the issue upon its own, rather than the administrative, record); *Atl. Coast Line R.R. Co. v. Pub. Serv. Comm'n*, 77 F. Supp. 675, 680 (D.S.C. 1948) (stating that an independent action in equity brought pursuant to an act of Congress deserves *de novo* review).



## IV. ANALYTICAL SUMMARY

A. *Nature of Administrative Justice in Each System of Law*

Although the philosophical starting points differ, the end of each system of administrative law remains the protection of some individual or group aggrieved through the unjust use of government power. With the promulgation of the 1983 Code, Pope John Paul II perfected many features of modern ecclesiastical administrative justice.<sup>689</sup> Consistent with the ecclesiology of Vatican II, the Code implements a juridic structure designed to insure that administrative justice reflects the mystery of *communio*.<sup>690</sup> In accord with the unity of sacred power that finds its matrix in hierarchical communion, it officially adopted the threefold distinction of legislative, judicial, and executive power.<sup>691</sup> On the basis of the proposed *Lex Fundamentalis*, it enumerated the rights of all the Christian faithful.<sup>692</sup> There is in the new Code a clear sense that an injury to any member of the church as a result of an exercise of administrative power must be addressed since it disrupts the communion of the Mystical Body of Christ. Title IV of Book I defines the single administrative act to include a decree, precept, or rescript which is issued by one who possesses executive power and which promotes compliance with the law and, or, grants some favor.<sup>693</sup> The single administrative act may be the object for scrutiny in the process of hierarchical recourse. In its most profound sense, the process of hierarchical recourse can be understood as an instrument of the healing grace of Christ in the service of the communion of the faithful.

The American constitutional democracy rests on the foundational principle that government institutions which set and enforce public policy must be politically accountable to the electorate.<sup>694</sup> This principle stems from the eighteenth-century political theory in

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689. See Ioannes Paulus Pp. II, *supra* note 74, at 128; see also *supra* p. 95 and note 74.

690. See Ioannes Paulus Pp. II, *supra* note 29, at 128; see also 1983 CODE c.1733.

691. See Ioannes Paulus Pp. II, *supra* note 29, at 1.

692. See 1983 CODE c.204, § 1, cc.208-231.

693. See *id.* c.35.

694. See *supra* pp. 112-114.

which an autonomous individual encounters the free market with a minimum of government regulation.<sup>695</sup> The Framers of the Constitution attempted to safeguard the principle by establishing a federal government of limited powers that were distributed into distinct executive, legislative, and judicial branches of government.<sup>696</sup> The tripartite separation was intended to minimize the risk of arbitrary government.<sup>697</sup> Given the inherent institutional limitations of each of the three branches, the requisite level of government regulation requires numerous specialized agencies to which were delegated broad law-making, executory, and adjudicatory powers.<sup>698</sup> American administrative justice may be understood as an analysis of the legal limits set on the powers and actions of administrative agencies. Although the agencies are delegated broad government powers, this does not imply freedom from political accountability. According to the conventional model, policy oversight by elected officials and judicial review insure that administrative agency power is kept in check.<sup>699</sup> These elements were reflected in the Administrative Procedure Act (APA) of 1946.<sup>700</sup> At the core of the discussion of arbitrary government power is the notion of individual freedom as the absence of government restraint.<sup>701</sup> To the extent that freedom thus conceived can be maintained, the individual is vested with certain legal rights.<sup>702</sup> One of the central functions of the judicial branch remains the protection of individual and minority group rights against majoritarian unfairness.<sup>703</sup>

To juxtapose the theological language of *communio* against that of liberal political theory reveals the fundamentally different starting

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695. See LOCKE, *supra* note 185, at 63-77.

696. See U.S. CONST. art. I, § 9 (establishing Congress as the national legislative body); *id.* art. II, § 9 (establishing the executive branch); *id.* art. III, § 2 (establishing the federal court system).

697. See STRAUSS, *supra* note 80, at 501; TRIBE, *supra* note 7, at 15.

698. See *supra* pp. 117-119 and accompanying notes.

699. See *supra* pp. 118-118.

700. See 5 U.S.C. §§ 551-559 (1994); see also *supra* p. 119 and note 219.

701. See *supra* pp. 90-91 and note 50.

702. See *supra* pp. 166-167.

703. See *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 609 (1974) (holding that laws affecting a group of minorities within the population "without any justification and, with its irrationality and invidiousness thus uncovered, must fall before the Equal Protection Clause").

points of the two systems of administrative justice. In accord with liberal political theory, the tripartite distinction of separate government powers stems from respect for individual autonomy and suspicion of government authority.<sup>704</sup> Freedom is conceived of in terms of the absence of government restraints.<sup>705</sup> The rule of law is intended to facilitate equal opportunity in the functioning of the market economy.<sup>706</sup> In comparison, canon law reflects the belief that the unified power of governance is vested in one authority as part of the economy of salvation.<sup>707</sup> Authentic freedom is thought to involve a harmonious integration of rights and responsibility.<sup>708</sup> The faith of the individual believer engenders a trust and respect for ecclesiastical authority who is expected always to act to facilitate the experience of communion and nourish the lives of individuals.<sup>709</sup> Yet, each system of administrative law is designed to the end of insuring the correct balance between the common good and individual rights.<sup>710</sup> Both systems attempt to produce this balance by affording official and efficient recourse to an individual, who has been aggrieved by an unjust act of administrative power, through appeal and judicial review.<sup>711</sup>

*B. Comparison of the Administrative Procedures Prior to Review at the Supreme Tribunals*

The administrative procedures of the ecclesiastical and American systems reflect the crucial theoretical differences between the two systems of administrative justice. In fidelity to the reality of *communio*, canon law posits a system of hierarchical recourse that culminates at the appropriate Dicastery of the Roman Curia as speci-

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704. See STRAUSS, *supra* note 80, at 501; STREET & BRAZIER, *supra* note 187, at 31; TRIBE, *supra* note 7, at 15.

705. See STRAUSS, *supra* note 80, at 501.

706. See FULLER, *supra* note 57, at 209-10.

707. See GHIRLANDA, *supra* note 78, at 255-57.

708. See 1983 CODE c.204; see also JAVIER MARTINEZ-TORRON, DERECHO ANGLIAMERICANO Y DERECHO CANONICO, LAS RAICES CANONICAS DE LA COMMON LAW 43-49 (1991).

709. See *supra* p. 104.

710. See LABANDEIRA, *supra* note 20, at 270-77; DAVIS, *supra* note 21, at 25.

711. See Koch, *supra* note 6, at 471-78; see also Beal, *supra* note 23, at 70-106.

fied in Pastor Bonus.<sup>712</sup> Consistent with the delegation of distinct legislative and judicial powers, American administrative agencies exercise rulemaking and adjudicatory functions.<sup>713</sup> The latter of these functions may be divided into formal and informal adjudications.<sup>714</sup> Prior to official recourse against an act of administrative power, both systems of administrative justice urge that parties have recourse to alternate forms of dispute resolution.<sup>715</sup> In ecclesiastical law, this exhortation is rooted in the mystery of *communio*, which seeks reconciliation rather than the rupture of communion which can result from the contentious-administrative process.<sup>716</sup> While the American system does not share the theological foundation, it prefers alternate means of dispute resolution for practical reasons.<sup>717</sup> Such alternatives generally result in a speedier decision at less cost.<sup>718</sup>

The initial recourse in an ecclesiastical administrative dispute is to the one who issued the decree which is being challenged.<sup>719</sup> Given the *communio* of the church, such a procedure reflects a basic trust in the goodness, justice, and charity of one who exercises administrative power.<sup>720</sup> In contrast, American administrative justice functions from the rule against bias, or the principle that "no one may be the judge of his or her own case."<sup>721</sup> No matter how small the adjudicator's interest might be, no matter how unlikely it is to affect the judgment, the adjudicator cannot serve as the judge of an issue or case in which he or she has rendered the decision under appeal.<sup>722</sup> Thus, while a bishop must be requested to reconsider his own administrative act, an independent Administrative Law Judge

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712. See 1983 CODE cc.1732-1739.

713. See U.S. CONST. art. I, § 8; see, e.g., *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514 (D.C. Cir. 1981).

714. See 5 U.S.C. § 553(c) (1994) (discussing informal adjudications); *id.* §§ 551-559 (discussing the formal adjudication process).

715. See *supra* pp. 106-107 and note 145, p. 125 and note 252.

716. See 1983 CODE c.1733, § 1; see also Coccopalmerio, *supra* note 144, at 670; Grochowski, *supra* note 144, at 349-50.

717. See 5 U.S.C. §§ 571-583.

718. See *supra* p. 131.

719. See Gordon, *supra* note 16, at 253-55.

720. See *supra* p. 104.

721. STREET & BRAZIER, *supra* note 187, at 583-86.

722. See STREET & BRAZIER, *supra* note 187, at 583-86.

(ALJ) will hear the case against the decision of an American administrator.<sup>723</sup>

As the process of hierarchical recourse moves from one level of superior to the next, appeals from the decisions of diocesan bishops normally are taken to the appropriate Dicastery of the Roman Curia.<sup>724</sup> Recourse from the administrative act of a provincial superior of an institute of consecrated life would be to the supreme moderator of the institute, and only then to the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life.<sup>725</sup> In the American system, an appeal from the initial decision of an ALJ would normally follow an appeals process established within the particular administrative agency with the agency head as the ultimate adjudicator.<sup>726</sup>

### C. Comparison of the Structures of the Supreme Tribunals

The comparison of the structure of the Apostolic Signatura with that of the Supreme Court juxtaposes continental and common-law systems. It discloses five significant differences. First, pursuant to Ignacio Gordon's analysis, ecclesiastical administrative justice constitutes a system of hierarchical recourse until it reaches the level of the Apostolic Signatura.<sup>727</sup> Canon law draws a formal distinction between judicial and administrative matters, so the Apostolic Signatura is divided into two separate Sections of the same judicial tribunal.<sup>728</sup> It has been suggested that the creation of the Second Section resulted in a system of double jurisdiction within the church's supreme administrative tribunal.<sup>729</sup> Although the Second Section, in fact, shares many characteristics with the French Court of Cassation, it does not exist as an absolutely independent body from the ordinary judicial tribunal, the First Section.<sup>730</sup> Pursuant to Pastor Bonus, the Apostolic Signatura might be described as one supreme tribunal

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723. See 5 U.S.C. § 3105.

724. See *supra* pp. 105-105; e.g., PASTOR BONUS arts. 122-124.

725. See Decision of the Apostolic Signatura, 21 November 1987, *supra* note 348, at 88-94.

726. See *id.* at 95.

727. See Gordon, *supra* note 16, at 253-54.

728. See *id.* at 15 n.2.a.

729. See *id.* at 67; see also VALDRINI, *supra* note 307, at 65; Lobina, *supra* note 307, at 397.

730. See PASTOR BONUS arts. 123-124.

which is divided into two sections, the first section of which exercises jurisdiction over the ordinary judicial forum, and the other section of which exercises jurisdiction over extrajudicial, or administrative, matters.<sup>731</sup> The third section of the Signatura functions as a congregation entrusted with vigilance over the administration of justice in the church.<sup>732</sup>

In comparison, the American system is what Ignacio Gordon describes as one of single jurisdiction.<sup>733</sup> Under the terms of Article III of the United States Constitution, the Supreme Court constitutes the supreme judicial tribunal, the decisions of which are binding on the inferior federal courts.<sup>734</sup> Even the administrative adjudication conducted by an ALJ is considered to be essentially judicial in nature.<sup>735</sup> Moreover, an appeal from the agency adjudication is taken to the appropriate federal district or appeals court.<sup>736</sup> These federal courts are the ordinary judicial forum.<sup>737</sup> The courts represent an intermediate level of recourse between the administrative adjudication and the Supreme Court, which serves as the supreme judicial tribunal for both judicial and administrative matters.<sup>738</sup> Typical of a system of single jurisdiction, American law considers administrative cases as one branch of the civil law which are heard at the Supreme Court without the formal-bilateral distinction.<sup>739</sup>

Second, although both the Apostolic Signatura and the Supreme Court constitute supreme administrative tribunals, there is a large degree of difference in how their authority is understood. The Apostolic Signatura ranks as an equal among the other Roman Dicasteries.<sup>740</sup> Like the French Court of Cassation, it hears cases in order to determine whether an error of law has occurred in the previous procedure.<sup>741</sup> If it determines that such an error occurred, it remands the

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731. See Gordon, *supra* note 16, at 15 n.2.a.

732. See Grochowski, *supra* note 306, at 404, 406, 412.

733. See Gordon, *supra* note 16, at 253-54.

734. See U.S. CONST. art. III, § 1.

735. See 5 U.S.C. §§ 551-555, 557(c).

736. See Currie & Goodman, *supra* note 375, at 6-7.

737. See *id.*

738. See BATOR ET AL., *supra* note 362, at 46.

739. See *supra* p. 160.

740. See PASTOR BONUS art. 122; Alesandro, *supra* note 25, at 12.

741. See PASTOR BONUS art. 1, § 1, art. 123, § 1.

case back to the authority that issued the decree for a new decision or correction.<sup>742</sup> The Supreme Court stands alone as the superior tribunal of the ordinary and judicial forum.<sup>743</sup> When it reviews the determination of a lower court, the Supreme Court's decision is conclusive of the matter; the lower courts and administrative agencies are bound to follow it.<sup>744</sup> Supreme Court decisions are considered highly important precedents which constitute part of the law.<sup>745</sup>

Third, the important role played by the officials of the Apostolic Signatura such as the secretary and promoter of justice as well as all those who assist them has no parallel at the Supreme Court. The officials of the Signatura actively engage in the process of the discovery of the truth of the matter under consideration, and their opinions are officially recognized as an aspect of the overall process.<sup>746</sup> While it is true that each of the nine Supreme Court Justices is assisted by several law-clerks, as well as other officers of the Court, these clerks and officers have little, if any, official role in the actual disposition of a case.<sup>747</sup>

Fourth, the role of the advocates reflects the continental with common-law comparison. The procurator-advocates who represent individuals at the Second Section are officially approved agents who assist the tribunal in discerning the truth of the case.<sup>748</sup> Theoretically, they are dedicated to the proposition that their function at the tribunal is to obtain a just result rather than to win victory for their particular clients.<sup>749</sup> The common-law system has long understood the role of lawyers to be more adversarial than their continental counterparts.<sup>750</sup> Although it would be grossly unfair to cast them as

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742. See 1983 CODE c.1739.

743. See U.S. CONST. art. III, § 1; KLEIN, *supra* note 363, at 168.

744. See generally STRAUSS, *supra* note 80, at 7 (noting that the Supreme Court's "constitutional judgments cannot be changed by ordinary legislation").

745. See *id.* at 82; KLEIN, *supra* note 363, at 167-72.

746. See PASTOR BONUS arts. 183-185; Baccari, *supra* note 341, at 174-75.

747. See CARRINGTON ET AL., *supra* note 380, at 44-46.

748. See Baccari, *supra* note 341, at 174-75; Grocholewski, *supra* note 307, at 37-39.

749. See Baccari, *supra* note 341, at 174-75.

750. See generally BROWN, *supra* note 52, at 215-18 (comparing the practices of American lawyers to that of English Barristers); GOLDBERG ET AL., *supra* note 145, at 316-20 (discussing the different role of an attorney in dispute resolution).

entirely uninterested in a just result for their cases, advocates before the Supreme Court are concerned primarily with the interests of their clients.<sup>751</sup>

Fifth, the decisions of the Apostolic Signatura are generally not published in deference to the privacy of the parties.<sup>752</sup> When publication is permitted, it is generally with the understanding that the identity of the parties remains anonymous.<sup>753</sup> Since the common-law tradition attributes precedential value to individual case decisions, all the decisions of the Supreme Court are, of course, part of the public record and highly scrutinized upon publication.

#### *D. Comparison of Due Process at the Supreme Tribunals*

Both supreme tribunals mandate that a party must have exhausted all administrative remedies before proceeding to judicial review of the case.<sup>754</sup> In the church, the individual must first exercise recourse to the author of the challenged decree, and then to the next competent authority up to the level of the appropriate Dicastery.<sup>755</sup> In the American system, the petitioner must have exhausted all possible recourse within the administrative agency, and then to the competent federal district or appeals court.<sup>756</sup> When one considers the amount of due process to be afforded an individual who brings a petition for remedy against an act of administrative power, there is a striking similarity between the current practice of the Apostolic Signatura and the Supreme Court. Essentially, both supreme tribunals require the right to a fair hearing. The requirement means that no individual ought to be adversely affected by some administrative decision unless there has been sufficient notice of the case and a fair opportunity to be heard.<sup>757</sup> While the minimum due process requirement may be explained in light of the necessities of institutional limitations, it also constitutes the requirements traditionally

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751. See BROWN, *supra* note 52, at 215.

752. See NORMAE SPECIALES arts. 97-98.

753. See *id.* art. 98.

754. See STERN & GRESSMAN, *supra* note 384, at 27-28.

755. See 1983 CODE c.1734, § 1, c.1735.

756. See STRAUSS, *supra* note 80, at 81.

757. See 5 U.S.C. § 556(d) (1994); e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Painter v. Liverpool Gas Co.*, 111 Eng. Rep. 478, 484 (K.B. 1836).



derived from natural law. Right reason seems to advise that one must know the charges or matter of the pending case and that one ought to be heard, either orally or in writing. Beyond these minimal requirements of practical and natural reason, neither supreme tribunal seems willing to impose a more elaborate due process on the vast majority of administrative decisions.

Generally speaking, the American system demonstrates a more flexible and highly developed due process requirement than the hierarchical recourse and contentious-administrative recourse of canon law. At the same time, the American procedure tends to be more adversarial and less concerned with an objective quest for the truth of the matter than its ecclesiastical counterpart. Formal administrative hearings conducted under the APA exhibit a full range of procedural safeguards including, *inter alia*, knowledge of opposing evidence prior to the hearing, representation by counsel, and the opportunity to call and cross-examine witnesses.<sup>758</sup> In most administrative adjudication, however, the Supreme Court simply requires that an informal hearing with minimum due process has been conducted.<sup>759</sup> Sometimes, it suffices for the ALJ or other administrative official to review the documents submitted by the parties in order to fulfill the due process requirement for the opportunity to be heard.<sup>760</sup> The flexibility of the American system allows it to respond to the nature of individual cases. Although not required to do so, the superior in the canonical process of hierarchical recourse might upon occasion exercise discretion to conduct a more formal type of hearing.<sup>761</sup> Yet, since it is not required by canon law, the Apostolic Signatura would not likely find a violation of law if the hierarchical superior chose not to conduct a formal hearing.<sup>762</sup>

Due process also depends on the competency of each of the supreme tribunals.<sup>763</sup> Pursuant to *Pastor Bonus*, the competency of the Second Section of the Apostolic Signatura is to determine whether an administrative act, in deciding or proceeding, amounts to a violation

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758. *See* 5 U.S.C. § 556(d).

759. *See* STRAUSS, *supra* note 80, at 146-47.

760. *See id.*

761. *See* 1983 CODE c.1738.

762. *See* Alesandro, *supra* note 25, at 12-13.

763. *See* PASTOR BONUS arts. 122-124; 1983 CODE c.1445.

of some law.<sup>764</sup> While technically it does not reach the merits of the case, an examination of several recent decisions raises some question as to whether it is possible to fulfill the mandate of Pastor Bonus through a consideration of the law alone.<sup>765</sup> The facts of certain cases seem to render it difficult, if not impossible, to decide whether a violation of law occurred without some examination of the overall merits of the case.<sup>766</sup> When Pastor Bonus expanded the competency of the Second Section to include the determination of damages, the problem was further compounded. Absent a consideration of all the aspects of a case legal and factual, it would seem difficult for the supreme administrative tribunal to fix a certain financial amount as compensation for injury to a party.<sup>767</sup> The competence of the Apostolic Signatura needs clarification. Because its competency is limited to violations of law, it is possible that the Second Section of the Apostolic Signatura could be confronted with what appears to be an unjust but nonetheless lawful result. Like the Second Section, the Supreme Court is a tribunal of limited jurisdiction.<sup>768</sup> The primary source of the Supreme Court's jurisdiction to review acts of administrative power is statutory authorization by Congress.<sup>769</sup> Such statutory authorization may be either expressed or implied, and alternatively, Congress may preclude judicial review of certain kinds of administrative decisions.<sup>770</sup> Moreover, judicial review by the federal courts is sometimes unavailable as a result of the doctrine of sovereign immunity. The Supreme Court itself has tended to take a broad view of its jurisdiction over administrative agency decisions, although it often exercises deference to such decisions on the grounds of administrative expertise.<sup>771</sup>

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764. See *supra* note 436.

765. See PASTOR BONUS art. 123, § 1.

766. See LABANDEIRA, *supra* note 20, at 729-34.

767. See PASTOR BONUS art. 123, § 2.

768. See U.S. CONST. art. III, § 2.

769. See 5 U.S.C. §§ 701-706; STRAUSS, *supra* note 80, at 81.

770. See U.S. CONST. art. III, § 2; Koch, *supra* note 6, at 479-80.

771. See Koch, *supra* note 6, at 480-81.

### E. U.S. Supreme Court Standards of Review

The Supreme Court has relied on several deferential standards, employed by itself and the lower federal courts, to review administrative adjudications.<sup>772</sup> An administrative finding of fact must be supported by substantial evidence considered on the record as a whole.<sup>773</sup> An interpretation of a statute by an administrative agency will generally be upheld upon judicial review as long as the interpretation was reasonable.<sup>774</sup> A discretionary decision, which is made pursuant to law, will often only be reversed when it is determined to constitute an abuse of discretion because it was arbitrary, capricious, and discriminatory.<sup>775</sup> These standards of review reflect the Court's deference to the role of the fact-finder and to administrative agency expertise.

Upon occasion, the Court chooses a higher level of judicial scrutiny.<sup>776</sup> Particularly, when review of an administrative decision turns on a novel point of law or an interpretation of the Constitution or a federal statute, the Court may elect to review the matter *de novo*.<sup>777</sup> Thus, the procedure of the Court permits it wide latitude in which to exercise judicial review of administrative action, but the Court prefers judicial deference to most administrative decisions.<sup>778</sup> Although the federal courts show a high degree of judicial deference to administrative discretion, the development of the hard-look doctrine demonstrates that the courts have on some past occasions been willing to set aside an administrative decision when, in their

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772. See *id.* at 471. See generally STRAUSS, *supra* note 80, at 81-82 (discussing the function of administrative review through petitioning the Court for certiorari).

773. See 5 U.S.C. § 706(2)(e) (1994); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1981).

774. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 844-45 (1984); Koch, *supra* note 6, at 492.

775. See 5 U.S.C. § 706(2)(A) (1996); *Chevron*, 467 U.S. at 843-44.

776. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970); *Wong Yag Sung v. McGrath*, 339 U.S. 33, 50-51 (1950).

777. See generally *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) (noting that a state may utilize its own judicial tribunals to formulate judgments as to both law and fact so long as it does not contravene the U.S. Constitution).

778. See Koch, *supra* note 6, at 471-94.

judgment, the decision fails to meet the requirements of fundamental fairness or yields an unjust result in a particular case.<sup>779</sup> The adoption of these standards of review might be most beneficial to the Apostolic Signatura in the contentious-administrative process.

## V. CONCLUSION

This comparative study of canon law and federal law has suggested that the individual human person constitutes the proper focus of administrative law. The two systems of law seem to be grounded in different assumptions about the nature of the human being in relation to society and government power. Ecclesiastical law manifests the theological concepts of communion and the mystical Body of Christ.<sup>780</sup> The modern liberal democracy focuses on individual autonomy and suspicion of government power. Despite these different theoretical starting points, each system of law is designed to establish the correct balance between the rights of the individual person and the common good of society. Both systems of administrative law rely on a relatively informal process for review of administrative action prior to judicial review.<sup>781</sup> For an individual person, who remains dissatisfied with the outcome of the informal process of recourse, there remains the possibility of a more formal review. Established in canon law as a distinct administrative tribunal, the Second Section of the Apostolic Signatura comprises the only administrative tribunal in the church.<sup>782</sup> The federal courts of the United States and ultimately the Supreme Court afford the opportunity for formal judicial review of administrative power.<sup>783</sup> While the competency of both supreme tribunals is circumscribed by statute, they nonetheless have been established as the final judicial means to correct an injury caused by an administrative act.<sup>784</sup> Given the

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779. See *id.* at 489; STRAUSS, *supra* note 80, at 267-68.

780. See Alesandro, *supra* note 25, at 11; Ladislav Orsy, *Theology and Canon Law: An Inquiry into Their Relationship*, 50 *JURIST* 402, 412-13, 416-17 (1990).

781. See Currie & Goodman, *supra* note 375, at 39.

782. See Grocholewski, *supra* note 297, at 406.

783. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

784. See Alesandro, *supra* note 25, at 11.

discretionary nature of administrative power, this judicial function is crucial to insure justice for individual human beings.