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The American Administrative State: The New Leviathan

*A. M. Gulas**

I. Introduction

> In virtually every relevant respect, the administrative process has become a fourth branch of government, comparable in the scope of its authority and the impact of its decision making to the three more familiar constitutional branches.[1]

Taking into account the vast resources at the disposal of administrative agencies, to have so much rulemaking and adjudicative power in the hands of a group unaccountable to the electorate, creates what one commentator has referred to as a "crisis."[2] What can justify, or legitimate, the exercise of such sweeping powers by the offspring of a government, composed of co-equal branches, dedicated to the philosophy of a separation of powers? Or, to put it succinctly, how do you control a leviathan?[3]

The purpose of this article is to give an introduction to the modern administrative process and its powers, its quest for legitimacy within a cautious society, and a description of methods used to—if not control—at least contain its rambling existence. Out of necessity, discussion will be limited to the federal sphere although the questions raised are applicable to state administrative agencies as well.

II. The Administrative State

A. *Historical Roots*

The American Revolution was fought for more than freedom

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1. J. FREEDMAN, CRISIS AND LEGITIMACY, 6 (1978).
2. *Id.* at 7.
3. T. HOBBES, LEVIATHAN, (1970). "For by Art is created that great LEVIATHAN called a COMMON-WEALTH or STATE, . . . WHICH IS BUT AN Artificial Man; though of great stature and strength than the Naturall, for whose protection and defence it was intended . . ."*Id.* at xiii.

from colonial rule. The independence sought was as much a philosophical independence as it was political independence. The newly formed country was innocent, seemingly naive in the eyes of governments established centuries earlier. Yet, it was a country determined that it would acquiesce only to the acts of a legitimate government created by the people. The first three words of the Preamble to the Constitution were more than an introductory phrase, the meaning in that day and age was resounding: WE THE PEOPLE . . . was the expression of the Framers' belief that the federal government must be the legitimate sovereign entity created by the people, made of the people, to work for the people. Furthermore, and contrary to the earlier theory expounded by Thomas Hobbes, the sovereign was subject to the law.[4]

The philosophy behind the notion of a government of the people can be traced to John Locke and *The Second Treatise of Government*.[5] The United States Constitution, however, is more Madison and Montesquieu. James Madison explained the need for a government based on co-equal branches, now known as the theory of separation of powers, in *The Federalist*: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, of few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[6]

The revolutionary war, won at the cost of numerous lives, would amount to a hollow victory if the government replacing the English rule was equally unresponsive to the needs of the people. To avoid that very chilling possibility, the Framers of the Constitution divided the essential governmental functions into three co-equal branches to prevent any one branch from accumulating too much power. "The very structure of the articles delegating and separating powers under Articles I, II and III exemplify the concept of separation of powers."[7]

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4. *Id.* Hobbes felt one of the things which tends to weaken or dissolve the Commonwealth was the notion "That he that hath the Soveraign Power, is subject to the Civill Lawes." *Id.*, at 233.

5. *Compare* Hobbes, *supra* note 4 with Locke; "And so whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws, promulgated and known to the people . . . ." J. LOCKE, THE SECOND TREATISE OF GOVERNMENT, 73 (1950).

6. MADISON, THE FEDERALIST, No. 47 ( ).

7. Immigration & Naturalization Service v. Chada, 462 U.S. 919, 946 (1983). *Chada* involved § 244(c)(2) of the Immigration and Nationality Act which authorized either House of Congress, by resolution, to invalidate the decision of the Attorney General to permit an

Obviously, the administrative agencies, with their combined investigative, adjudicative and legislative powers do not conform with the ideal advanced by political theorists. In fact, the criticism leveled at the administrative process as being at variance with the notion of separation of powers is perhaps the main stumbling block to its acceptance as a legitimate government entity.[8] One might wonder if theorists tried to out-do Madison by requiring a strict adherence to that theory, since Madison viewed the doctrine as a precaution against a concentration of power but not as a preclusion of one branch participating with another in the process of government.[9] "The key principle is a system of checks and balances—not a watertight separation between the three branches."[10]

B. *Separation of Powers and Delegation*

Simply stated, the separation of powers doctrine forbids one branch of government from performing the acts of another. Matters of necessity make it impossible to strictly adhere to that theory. The nondelegation doctrine, which is borrowed from the common law of agency and forbids subdelegation,[11] is also difficult to strictly enforce.

Conceivably, since the people of the United States have delegated their power to the federal government and embodied the limits of delegated power within the Constitution, this is very similar to the principal-agent relationship where the contract defines the scope of the agency. Agency law forbids the delegation of the agent's power to a subagent without authorization by the principal.[12] By analogy, when Congress transfers law-making power to the executive branch and permits the executive to legislate standards and codes applicable to national industry, there is an unconstitutional delegation of power by the legislature.[13] As can be seen,

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alien, who could otherwise be deported, to remain in the United States. The Court held, *inter alia* that the one-house veto was violative of the constitutional doctrine of separation of powers. *Id.*

8. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 109, 64 (1959).

9. J. FREEDMAN, ADMINISTRATIVE LAW TREATISE, 18-19.

10. B. Schwartz, *Administrative Law Cases During 1983*, 36 ADMIN. L. REV. 92 (1984). Furthermore: "The only absolute separation that has ever been possible was that in the theoretical writings of a Montesquieu, who looked across a foggy England from his sunny Gascon vineyards, and completely misconstrued what he saw." *Id.*

11. R. LORCH, DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW, 79 (1980).

12. Restatement (Second) of Agency § 18 ( ).

13. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). *See also* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

a violation of the doctrine against delegation can result in the violation of the theory of separation of powers as well.

Although the first time the United States Supreme Court held there had been an unlawful delegation of legislative power did not occur until 1935, it was not the first time an administrative action was challenged as an unlawful delegation of power. As early as 1813,[14] the Court upheld an act of Congress which provided that certain sections of a previous act would be revived upon the determination by the President that a named contingency had occurred.[15] While the "contingency" theory was a valid explanation for presidential actions, the Court needed another theory to uphold the transfer of power when Congress authorized the Secretary of Agriculture to make such rules and regulations as he deemed necessary to provide for the protection and use of the national forests.[16] A unanimous Court held that the Secretary of Agriculture

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In *Schechter* the Supreme Court held § 3 of the National Industrial Recovery Act unconstitutional, because the Court found that the "codes of fair competition" would allow the President to impose his own conditions on the regulated industries resulting in a sweeping delegation of legislative power to the executive branch. The Court reasoned that the NIRA supplied no standards for any trade, industry, or activity nor did the statute provide any standards for the president to follow in implementing the codes. Consequently, the Court found § 3 violative of the doctrine against delegation implicit in the constitution. 295 U.S. at 541-42.

Similarly, in *Panama Refining Co.*, the Court held § 9(c) of the National Industrial Recovery Act (NIRA) unconstitutional. 293 U.S. at 430. Section 9(c) authorized the president to prohibit the transportation of petroleum in interstate commerce in excess of the amount permitted by state law. The violation of the regulations could result in fines or imprisonment not to exceed six months. The Court concluded that in the absence of Congress setting a standard for the executive to follow, § 9(c) resulted in Congress abdicating its essential legislative function to the executive. 293 U.S. at 406.

14. The Brig Aurora, 7 Cranch 382 (1813). The contingency was a determination by President Madison that Great Britain and France had ceased violating the neutral commerce of the United States. [Author's note: Had THE BRIG AURORA been decided after *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), one wonders if Chief Justice Marshall would have invoked the "necessary and proper" clause and ended the ongoing controversy before it started. Perhaps not, since Congress was not exercising the power itself to implement what was "necessary and proper," but was delegating the power to another to make the decision. The delegation of such sweeping power would have flown in the face of the Constitution itself.]

15. Field v. Clark, 143 U.S. 649 (1892). Congress had passed the Act of October 1, 1890, 26 Stat. 567, with a view to secure reciprocal trade with countries producing certain named articles. Whenever the President was satisfied that a particular country producing a named good imposed duties "reciprocally unequal and unreasonable" upon the agricultural or other products of the United States, the President could suspend the free introduction of the foreign products and levy duties on the imported products. *Id.* 692-93.

16. United States v. Grimaud, 220 U.S. 506 (1911). *See also* Buttfield v. Stranahan, 192 U.S. 470 (1904).

In *Grimaud*, the Court upheld the regulations promulgated by the Secretary of Agricul-

was not legislating but was exercising the power to "fill up the details" of the legislation Congress had enacted to regulate the occupancy and use of the forests and preserve them from destruction.[17] The theory was that Congress had already determined a "primary standard"[18] and left it to the Secretary to administer the policy.[19]

In 1935, when the Supreme Court invalidated Title I of the National Industrial Recovery Act declaring it to be an improper delegation of legislative power to the President, it was because Congress had failed to establish an "intelligible principle" for the executive to follow.[20]

After 1935, the Court continued to uphold Congressional grants of power to agencies either by narrowly construing the legislation to meet constitutional requirements,[21] or by finding standards in previous agency action.[22] The nondelegation doctrine became so

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ture regarding the use of forest reservations for grazing purposes. 220 U.S. at 522.

In *Buttfield*, the Court determined that the regulations implemented by the Secretary of Treasury pursuant to the "Tea Inspection Act of 1897", 29 Stat. 604, were valid since Congress can, without violating the due process clause, establish standards for the importation of food articles. 192 U.S. at 492-97.

17. *Grimaud*, 220 U.S. at 517.

18. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1924). Congress enacted a flexible tariff authorizing the imposition of custom duties on imported articles equaling the difference between the cost of producing them in a foreign country and of selling them here and the cost of producing like or similar articles and selling them in the United States. The Tariff Commission was to investigate and determine the differences and report to the President who increased or decreased duties accordingly. The Court upheld the Act since Congress had laid down an "intelligible principle" for the President to follow. *Id.* at 411-13.

19. *Grimaud*, 220 U.S. at 523.

20. *See Schechter, supra* note 13. *Schechter* was decided on two grounds; the one mentioned (delegation) and also for the improper regulation of intrastate commerce. 295 U.S. at 529-51. *See also Panama Refinery, supra* note 13. In *Panama Refinery*, Justice Cardozo's dissent found an "intelligible principle" in section 1 of the legislation, wherein Congress identified the purpose of the statute. 293 U.S. at 435.

21. National Cable Television Assn. v. United States, 415 U.S. 336 (1974) and its companion case Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974). In *National Cable*, the Court upheld the Federal Communication Commission's practice of charging a fee for costs to the FCC for CATV regulations to community antenna television (CATV) based on the "value to the recipient." The Court remanded the case to the FCC to eliminate that portion of the fee which could be considered the cost of the FCC supervision unit which benefited the public. Thus, the Court narrowly defined the term "value to the recipient" to mean the CATV and not the public. *Id.* at 342-43.

In *FPC v. New England Power*, the Court upheld the FPC's impostion of a fee on electric utilities but limited the fee to "each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit," in other words, "only specific charges for specific services to specific individuals or companies." *Id.* at 345.

22. Fahey v. Mallonee, 332 U.S. 245 (1947). In *Fahey*, the Court concluded that the rules and regulations of the Home Loan Bank Board governing the appointment of conservators were sufficiently explicit, when considered with the conventional regulations found in state and federal banking statutes and against the background of custom, "to be adequate

out of use that it was described as being "as moribund as the substantive due process approach of the same era [1930's]."[23] The doctrine has been continuously raised and just as consistently ignored by the Court "almost since the day [*Schechter*] was decided."[24]

In the early 1980's opinions written by Justice (now Chief Justice) Rehnquist revived the nondelegation doctrine in its purist form.[25] *Industrial Union v. American Petroleum Institute*[26] involved a guideline enacted in section 6(b)(5) of the Occupational Safety and Health Act of 1970 (OSHA) which allowed the Secretary of Labor to enact health standards which would "to the extent

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for proper administration and for judicial review if there should be a proper occasion for it." 332 U.S. at 253.

23. *National Cable Television Ass'n*, 415 U.S. at 353 (J. Marshall, dissenting).

24. *Id.* at 354. Justice Marshall continued, *citing* 1 K Davis, Administrative Law Treatise, §2.01 (1958). "Lawyers who try to win cases by arguing that Congressional delegations are unconstitutional almost invariably do more harm than good to their client's interests . . . .In absence of palpable abuse or true Congressional abdication, the nondelegation doctrine to which the Supreme Court has in the past offered lip service is without practical force." *Id.* at 353 n. 1.

But see Pork Motel Corp. v. Kansas Dep't of Health & Env't, 234 Kan. 374, 673 P.2d 1126 (1983), Gold Kist Inc. v. Dept. of Agriculture, 741 F.2d 344 (11th Cir. 1984), Subcontractors v. Koch, 62 N.Y.2d 422, 477 N.Y.S.2d 120 (1984), Louisiana v. Broom, 439 So.2d 357 (La. 1983) all showing that the nondelegation doctrine is very much alive in certain states. This is especially so when the legislature delegate the power to create felonies, *Broom, supra.*

25. *See* Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607 (1980) and American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981) [also known as the "Cotton Dust" Case].

Industrial Union involved a standard promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970 which permits the Secretary to issue sastandards to insure the safe and healthful working conditions of the country's workforce. After determining that there was a causal connection between benzene and leukemia, the Secretary issued a standard reducing the permissible exposure level of airborne concentrations of benzene from 10 parts per million (ppm) to 1 ppm, and prohibitting skin contact with solutions containing benzene. The Court of Appeals for the Fifth Circuit held the standard invalid because it was based on findings not supported by the record.

A plurality of the Court concluded that the Secretary had to make a threshold finding that the place of employment was unsafe before promulgating any permanent health or safety standards. They reasoned that the Secretary's imposition of a burden on the industry without making the threshold detemination of an unsafe condition was an improper use of his power. 448 U.S at 653-59.

American Textile also involved the Occupational Safety and Health Act of 1970. Pursuant to § 6(b)(5) of the Act, the Secretary of Labor is required to promulgate occupational safety and health standards dealing with toxic materials or harmful agents "which most adequately assures, to the extent feasible, on the basis of the best available evidence" that no employee will suffer material impairment of health. The Secretary promulgated the "cotton dust" standard for the textile industry limiting occupational exposure to cotton dust in order to control the serious and potentially disabling lung disease byssinosis or "brown lung". 452 U.S. at 503.

26. 448 U.S. 607 (1980), *see supra* note 25.

feasible" assure no employee would suffer impairment of health.[27] In his concurring opinion Justice Rehnquist noted " 'to the extent feasible' render[ed] what had been a clear, if somewhat unrealistic, standard largely, if not entirely, precatory" so as to be an unconstitutional delegation of legislative authority to the Executive branch.[28] The majority of the Court in the 5-4 decision which invalidated the Secretary's standard for permissible exposure levels to benzene was unable to agree on an opinion.[29] Three Justices expressed the view that the Secretary had failed to adequately support the guidelines with findings of fact.[30] Justice Powell concurred, but carried the analysis one step further to require the Secretary to perform a cost-benefit analysis.[31] Justice Rehnquist's nondelegation approach provided the tiebreaking vote. In contrast, the dissent was solidly of the opinion that the Secretary had complied with the statute and his decision was supported by "substantial evidence."[32]

A year later in the "Cotton Dust" Case,[33] Justice Rehnquist was joined in his dissent by Chief Justice Burger as he reiterated his warning of the previous year that "to the extent feasible" resulted in a bald delegation of legislative power to the executive branch.[34] This had resulted from the failure of Congress to agree on the extent to which the "Secretary should be authorized to create a risk-free work environment;" therefore, the language is "no more than an admonition to the Secretary to do his duty," and provides "no meaningful guidance to those who will administer the law."[35]

In essence, Justice Rehnquist's concern is as follows. The judicial

27. *Industrial Union*, 448 U.S. at 612 (emphasis in original).

28. *Id.* at 681-82.

29. *See generally Id.* at 611-88.

30. 448 U.S. at 659-62.

31. *Id.* at 665-71.

32. *Id.* at 705-06. *See* Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474 (1951) which explains the substantial evidence test as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion when looking on the record as a whole.

33. American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981). This case involved the determination of the validity of industry standards promulgated by the Secretary of Labor under OSHA which regulated the permissible exposure levels to cotton dust. *Id.* at 495. *See supra* note 25 and accompanying text.

34. 452 U.S. at 548.

35. 452 U.S. at 546. Justice Rehnquist further explained his position in a footnote, that, "I do not argue that the existence of several plausible interpretations of the statute is a ground for invoking the delegation doctrine: I invoke the delegation doctrine because Congress failed to *choose* among those plausible interpretations." 452 U.S. at 548, n. (Emphasis in original.)

juggling performed by the majority which ultimately resulted in the rejection of petitioner's argument that section 6(b)(5) required a cost-benefit analysis was unnecessary. Had Congress defined what it meant by the phrase "to the extent feasible," the search for a definition would not have fallen upon, first the Secretary of Labor, and finally nine non-elected judges. The standard should have been delineated in the statute. If Congress desires the Secretary to use a cost-benefit analysis in determining permissible exposure levels, it should state so in the statute; if not, it should state that as well, and avoid the resort by the Court to the legislative history of the statute to deduce the legislative intent. The fear is that a "bald delegation" of power allows too much discretion on the part of the administering agency, a subject discussed further in Part IV of this article.

C. *The Not So Separate Powers of Agencies*

> The administrative process has developed in spite of the dominant theoretical thinking, not in response to it.[36]

Understandably, individuals entrusted with the duty to resolve problems are more concerned with finding immediate and practical answers to those problems. They are not concerned with philosophical arguments as to why they cannot do what needs to be done.

Agencies can be divided into two basic types: regulatory, which have the authority to regulate the economic activities of individuals and businesses; and benefactory, which have the authority to provide benefits to promote social and economic welfare. Examples of regulatory agencies include: the Interstate Commerce Commission (ICC), National Labor Relations Board (NLRB), and the Securities and Exchange Commission (SEC). Examples of benefactory agencies include the Social Security Administration, and state and federal public assistance agencies.[37]

The blending of powers which exists in the administrative process is a reflection of the blending found in the three traditional branches. The following discussion describes the major powers exercised by modern independent administrative agencies.

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36. 1 K. Davis, Administrative Law Treatise, § 2.1, 59-60. (2d ed. 1978).

37. W. Gellhorn, C. Byse & P. Strauss, Administrative Law, 16-18 (1979).

1. *Investigative (Subpoenas & Inspections)*

Prior to the 1940's, the Constitution, specifically the Fourth and Fifth Amendments, provided virtual blanket protection from unnecessary federal governmental investigation.[38] In 1908, Justice Holmes voiced the attitude of the times in *Harriman v. ICC*,[39] "the power to require testimony is limited . . . to . . . cases . . . where investigations concern a specific breach of the law."[40] Consequently, the Interstate Commerce Commission could not use subpoenas in investigations undertaken to determine regulatory policy.[41] Later, Justice Holmes similarly refused to allow the Federal Trade Commission to go on a "fishing expedition" in *FTC v. American Tobacco Company*.[42] Holmes adamantly argued, "[i]t is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up."[43]

The Supreme Court reversed its policy in 1943 when it permitted the issuance of subpoenas for payroll records by the Secretary of Labor pursuant to the Walsh-Healey Act.[44] As the evidence sought by the Secretary was neither "incompetent or irrelevant" to

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38. *Compare* Harriman v. I.C.C., 211 U.S. 407 (1908) *with* Endicott-Johnson Corp v. Perkins, 317 U.S. 501 91943). *See infra* notes 39 and 41 and accompanying text.

39. 211 U.S. 407 (1908). In November, 1906, the ICC, on its own motion and not upon a complaint, began an investigation to determine whether certain combinations and practices engaged in by railroads were defeating the purposes of the Commission. Harriman was a director and Chairman of the Executive Committee of the Union Pacific Railroad. He was called as a witness by the Commission which was investigating the relations between Union Pacific and other connecting railroads. During the inquiry, the Commission asked Harriman several questions with regard to the amount of stock Union Pacific owned in other railroads. At the advice of counsel, Harriman declined to answer. The Commission directed him to respond and he refused. The Circuit Court directed him to answer and he appealed. The Supreme Court reversed, and further stated that "the purposes of the act for which the commission may exact evidence embrace only complaints for violations of the act, and investigations by the commission upon matters that might have been made the object of a complaint." 211 U.S. at 419.

40. 211 U.S. at 419-20.

41. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 41 (2d ed. 1978).

42. 264 U.S. 298 (1924). The FTC brought petitions for writs of mandamus in the district court against the manufacturers and sellers of tobacco requiring the production of records, contracts and correspondence for inspection and examination. The FTC was investigating the possibility of unfair competition through price fixing. The district court denied the issuance of the writs and the Supreme Court affirmed. The Court stated that "a general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced." 264 U.S. at 306.

43. *American Tobacco*, 264 U.S. at 305-06.

44. Walsh-Healey Public Contracts Act, 41 U.S.C.A. § 35-45 (West 1987). *See also* Endicott-Johnson Corp. v. Perkins, 317 U.S. 501 (1943). The Act provided that government contracts would not be granted to corporations in violation of the minimum wage standards.

the duties entrusted to the Secretary, the district court was ordered to enforce the subpoena for production of the information.[45] A similar situation existed in 1946 when the Court upheld the issuance of a subpoena under the Fair Labor Standards Act.[46] Justice Rutledge's opinion overruled many pre-1943 holdings, and more specifically *American Tobacco*, with this language: "The very purpose of the subpoena . . . is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so."[47]

It should be noted, however, that the change in the Court's attitude toward subpoenas was not totally the result of a change in the Court's philosophy. Congress had made its intent abundantly clear by including language in the statutes which granted the agency administrator the power to investigate and subpoena. Thus, Congress was becoming more refined in the direction it was giving the agencies.

The strengthening of the administrative hand continued in the 1970's as the courts wrestled to balance the need of the government to conduct investigations in order to make informed policy decisions with the need to protect the private individual from unreasonable searches and self-incrimination.[48] In 1967, the Court of Appeals for the Third Circuit reasoned that the power of agencies to issue investigative subpoenas depends upon congressional authorization in the enabling statute.[49] This is in accord with other courts of appeal which have concluded that the burden of proving a subpoena is unreasonably placed on the challenger.[50]

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45. 317 U.S. at 509.

46. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). Section 11(a) of the Fair Labor Standards Act authorized the Administrator of the Wage and Hour Division of the Department of Labor to investigate practices and conditions in any industry covered by the Act. The Act incorporated § 9 of the Federal Trade Commission Act which authorized the issuance and judicial enforcement of a subpoena *decus tecum* requesting the production of records, books and papers during an investigation of a violation of the Act. The Court reasoned that the Administrator's function in enforcing the Act was similar to that of a grand jury. 327 U.S. at 216.

47. 327 U.S. at 201.

48. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 109, 232-33 (1959).

49. Serr v. Sullivan, 270 F. Supp. 544 (E.D. Pa. 1967), *aff'd* 390 F.2d 619 (3d Cir. 1967). *See also* Donovan v. Lone Steer, Inc., 464 U.S. 408 (1984) which affirms the *Oklahoma Press* holding. "[T]he defenses available to an employer do not include the right to insist upon a judicial warrant as a condition precedent to a valid administrative subpoena." *Id.* at 414-15.

50. FTC v. Rockefeller, 591 F.2d 182 (2d Cir. 1979); Small Business Admin. v. Barron, 240 F. Supp. 434 (W.D.S.C. 1965) (challenger has burden of proving that the subpoenas

Generally, government agencies engaged in the inspection of private commercial enterprises must have a showing of probable cause to satisfy Fourth Amendment requirements.[51] There are several exceptions to this rule, notably those industries with a long history of close regulation such as liquor and firearms.[52] For those businesses still protected by the Fourth Amendment Warrant Clause, the Court's language in *Marshall v. Barlow's Inc.*,[53] that traditional probable cause was not required in certain administrative searches,[54] is very important. According to the Court, in administrative matters, what is necessary is a showing that reasonable legislative or administrative standards for conducting an investigation are satisfied.[55]

In 1981, the Supreme Court added mining industries to the list of comprehensively regulated industries after concluding there was a substantial federal interest in the improvement of mining conditions which was evidenced by the specific standards outlined in section 103(a) of the Federal Mine Safety and Health Act.[56]

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requiring him to produce books and records of the corporation were unduly broad or oppressive). In *FTC v. Rockefeller*, the Court of Appeals for the Second Circuit held that a showing by the FTC that an ancillary investigation was necessary to aid the principal investigation was sufficient to meet the statutory requirement of 15 U.S.C. § 49 for issuance of subpoenas to several bank holding companies. 591 F.2d at 191.

51. *See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

In *Marshall v. Barlow's, Inc.*, the owner of a electrical and plumbing installation petitioned for injunctive relief from a warrantless investigation by the agent of the Department of Labor pursuant to the Occupational Safety and Health Act (OSHA). The Court reasoned that the exceptions to the warrant clause requirement of the fourth amendment were limited to those closely regulated industries with a long history of close supervision and inspection which had no reasonable expectation of privacy. Consequently, in any other commercial building, just as with a private home, the warrant clause of the fourth amendment provides protection from warrantless searches.

Colonnade involved one of the closely regulated industry; that of liquor. In *Colonnade*, the Court concluded that the general rule requiring a warrant to search commercial premises is not applicable to inspections under liquor laws. The statute does not, however, authorize warrantless searches, but rather, makes it an offense to refuse to admit the inspector.

52. *Id.*

53. 436 U.S. 307 (1978). *See supra* note 51 and accompanying text.

54. 436 U.S. at 320.

55. 436 U.S. at 320.

56. Donovan v. Dewey, 452 U.S. 594 (1981). The Court held that warrantless inspections pursuant to § 103(a) of the Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 91 Stat. 1290, 30 U.S.C. § 801 *et seq.* (1976) were reasonable within the meaning of the fourth amendment. The Court reasoned that since the mine owners were aware that regular inspections would be made, nothing would be gained by the additional requirement of a warrant since the discretion and arbitrariness which agency officials could exercise in determining which mines to inspect and which would be curtailed by the regulatory scheme. In

2. *Regulatory (Rulemaking)*

The regulatory powers exercised by agencies such as the ICC fall into three categories: licensing power, by which the agency can control entry into a given economic activity; rate-making power, which is the authority to fix the rates charged by companies subject to its jurisdiction; and power over business practices, with which the agency can approve or prohibit practices engaged in by the industry.[57]

Time and again federal courts have upheld the power of agencies to promulgate substantive rules when the statutory language grants the administrator the power to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act."[58] Since such rules often have the force of law on those regulated,[59] concern naturally exists that those regulated be permitted to have a voice in the policy determination. Despite the existence of the Administrative Procedure Act[60] which specifies the procedures to be followed by agencies, federal courts for many years would engraft their own notions of procedural requirements upon agencies. The Supreme Court put a stop to this in 1978 with its decision in the *Vermont Yankee* case.[61] Justice Rehnquist, penning the opinion for a unanimous (seven Justice) court, stated: "Absent constitutional constraints or compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their . . . du-

addition, the regulations clearly state what standards must be met. 452 U.S. at 605.

"The statute provides that federal mine inspectors are to inspect underground mines at least four times per year and surface mines at least twice a year to insure compliance with these standards." *Donovan*, 452 U.S. at 596.

57. W. Gellhorn, C. Byse & P. Strauss, Administrative Law, 16-17 (1979).

58. In re Permanent Surface Mining Regulation Litigation, 653 F.2d 514 (D.C. Cir. 1981). The Court of Appeals for the D.C. Circuit held that pursuant to the Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87, 91 Stat. 447, 30 U.S.C. § 1201 *et seq.*, the Secretary of the Interior had the "rulemaking power to prescribe minimum information requirements for permit applications submitted to state regulatory agencies." 653 F.2d at 516.

59. For cases holding that agency rules have the force of law, *see* J.G. Masonry, Inc. v. Dep't of Revenue, 680 P.2d 291 (Kan. 1984); Reed v. Hansbarger, 314 S.E. 2d 616 (W. Va. 1984); *in re* Matter of GP, 679 P.2d 976 (Wyo. 1984).

60. Administrative Procedure Act, originally enacted June 11, 1946, c. 324, 60 Stat. 237, *repealed* and *revised* Pub. L. 89-554, 80 Stat. 381 (1966), *codified at* 5 U.S.C. § 551, *et. seq.* (1982).

61. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). The case involved the scope of judicial review with regard to the procedures followed by the Atomic Energy Commission's licensing of nuclear power plants.

ties."[62] Thus, 5 U.S.C. § 553 establishes the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."[63]

3. *Adjudicatory*

Essentially, the difference between rulemaking and adjudication by an agency is the same as the difference between Congress and the Supreme Court. Both make rules: Congressional rules are referred to as statutes, treaties, public laws, and resolutions while judicial rules are known as principles or rules of law. Congressional acts involve across the board line-drawing which act prospectively and generally effect everyone. Judicial principles bind the parties before the Court and in doing so set up a precedent so that people similarly situated will be treated to the same general principle. Usually, judicial decisions must have a retroactive effect to be given weight.[64]

The choice of proceeding with its statutorily imposed duties by rulemaking (legislative power) or by adjudication is one left to the agency.[65] As the Court explained in *S.E.C. v. Chenery*,[66] problems might arise which an agency could not foresee but which need to be handled on an *ad hoc* basis;[67] while if it determines that certain standards must be promulgated in order to enforce the statute the agency is entrusted with administering, then a general rule may be in order.[68] A rigid requirement that an agency proceed one way or the other would make the administrative process too inflexible and incapable of dealing with the myriad of specialized problems which can arise.[69] Agency action by adjudication acts on the parties before the administrator. Yet, it can also have the force of law because it gives an indication of the policy now being enforced by the

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62. 435 U.S. at 543.

63. 435 U.S. at 524.

64. *But see* S.E.C. v. Chenery Corp., 332 U.S. 194 (1947). In *Chenery*, the Court noted that the Commission's action in the present case was not prohibited by its failure to anticipate the problem and implement a general rule. To so hold would be to say the Commission has no power to perform its statutory duty. 332 U.S. at 201-202.

65. S.E.C. v. Chenery Corp., 332 U.S. 194 (1947)(Commission's order prohibiting purchase of company's stock while undergoing reorganization affirmed as complying with §§ 7 and 11 of the Holding Company Act). *See also* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) (company ordered to supply list of employees to union for use in election must comply with valid Board order).

66. 332 U.S. 194 (1947).

67. 332 U.S. at 202.

68. *Id.*

69. *Chenery*, 332 U.S. at 202-203.

agency. One of the best examples of an agency directing policy through adjudication is the National Labor Relations Board, which enforces virtually all its regulatory policy through the adjudicatory system.[70]

Agency adjudication on an informal basis, *i.e.*, without a trial type hearing, can be seen in the everyday workings of an agency. For example, the grant or denial of benefits by the Social Security Administration for a disability claim requires the administrator (or a subordinate) to apply the given standards to the individual and reach a determination. This is adjudication. Should the potential recipient be denied, he has the right to appeal through the agency's remedies. Generally, all remedies through the agency must be exhausted before the individual can obtain judicial review through the courts.[71]

III. Quest for Legitimacy

> Institutional legitimacy is an indispensable condition for institutional effectiveness. . . . [L]egitimacy permits an institution to achieve its goals without the regular necessity of threatening the use of force and creating renewed episodes of public resentment.[72]

Even the most legitimate of governments occasionally finds itself

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70. *See* National Labor Relations Bd. v. Hearst Pub., Inc., 322 U.S. 111 (1944). The NLRB was entrusted with the task of enforcing the Wagner Act. In doing so, the Board expanded the common law definition of employee. The Supreme Court upheld the Board's definition, thereby overturning the court of appeals determination that Congress intended the common law definition to apply. The Court noted:

> It is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act. ... Every experience in the administration of the statute gives it familiarity with the circumstances and background ...

322 U.S. at 130.

See also N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267 (1974), wherein the Court determined that the Board could, by adjudication, overrule a long line of cases and adopt a new rule without resorting to rulemaking power.

71. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). This is known as the doctrine of exhaustion. Exceptions to the doctrine are: 1) the proceeding was unconstitutional or will cause harm to the plaintiff, (Rosenthal & Co. v. Bagley, 581 F.2d 1258, 1261 (7th Cir. 1978)) 2) agency action was unauthorized, (Leedom v. Kyne, 358 U.S. 184, 188 (1958)) 3) conflict exists between federal jurisdiction and a state agency, (U.S. Const. art. VI, cl. 2) 4) agency is deadlocked or exhaustion is futile, (4 K. Davis, Administrative Law Treatise, § 26:11 (2d Ed. 1983)) 5) § 704 of the Administrative Procedure Act does not require exhaustion (5 U.S.C. § 704 (1982)).

72. J. Freedman, Crisis and Legitimacy, 10 (1978). As Max Weber would have it, the authority of any institution ultimately rests upon the popular belief of its legitimacy. *Id.*, *citing* M. Weber, The Theory of Social and Economic Organization (T. Parsons ed. 1970).

resorting to force, as evidenced by the federal government's use of the military to quash a few "rebellions", *e. g.*, the Whiskey Rebellion, the Civil War, and its twentieth century counterpart in 1956 after *Brown v. Board of Education of Topeka, Kansas*.[73] How then can an institution, the legitimacy of which is questioned because its very nature violates the separation of powers doctrine be accepted, obeyed and respected?

One commentator suggested the sense of "crisis" results from "the failure of many Americans to appreciate the relevance of four principal sources of legitimacy to the role that administrative agencies play in the American government."[74] First, agencies occupy an important position in the governmental framework; second, the agencies embody significant elements of political accountability; third, the effectiveness of many agencies in meeting statutory requirements; and fourth, for the most part, agency decision-making procedures are fair.[75]

The second half of this article will consider the controls the three traditional branches of government place on the administrative process, as well as the limitations the Administrative Procedure Act requires the agencies to place on themselves. This is premised on a simple syllogistic argument: if a controllable government entity is more readily accepted by the governed, and acceptance equates to legitimacy, then proof of control should yield legitimacy.

IV. Control of the Administrative State

> Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.[76]

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73. 347 U.S. 483 (1954), *see also* Cooper v. Aaron, 358 U.S. 1 (1958). *Brown* is, of course, the case overruling Plessy v. Ferguson, 163 U.S. 537 (1896) and the policy of "separate but equal," with its holding that the doctrine denied African - American children an education equal to that received by white children.

When the Governor and Legislature of Arkansas refused to implement the desegregation policy required by *Brown* on the grounds that State officers have no duty to obey federal court orders interpreting the United States Constitution, the Supreme Court, in a unanimous opinion, stated "Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' " *Cooper*, 358 U.S. at 18. Thus, while it is true that the responsibility for public education generally falls on the states, it is equally true that the undertaking must comport with federal constitutional requirements. *Id.* at 19.

74. J. Freedman, Crisis and Legitimacy, 11 (1978).

75. *Id.*

76. Kenneth C. Davis, Discretionary Justice: A Preliminary Inquiry, 3 (1969).

According to one commentator, most instances of discretionary justice exercised by agency administrators fall beyond the scope of judicial review.[77] It is this almost unbridled power which if not controlled, can switch from discretion to tyranny. Examples of discretionary justice are commonplace: prosecutorial discretion of who to or not to prosecute; agency discretion in determining which of numerous violators the agency should sanction to best effectuate policy;[78] and the very simple but often very important decision of who receives the benefits offered by the government. In an effort to restrain some of the discretion exercised by agencies, each of the three traditional branches of government exerts its own area of expertise over the agency.

A. *Legislative*

Prior to 1983, nearly 200 statutory provisions existed in various enabling statutes which allowed Congress to have the final say in an agency's determination, whether it involved agency adjudication or rulemaking.[79] This device, known as the legislative veto, came into being in 1929 when President Hoover requested authority to reorganize the governmental structure.[80] The legislative veto offered a solution to the problems arising from the delegation of powers to handle national security and foreign affairs during the second world war.[81] During the 1970's, the veto permitted the granting of broad powers to administrators who were entrusted with settling complex issues which could not easily be resolved within the framework of a tightly worded enabling statute.[82] It was, in essence, an indispensable political invention which allowed the President and Congress to effect policy decisions and assure the accountability of independent agencies, all the while preserving Congressional control over lawmaking.[83] With the decision in *I.N.S. v. Chada*,[84] the Supreme Court invalidated the legislative veto for three reasons: one, it violated the separation of powers

77. *Id.* at 4.

78. FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967). (In the absence of an abuse of agency discretion, the courts cannot overturn determinations which require the specialized judgment of the agency.)

79. 462 U.S. at 968.

80. I.N.S. v. Chada, 462 U.S. 919, 968 (1983) (Justice White, dissenting). *See supra* note 6 for further discussion of *Chada*.

81. *Id.* at 969.

82. *Id.* at 970.

83. *Id.* at 972-73.

84. 462 U.S. 919. *See supra* note 7.

doctrine by allowing the legislature to exercise an executive power; two, it violated the principle of bi-cameralism (*i.e.*, except for instances enumerated in the Constitution, all bills had to be presented from both Houses); and, three, it violated the presentment clause (*i.e.*, any bill passing both Houses had to be presented to the Executive for signature before it became law).[85]

With the loss of the legislative veto, how can Congress assure accountability of independent and executive agencies? One method, suggested by Kenneth Davis in his book *Discretionary Justice: A Preliminary Inquiry*, is that Congress write the statutes with greater specificity thereby eliminating much of the agency's discretion. Discretionary power can suffer from being too broad or too narrow; normally, the error is toward making discretion too broad which leads to arbitrariness or inequality.[86] If the statute is too narrow, one remedy is for the agency administering it to make recommendations to the legislature for statutory amendment.[87]

While such an approach (specificity in the enabling statute) is theoretically the most favorable, and is certainly likely to meet with the mandates of Justice Rehnquist's dissent in the "*Cotton Dust*" Case, it is not the most practical approach. Consider the time and effort put into the 1986 Internal Revenue Code. Consider also that despite these efforts, volumes of Treasury Regulations and Revenue Rulings will result as individuals question the meaning of each new statutory section. If each piece of legislation enacted by Congress had to reach the level of specificity of the Internal Revenue Code, lawmaking as such would come to a screeching halt in a seemingly torpid system. Congress, and the public as well, would find this intolerable. Consequently, Congress has within its power several alternatives which vary from direct devices, such as: explicit statutory override of an offending regulation, joint resolutions, and the limitation or removal of agency jurisdiction; to indirect methods, such as: committee vetoes, critical oversight hearings, and limitations on appropriations.[88] The power Congress exerts over the agencies is becoming increasingly more political.

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85. *Id.*, at 959-67. In his concurring opinion, Justice Powell would have limited the reasons for invalidation in this case to the fact that Congress, by deciding to deport an alien, was exercising judicial power. *Id.* at 965-67. This would have saved the legislative veto in general by limiting the holding of the case to the narrowest issues.

86. KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY, 52 (1969).

87. *Id.* at 53.

88. Frederick M. Kaiser, *Congressional Control of Executive Actions in the Aftermath of the Chada Decision*, 36 ADMIN. L. REV. 241 (1984).

The theoretical argument that agencies have no accountability to the public since they are manned by nonelected officials appears insignificant when viewed realistically.

B. *Judicial Review*

If habeas corpus is the Great Writ, due process is the Great Clause.[89]

"Most administrative law is judge-made law."[90] Since administrative law concerns the powers and procedures of administrative agencies, including the law governing judicial review of agency actions, this area of law has "been one of the areas of special judicial creativity."[91]

One case has altered the balance between the agency and judicial authority over statutory interpretation. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[92] the Court held that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear; that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction.[93]

Thus, the Court has clearly indicated that the courts of appeal are not to impose their interpretation of the statute on the agencies absent an administrative interpretation.[94]

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89. J. Mashaw, Due Process in the Administrative State, 2 (1985).

90. 1 K. Davis, Admin. Law Treatise, §1:9 (2d ed. 1978).

91. *Id.*

92. 467 U.S. 837 (1984).

93. *Id.* 842-43. This attitude is not new to the Court, although it has resurfaced in recent years. The Court had originally stated similar language as early as 1947.

> The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is not our concern. Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress.

S.E.C. v. Chenery, 332 U.S. 194, 207 (1947) (citations omitted). *See supra* note 64 for a discussion of *Chenery*.

94. Even in the absence of a state administrative interpretation it may be prudent for a federal court to abstain from hearing a case if it is evident that the state agency entrusted

Although the *Vermont Yankee* case may have put a stop, at least temporarily, to judicial creativity with regard to rulemaking procedures, and *Chevron* has halted the imposition of the courts' interpretation of the regulatory statute on the agency, it is doubtful the Court will ever severely limit the scope of review with regard to adjudicatory procedures followed by agencies. This naturally follows from the distinction between rulemaking (legislation) and adjudication. Whenever a government body acts to affect the rights of an individual, whether property or liberty interests are involved, the issue is raised to a constitutional level invoking either fifth or fourteenth amendment protections of due process.[95] Regulation or rulemaking, which is generally across the board line-drawing, in essence, is due process,[96] because the rule of conduct effects all of a large group of people. Fundamentally, due process is fairness. "Procedural due process rules are meant to protect persons not from the deprivation of life, liberty or property, but from the mistaken or unjustified deprivation of life, liberty or property."[97]

It is no small coincidence that the "due process explosion" of the 1970's resulted from review of agency determinations.[98] As the effects of both regulatory and benefactory agencies became more pervasive, individuals began to question, *not* whether the agencies could act as they did, but whether the act was taken properly. Necessity of the times and the complexity of the society demonstrated the need for the agencies to act, but the individuals effected wanted to make certain the act was as fair as possible. The Court was willing to oblige by eliminating the distinction between

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with regulating the subject matter at issue is presently considering the issue. *See* Burford v. Sun Oil Co., 319 U.S. 312 (1943) (a federal court having jurisdiction, whether by diversity or federal question, of a suit to enjoin enforcement of a state agency may, in its sound discretion, refuse such relief if to grant it would be prejudicial to the public interest). Such is generally not an issue however, when the plaintiff raises a pre-emption issue. Kentucky West Virginia Gas v. Pennsylvania Public Utility Comm'n, 791 F.2d 1111 (3d Cir. 1986) (Abstention by district court is usually not appropriate where a federal plaintiff asserts a pre-emption claim). *Id.* at 1117.

95. *See* Goldberg v. Kelly, 397 U.S. 254 (1970). This case, which eliminated the "right v. privilege" distinction involved the termination of welfare benefits by the New York City Department of Social Services.

96. Provided the agency follows the procedures of § 553 of the A.P.A. regarding formal rulemaking.

97. Carey v. Piphus, 435 U.S. 247, 259 (1978). (It was a violation of due process to suspend high school students without affording them an opportunity to answer the charges, even if the suspensions were justified.)

98. The "due process explosion" referred to is that resulting from the elimination of the "right v. privilege" argument in *Goldberg v. Kelly*. This should not be confused with the changes in constitutional criminal procedure developed during the Warren Court.

rights and privileges. That may seem simplistic, yet the elimination of the distinction opened up the rights of due process to those previously denied a hearing.

For example, in 1956, the security officer of the Naval Gun Factory in Washington, D.C. revoked the security pass of a cafeteria worker without a hearing or any indication of a reasons for the revocation.[99] The Supreme Court denied the individual's due process claim stating that such government employment was "a mere privilege subject to the Executive's plenary power . . . [therefore] notice and hearing are not constitutionally required."[100] Compare that holding with *Goldberg* eleven years later, where the Court determined that the fourteenth amendment procedural protections apply to liberty and property interests and recognized that the property interests are determined by whether or not the individual has a legitimate claim of entitlement to the interest.[101]

An attempt was made to curtail the "explosion" in 1974 by limiting due process to the procedures supplied in the enabling statute granting the benefit. The "bitter with the sweet" approach, announced by Justice Rehnquist in *Arnett v. Kennedy*,[102] would limit the scope of the procedural protection of a statutorily granted benefit, whether it be employment or public assistance, to the proce-

99. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 887-88 (1961).

100. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). The Court reasoned that "[A]ll that was denied her was the opportunity to work at one isolated and specific military installation." *Id.* at 896.

101. *Goldberg*, 397 U.S. at 254, 261-62 (1970). *See* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). The case involved a college teacher who was not rehired after the expiration of his one-year contract. Roth claimed the Board refused to rehire him due to his outspokenness against the Vietnam War. The Board contended that it did not have to give Roth a hearing to discuss the issue since the contract had expired and he was not entitled to a hearing. The Supreme Court agreed, thereby defining the scope of property interests:

> [T]o have a property interest in a benefit, a person clearly must have more than an abstrct need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
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> * * *
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> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law.

408 U.S. at 577. In a dissenting opinion, Justice Douglas stated:

> [W]hen a violation of the First Amendment rights is alleged, the reasons for dismissal or nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution.

408 U.S. at 582. Thus, he would have granted a hearing because of the chilling effect the nonrenewal would have on constitutionally protected speech. *Id.* at 585-87.

102. 416 U.S. 134 (1974).

dures outlined in the statute authorizing agency action.[103] This approach was never accepted by a majority of the Court which refused to combine substance with procedure as Justice Rehnquist's approach would require. As Justice Powell put it in his concurring opinion in *Arnett*, "the right to due process is conferred not by legislative grace, but by constitutional guarantee."[104]

The courts have also attempted to provide some check on the discretion exercised at the informal level, that is, agency guidelines or standards which do not have the force of law but which effect the method by which the agency carries out legislative policy. In *Morton v. Ruiz*,[105] the Supreme Court held that the agency must let the standard be generally known to the public to assure its consistent application, and, the agency interpretation must conform to the legislative purpose, in order to be given deference by the courts.[106]

The need to maintain the fairness of daily, ordinary agency decisions is a matter of great concern for both the legislators creating the benefit and the recipients of the benefit. Cases such as *Ruiz* began to provide the framework to control discretionary justice.

C. *Executive Control*

Most of the executive's control of the administrative state can be seen as politics in action. This includes the powers of appointment

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103. *Id.* In *Arnett*, a federal civil servant was dismissed for making allegedly defamatory comments about some of his superior. He was informed of his right to answer the charges but chose to bring suit for declaratory and injunctive relief since the informal hearing would be held by the superior allegedly defamed. A plurality of the Court, Justice Rehnquist opining, concluded that where a statute provides that a federal employee can be dismissed only for cause and further conditions the grant of protection on the use of the procedures outlined in the statute, the litigant is required to use only those procedures. 416 U.S. at 153-54.

Justice Powell, writing a concurring opinion, determined that the statute gave the employee a property interest in employment which could only be terminated by constitutionally acceptable procedures. 416 U.S. at 164-71. Justice Powell then analyzed the procedures and determined they comported with due process. *Id.* at 171. His rationale was later adopted by the majority of the Court. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) discussed at note 134 *infra.*

104. *Arnett*, 416 U.S. at 167. *See also* note 98 *supra.*

105. 415 U.S. 199 (1974).

106. *Id.*. Plaintiffs, Papago Indians, were denied benefits by the Bureau of Indian Affairs ("BIA") based on an unplublished internal policy which denied benefits to Indians not living on the reservation. The Court voided the BIA policy on the basis that failure of the Secretary of the Interior to publish the policy and treat it as a legislative rule deprived the policy of effect. Additionally, the Court found that the BIA internal policy was contrary to Congressional intent since Congress never distinguished between the Indians living on and those living near the reservation. 415 U.S. at 237.

and removal from office of top administrators, direction of policy within statutory boundaries, and organization or reorganization of agency power. Some of the executive's control over administrative agencies has been weakened as Congress exercises more control over the Executive. Perhaps the single most effective control the executive retains over the administrative state is the power of the purse. In 1921, the Budget and Accounting Act established the Bureau of the Budget which required that all requests for appropriations be channelled through the Bureau to Congress. In 1970, this Bureau became known as the Office of Management and Budget.[107] In this manner, presidential control over finances can be used to control policy, thereby resulting in administrative repeal of legislative action through the funding process.[108]

A significant attempt was made in 1985 to control the budget deficit through the use of the Office of Budget Management with the passage of the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act).[109] Section 251 of the Act would have permitted the Comptroller General to recommend to the President reductions in spending and appropriations.[110] The section was found to be unconstitutional as a violation of the separation of powers doctrine in *Synar v. United States*.[111] The Court reasoned that since the Comptroller General exercised powers executive in nature, yet was subject to removal only by Congress itself, this permitted Congress to retain control over an executive officer, an action in violation of the theory of separation of powers.[112] In view of the fact that section 274(f), or the "fallback" provision of the Gramm-Rudman Act is still valid legislation,[113] deficit reduction legislation remains a viable control over the administrative state.

D. *Administrative Procedure Act*

The outstanding single development in administrative law and in the ad-

107. W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW, 139 (1979).
108. *Id.*
109. Pub. L. No. 99-177, § 200, 99 Stat. 1038 (1985).
110. 80 Stat. 1063 (1985).
111. 626 F. Supp. 1374, 1388 (D.D.C. 1986), *aff'd sub nom.*, Bowsher v. Synar, 478 U.S. 714 (1986).
112. *Bowsher v. Synar*, 478 U.S. at 736. "[T]he powers vested in the Comptroller General under section 251 violate the command of the Constitution that Congress play no direct role in the execution of the laws." *Id.*
113. *Id.* at 735.

> ministrative agencies of the last half-century . . . is the genesis and enactment of the Administrative Procedure Act.[114]

The Administrative Procedure Act appears in Title V, of the United States Code.[115] The two most important chapters of the Act, for the purpose of this article, are Chapter 5 - Administrative Procedure, and Chapter 7 - Judicial Review.

Section 553 (Rulemaking) requires an agency to publish general notice of a proposed rule within the Federal Register.[116] After notice, the agency is to allow interested persons an opportunity to participate in the rulemaking by submitting written data, views, or arguments relevant to the matter.[117] A hearing may be instituted, but is not mandatory and may be omitted if the agency determines the hearing to be is unnecessary or contrary to the public good.[118] After consideration, publication of the final substantive rule is made at least 30 days before the effective date.[119] The aforementioned procedures are sometimes referred to as procedures for formal rulemaking.[120] A variation known as "notice and comment" exists for informal rulemaking. Totally exempt from the procedures are policy statements and interpretive rules.[121]

The sections describing the procedures for agency adjudication (§§ 554-557), while instrumental in that they require the existence of framework for review within the administrative system, are equally as important as the grant of right of judicial review encompassed in section 702, which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant [enabling] statute, is entitled to judicial review thereof."[122]

The statutory grant of standing found in section 702 is controlled by the basic notion found in Article III that there must be a live case or controversy.[123] Unless the plaintiff has a direct per-

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114. J.S. Williams, *Fifty Years of the Law of the Federal Administrative Agencies - And Beyond*, 29 FED. B.J. 267 (1970).

115. 5 U.S.C. § 551 *et. seq.* (1982).

116. 5 U.S.C. § 553 (1982).

117. 5 U.S.C. § 553(b) *and* § 556 (1982).

118. 5 U.S.C. § 553(b)(3)(B) (1982).

119. 5 U.S.C. § 553(d) (1982).

120. 5 U.S.C. § 553(c) (1982).

121. *See generally* 5 U.S.C. § 553, *et seq* (1982).

122. 5 U.S.C. § 702 (1976).

123. Article III of the United States Constitution proves in pertinent part: "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitutuion, the Laws of the United States, and Treaties made ... to Controversies to which the United States shall be a party;—to Controversies between two or more states. ..." U.S. CONST. art.

sonal interest and can show causation between the injury and the remedy requested, there is no case or controversy.[124] No Court can act as a superior over the other branches of the government, but must instead perform its constitutional function of deciding an actual case before the court.[125]

The exceptions to the broad grant of power include statutory preclusion of judicial review and instances where agency action is committed to the discretion of the agency.[126] A third, judicially created, exception exists where the case calls for a determination outside the judicial domain.[127]

Since its passage in 1946, the Administrative Procedure Act,[128] has not been radically changed, with the possible exception of the Freedom of Information Act (FOIA) encompassed in Section 552.[129] Previous to the enactment of the FOIA, rules and organizational material had to be published in the Federal Register. The FOIA further required agencies to index and make available to the public all final opinions and orders in adjudacatory cases, statements of policy and interpretation, and staff manuals and instructions that affect an individual.[130] "Failure to comply with these . . . requirements deprives the agency of its ability to rely on these possible sources of law, absent actual notice of them to the affected party."[131] Particularly important is the FOIA requirement that information must be made available to any person, without restriction that it be a party involved in proceedings with the agency.[132]

III § 2.

124. Allen v. Wright, 468 U.S. 737, *reh. denied*, 468 U.S. 1250 (1984). Plaintiffs, parents of African American children, brought a class action against the Internal Revenue Service ("IRS") alleging that the IRS had failed to adopt sufficient standards to fulfill the IRS' obligation under 26 U.S.C. §§ 501(a) and (c)(3) to deny exempt status to schools which racially discriminate. The Court found that the parents lacked standing. In order to have standing, a plaintiff must show a judicially cognizable injury fairly traceable to the unlawful conduct of the defendant. There is an additional element of redressability, *i.e.*, that the relief requested will redress the violation of the law alleged. *Allen*, 468 U.S. at 753, n.19.

125. B. Schwartz, *Administrative Law Cases During 1984*, 37 ADMIN. L. REV. 148-50 (1985).

126. 5. U.S.C. § 701(a)(1) & (2) (1982).

127. Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969). There exist "issues [which] call for determinations that lie outside sound judicial domain in terms of aptitude, facilities, and responsibility." *Id.* at 129. This is particularly true in areas of foreign affairs.

128. Act of June 11, 1946, ch. 324, 60 Stat. 237, *repealed and reenacted* Pub. L. No. 89-554, 80 Stat. 381 *now codified as* 5 U.S.C. § 551 *et seq.* (1982).

129. 5 U.S.C. § 552(a) (1982).

130. W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW, 580 (1979).

131. *Id.*

132. The exceptions to the Freedom of Information Act are listed in § 552(b) and include, but are not limited to, matters of national security, trade secrets, inter-agency

The decision in *Morton v. Ruiz* was judicial vindication of the FOIA.

V. Conclusion

This author has spent considerable time expounding the virtues and decrying the faults of the present American administrative state, yet all the verbiage will not change the fact that it exists, it has its purpose, and it generally works. That statement indicates a "utilitarian" approach to the acceptance of laws and government, but the author is not as pessimistic as it would first appear. The administrative leviathan is not the only governmental body which exists within the American society. The three more traditional branches still retain an effective control over agencies through their various functions. Most notable are the legislature's power to create and provide standards for the agency in the enabling statutes, the executive's management of the budget, and the judiciary's right of review. While the traditional branches can require fair and reasonable procedures within the sphere of formal administrative activities, it is the daily, ordinary, informal actions which effect numerous individuals which appear to be beyond traditional control. Significantly, in this regard to controlling the informal actions, an immense potential exists within the Administrative Procedure Act, especially the Freedom of Information Act. By refusing to give deference to statements of general policy unless the agency has published those standards, the courts and the legislature have come that much closer to achieving definiteness and consistency in agency determinations. Consequently, there is less of a field of discretion to be exercised in that area where the courts are limited in their standard of review to an "abuse of discretion."[133]

Understandably, it appears that judicial review may be the best control over the administrative system since it was the inability of the legislature to handle detailed regulation and provision of assis-

memorandum and personnel files.

133. 5 U.S.C. § 706(2)(A). *See also* Citizen's to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). *Volpe* involved a group of citizens in Memphis, Tennessee who were concerned that the Secretary of Transportation would authorize the use of federal highway funds to put a six lane highway through a public park. The relevant statutes, § 4(f) of the Department of Transportation Act of 1966 and § 138 of the Federal-Aid Highway Act of 1968 permitted the construction of highways through park land only if there is not another feasible and prudent route. The Court found that the record was insufficient to determine if the Secretary had acted in an arbitrary or capricious manner, abused his discretion or otherwise acted not in accordance with the law. The Court was applying the standard found in § 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). 401 U.S. at 416.

tance benefits which originally resulted in the creation of the agencies. Cases such as *Morton v. Ruiz*, *Goldberg*, and *Mathews v. Eldridge*,[134] indicate that the Supreme Court is willing to issue guidance in the administrative law area. Only *Ruiz* addressed an issue premised on APA foundations, the other two advanced a more traditional constitutional question. However, the potential exists for more issues to be advanced using the APA approach as their basis. As judges and lawyers accept the Administrative Procedure Act as a valid guideline for agency activity, the administra tive state may lose some of its leviathan-ish characteristics and take on more of an appearance of a legitimate fourth branch of government.

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134. Mathews v. Eldridge, 424 U.S. 319 (1976) was referred to by C. Schwartz in *Administrative Law Cases During 1984* as the "cost-benefit analysis of the due process issue." *Mathews* involved a determination of whether the procedures followed by the Social Security Administation ("SSA") when awarding disability benefits passed constitutional muster. Based on Goldberg v. Kelly, 397 U.S. 254 (1970), the Court concluded that the recipient has a property interest in receiving benefits thereby triggering the due process protections. The next inquiry was: how much process is due. The procedures used by the SSA resulted in the termination of benefits before the hearing. In determining that a post-termination hearing was sufficient to protect the recipient, Justice Powell announced the three factor test commonly referred to as the cost-benefit analysis test:

> First, the private interest that will be affected by the official action; second, the risk of 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 requirment would entail.

424 U.S. at 335.