Denver Law Review

Volume 58
Issue 2 *Tenth Circuit Surveys*

Article 5

February 2021

Administrative Law

Diane L. Burkhardt

ADMINISTRATIVE LAW

OVERVIEW

The Tenth Circuit Court of Appeals entertained administrative law cases of considerable number and variety during the recent term. In general, the court's treatment of these cases was characterized by the traditional deference to the agencies' underlying decisions, and the court stayed well within the confines of the Administrative Procedure Act's scope of judicial review.[1] Where an agency's interpretation of a pertinent statute was clearly unreasonable, however, or where an administrative record was insufficient to support an agency's findings and conclusions, the court did not hesitate to reverse a decision and remand the matter for further deliberation.

In several of its more notable decisions, the Tenth Circuit undertook constructions of the Government in the Sunshine Act[2] and the Privacy Act.[3] Both statutes are relative newcomers[4] to the realm of administrative law and have not yet been the subjects of substantial litigation. Thus, the Tenth Circuit's analyses of certain of their provisions represent contributions to the limited body of interpretive material. Another noteworthy decision this term considered an association's standing to represent its members in an action challenging the Department of Health, Education and Welfare's sexual equality regulations for athletic programs. The court's ruling may well facilitate the first major attack on these controversial requirements.

This article will survey twenty-seven of the Tenth Circuit's administrative law decisions.[5] Sheer numbers prevent a thorough analysis of each case, but an attempt has been made to comment on questionable results and rulings of special significance.

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES

In *Brice v. Day*[6] the Tenth Circuit rejected the argument that exhaustion of administrative remedies cannot be required when a party seeks to vindi-

1. *See* 5 U.S.C. § 706 (1976).
2. 5 U.S.C. § 552b (1976).
3. 5 U.S.C. § 552a (1976).
4. The Sunshine Act became effective in 1977 and the Privacy Act became effective in 1974.
5. Additional administrative law cases reviewed and decided by the court of appeals during the year but not incorporated into this discussion include: Patterson v. National Transp. Safety Bd., No. 79-1426 (10th Cir., May 27, 1980) (affirmed FAA's suspension of mechanic's certificate); Selman v. Califano, 619 F.2d 881 (10th Cir. 1980) (affirmed district court's affirmance of Social Security Administration's denial of airline pilot's request for classification as independent contractor); Fry Bros. Corp. v. HUD, 614 F.2d 732 (10th Cir. 1980) (held that wage determinations under Davis-Bacon Act are not subject to judicial review); Cowell v. National Transp. Safety Bd., 612 F.2d 505 (10th Cir. 1980) (affirmed FAA's revocation of airman and airman medical certificates); Terry v. National Transp. Safety Bd., 608 F.2d 418 (10th Cir. 1979) (affirmed FAA's suspension of commercial pilot's certificate); David v. Erdmann, 607 F.2d 917 (10th Cir. 1979) (reversed ruling of Bureau of Alcohol, Tobacco & Firearms refusing import permit for pistol that was collector's item). *See also* notes 174 & 205 *infra*.
6. 604 F.2d 664 (10th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980).

cate his constitutional rights in an action for monetary damages. The two petitioners were prisoners at a federal penal institution in Oklahoma. Each had filed suit in district court alleging that overcrowded conditions in the facility subjected them to cruel and unusual punishment[7] in violation of the eighth amendment.[8] The lower court summarily disposed of both cases on the ground that neither prisoner had used the formal procedures for review of prisoners' complaints.[9]

On their consolidated appeal, the petitioners urged that the exhaustion doctrine does not apply to situations where constitutional rights are at stake, at least when the relief requested is monetary compensation. They argued that the available administrative procedure did not provide for such an award; thus, the inadequacy of the administrative remedy obviated the exhaustion prerequisite of judicial action.[10]

The court of appeals relied on two very different grounds to justify its ultimate holding that the petitioners were indeed obliged to exhaust their administrative remedies. In analyzing the claims, the court first observed that the petitioners sought to establish a private right of action for damages under a constitutional amendment, an approach similar to those actions recognized by the United States Supreme Court in *Bivens v. Six Unknown Named Agents*[11] and *Davis v. Passman*.[12] To maintain such an action three criteria must be satisfied. First, the complaining party must assert the violation of a constitutionally protected right. Second, the party must have no means to enforce the right other than through the judiciary. And, finally, the complaining party must demonstrate that monetary relief will satisfactorily redress the alleged constitutional violation.[13]

With these requirements in mind, the Tenth Circuit determined that facts would have to be developed to assess the validity of the petitioners' cause of action. The court of appeals concluded that an administrative inquiry by the Bureau of Prisons would facilitate such a fact-finding process, likening it to discovery in an ordinary civil case. The court explained that this procedure should be utilized before the petitioners could properly seek relief in the courts.[14]

In addition to recognizing the need for an administrative proceeding to evaluate the strength of the petitioners' claims, the court of appeals acknowledged the peculiar nature of the petitioners' status as prisoners.[15] In effect, it deferred to the administrative machinery already in place for the resolution of prisoners' grievances, thereby adhering to previous holdings reflecting a

7. *Id.* at 665.
8. U.S. CONST. amend. VIII.
9. 604 F.2d at 665.
10. *Id.*
11. 403 U.S. 388 (1971) (private damages action recognized for violation of fourth amendment right to freedom from unlawful searches and seizures).
12. 442 U.S. 228 (1979) (private damages action recognized under fifth amendment due process clause, U.S. CONST. amend. V, cl. 3, for alleged sex discrimination).
13. 604 F.2d 2d at 666 (citing Davis v. Passman, 442 U.S. 228 (1979); Bell v. Wolfish, 442 U.S. 520 (1979); Butz v. Economou, 438 U.S. 478 (1978)).
14. 604 F.2d at 666-67.
15. *Id.* at 666.

fervent desire to minimize judicial involvement with prison administration.[16] The court concluded that the orderly and efficient disposition of prisoners' problems required the use of administrative channels. Petitions to a court for relief cannot be "tickets to an immediate confrontation with the guards and supervisors outside the prison and in the courtroom no matter how they are framed."[17] Thus, the Tenth Circuit affirmed the district court's dismissal of the prisoners' complaints. The appellate court added that in such circumstances a trial court would be equally justified in retaining jurisdiction of a case while referring it to prison officials for administrative review before taking further action itself.[18]

II. RIPENESS

An attempt by the Federal Energy Regulatory Commission (FERC) to clarify orders disapproving a natural gas supplier's emergency curtailment plan created further confusion when one of the supplier's customers sought judicial review of the agency's action. In *General Motors Corp. v. FERC*[19] the Tenth Circuit held that an "Order Clarifying Prior Order," issued by the FERC, was not sufficiently "final" to permit review, and the court therefore dismissed the petition before it.[20]

Cities Service Gas Company, the supplier, proposed a restriction on new service connections in anticipation of possible reductions in the quantity of natural gas available to meet its existing customers' demands. The plan provoked a number of hearings and a plethora of orders. Initially, FERC refused to approve the Cities Service proposal because it did not include an index indicating consumers' use requirements as of January 1, 1978.[21] In a second order, the Commission called for further hearings and provided that high priority customers could anticipate continued service connections by their supplier.[22] A subsequent order indicated that the FERC was uncertain whether to require the use index after all but cautioned that the agency might impose an index "as of January 1st"[23] and warned that new connections would be made at the gas distributors' risk.[24]

The FERC detected an air of uncertainty among consumers and suppliers following this third order. Therefore, it issued one additional order denominated "Order Clarifying Prior Order" and announced that any index of requirements ultimately imposed would not incorporate the January date but would be prospective in application.[25] The petitioner, General Motors,

16. *See* Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Mower v. Swyhart, 545 F.2d 103 (10th Cir. 1976); Marchesani v. McCune, 531 F.2d 459 (10th Cir. 1976); Rivera v. Toft, 477 F.2d 534 (10th Cir. 1973); Daugherty v. Harris, 476 F.2d 292 (10th Cir. 1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972); Smoake v. Willingham, 359 F.2d 386 (10th Cir. 1966).
17. 604 F.2d at 667.
18. *Id.* at 668.
19. 607 F.2d 330 (10th Cir. 1979).
20. *Id.* at 331.
21. *Id.* at 332.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

objected to this decision, requested a rehearing, and upon denial of the request, appealed from the order.

The Tenth Circuit determined that the challenged order was merely a "segment of ongoing hearings, and relate[d] to a subject not yet decided."[26] Thus, the court concluded that the order was not final and, therefore, was not a proper matter for judicial scrutiny.[27] The Commission had made no decision to exact an index of requirements from Cities Service but had stated only that any index requested would take effect prospectively. "This may be a prehearing indication of [the FERC's] position, but this is not a matter ripe for judicial review."[28]

Additionally, the petitioner challenged the Commission's manner of issuing the clarification order, alleging that FERC could not properly enter such an order without additional hearings. It further contended that the agency had relied on events outside the administrative record to reach its decision.[29] The appellate court refused to sustain these objections, holding that the Commission had authority to change its position on the requirements index and on the applicable dates.[30] It found that the FERC had adequately explained the reasons for the change and concluded that new supporting evidence was unnecessary.[31] "[T]he Commission may act in a pending case without a petition requesting action. The Commission has a continuing duty to consider the consequences of actions it has taken in ongoing proceedings, and to make adjustments it considers to be in the public interest."[32]

III. PRIMARY JURISDICTION

The doctrine of primary jurisdiction endeavors to promote harmony between the judiciary and the administrative agencies. When a claim for relief falls within the jurisdiction of both a court and an agency, the former may suspend its proceedings and refer issues within the agency's authority and expertise to it for resolution. Referral is not mandatory, but it is often done to achieve uniformity in the application of certain statutes and regulations and to utilize an agency's specialized knowledge so that final disposition of a matter will be intelligent and accurate.[33]

In *Sunflower Electric Cooperative, Inc. v. Kansas Power & Light Co.*[34] the Tenth Circuit reviewed the propriety of a district court's invocation of the primary jurisdiction doctrine to justify both its refusal to entertain an antitrust action involving certain public utilities and its referral of the matter to

26. *Id.* at 333.
27. *Id.*
28. *Id.*
29. *Id.* at 332.
30. *Id.* at 333.
31. *Id.* at 334.
32. *Id.*
33. *See generally* United States v. Western Pac. R.R., 352 U.S. 59, 63-65 (1956); Far East Conference v. United States, 342 U.S. 570, 574-75 (1952); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 19.01, .07 (1958); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 19.01 (1976).
34. 603 F.2d 791 (10th Cir. 1979).

the Federal Power Commission (FPC) for resolution. The plaintiff, Sunflower Electric, a cooperative that sold electric energy to its Kansas members, alleged in its complaint that the defendants had unlawfully combined and conspired to monopolize the supply of "firm bulk power." Additionally, it alleged that a contemplated merger of several of the defendant power companies would violate the antitrust laws.[35] The district court perceived a possibility of conflict between a judicial resolution of the merger issue and the FPC's ultimate disposition of the merger application before it.[36] That court also identified a need for the agency's expertise in the matter. Thus, it elected to stay the antitrust action pending the agency's resolution of the merger question.[37]

The Tenth Circuit, however, concluded that the doctrine of primary jurisdiction did not apply to the proceeding. After a lengthy review and analysis of the lower court's opinion,[38] of the underpinnings of primary jurisdiction,[39] and of the leading case law,[40] it reversed the lower court's decision and remanded the case for a trial on the merits.[41] The appellate court's reasoning was based on several considerations. First, it noted that public utilities are not immune from the federal antitrust laws.[42] Next, it examined the extent of the FPC's jurisdiction over the "interstate transmission of electricity" at the time Sunflower Electric commenced its lawsuit.[43] Finding

35. *Id.* at 793. Sunflower Electric based its claims on sections one and two of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976).

36. A public utility may not sell or lease its facilities or merge or otherwise consolidate with another utility until it has obtained the government's approval. *See* 16 U.S.C. § 824b(a) (1976).

37. The district court relied primarily on the Supreme Court's decision in Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973). Among other things, *Ricci* counsels a court to abstain from judicial review when "some facets of the dispute . . . are within the statutory jurisdiction" of an agency. *Id.* at 302.

38. 603 F.2d at 793-95.

39. *Id.* at 795-96.

40. *Id.* at 796-98.

41. *Id.* at 799.

42. The court of appeals relied primarily on the Supreme Court's decision in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). *Ricci* and *Otter Tail* reach different conclusions about the administrative and judicial roles in antitrust actions involving regulated industries, prompting Professor Davis to observe that reconciling the two decisions "seems rather difficult." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 19.06 (1976).

The source of the conflict stems from a desire to accommodate, to the greatest extent possible, both federal antitrust and other regulatory schemes. The problem is recurring.

> It arises when conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress. Often, but not always, the other regime includes an administrative agency with authority to enforce the major provisions of the statute in accordance with that statute's distinctive standards, which may or may not include concern for competitive considerations.

Ricci v. Chicago Mercantile Exch., 409 U.S. at 299-300.

Ricci advocated deference to an agency's jurisdiction, at least when it is not immediately clear whether the antitrust laws apply to the industry or transaction in question. *Id.* at 301-08. *Otter Tail*, however, in a factual setting involving power companies, held that public utilities are clearly not insulated from antitrust liability and found that the FPC had no authority to provide remedies sufficient to redress the alleged violations. 410 U.S. at 373-74. Under those circumstances there seemed to be no reason for the district court to delay its review of the antitrust claims.

43. 603 F.2d at 798. With the creation of the Department of Energy and the transfer of the FPC's powers to the Federal Energy Regulatory Commission (FERC), the latter agency received additional authority with respect to the transmission of power. *See id.* at 793 n.1. The

that the Commission principally had responsibility for rates and charges[44] and that prior judicial edicts[45] disapproved of its ordering interconnections of facilities or coordinated power development by utilities,[46] the court of appeals concluded that the FPC had clearly "lacked authority to deal with the problems which were present in the district court case . . . . [T]he referral to the Commission was a futile move . . . . [I]t would have been merely a postponement of the day for coming to grips with the monopolizing issue."[47] Thus, the Tenth Circuit concluded that the doctrine of primary jurisdiction was not relevant to the matter; a trial on the merits of the plaintiff's claims could properly proceed. The mere possibility of a conflict between a judicial decision and the agency's disposition of the merger application was not enough to require abstention.[48]

On rehearing, the court of appeals considered the effect of the Public Utility Regulatory Policies Act,[49] which amended the Federal Power Act and increased the FERC's regulatory authority,[50] on its earlier disposition of *Sunflower Electric*. Acknowledging the general rule that a change of law must be given effect in a pending case,[51] the court nevertheless invoked a limitation on the rule that prevents its application if "manifest injustice" might result or if a statute and its legislative history indicate a contrary intent.[52] The court of appeals found that a referral of the case to the FERC would create additional delays and further prolong an already protracted lawsuit.[53]

> At bar Sunflower seeks treble damages . . . , injunctive relief in the form of wheeling and power interconnects, and attorneys' fees. It is possible that it would not be deprived of its rights in this regard if the matter were to be transferred to the Commission. It is certain, however, that they [*sic*] would suffer delay and a hazard of complete denial because a delay of this kind is frequently critical.[54]

In the congressional conference report to the Public Utility Regulatory Policies Act, the Tenth Circuit found expressions of an intention to preserve the courts' jurisdiction over actions involving public utilities that arise under the antitrust laws.[55] This legislative history lent further support to the court of appeals' conclusion that the new law could not be applied in *Sunflower*

---

court did not apply the Federal Power Act's amendments that created the broader authority because Congress did not expressly give them retroactive effect. *Id.* at 798.

44. *Id.*

45. *E.g.*, Conway Corp. v. FPC, 510 F.2d 1264 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976). *See also* Richmond Power & Light v. FERC, 574 F.2d 610 (D.C. Cir. 1978).

46. 603 F.2d at 799.

47. *Id.*

48. *Id.* at 798. *See also* Otter Tail Power Co. v. United States, 410 U.S. at 377.

49. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified at 16 U.S.C. §§ 2601-2645 (Supp. III 1979)).

50. *See* note 43 *supra*.

51. 603 F.2d at 800.

52. *Id.* (quoting Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974)).

53. Sunflower Electric instituted the action in 1975. 603 F.2d at 793.

54. *Id.* at 801.

55. "[I]t is not intended that the courts defer actions arising under the antitrust laws pending a resolution of such matters by the Federal Energy Regulatory Commission. . . . [T]he courts have jurisdiction to proceed with antitrust cases without deferring to the Commission for the exercise of primary jurisdiction." H.R. REP. NO. 95-1750, 95th Cong., 2d Sess. 68, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7659, 7802.

Electric to work a referral to the agency even though the FERC could, with its new powers, grant the relief that the plaintiff requested. Thus, there proved to be "no escape from the conclusion that the cause must be heard by the district court."[56]

IV. SCOPE OF AUTHORITY

A. *Price Support Loans*

The plaintiff in *Hiatt Grain & Feed, Inc. v. Bergland*,[57] a class action, challenged the authority of the Secretary of Agriculture to promulgate regulations authorizing price support loans to cooperatives for wheat and feed grains.[58] Relying on the pertinent statutory language and on congressional policy, as well as on the agency's construction of the controlling statute,[59] the Tenth Circuit held that the Secretary had such authority and affirmed the district court's judgment.[60]

The plaintiff argued that the statute authorizing the Secretary of Agriculture to make loans to "cooperators"[61] contemplates that assistance will be given to producers. Hiatt Grain urged that farmers' marketing cooperatives are not producers and, therefore, are not cooperators within the meaning of the controlling law.[62] Observing that cooperatives are merely an aggregation of individual producers[63] and noting that a cooperative must be approved by the Secretary to be eligible for a price support loan,[64] the court of appeals focused on statutory language directing the Secretary to furnish price supports "through loans, purchases, *or other operations*,"[65] and "through the Commodity Credit Corporation *and other means* available to him."[66] In these phrases the court found evidence of sufficient congressional guidance and direction to justify the agency's action. It also pointed to long-standing congressional interest in promoting the use of marketing cooperatives to implement farm programs.[67] In the appellate court's view, this policy, coupled with the express language of the statute, allowed only one conclusion.

Evidence of the agency's construction of the statutory mandate to make price supports available further persuaded the court of the propriety of the Secretary's wheat regulations. Acting on the assumption that it had the requisite authority, the agency had on previous occasions allowed loans to cooperatives for such other commodities as cotton, peanuts, and rice.[68] The court identified these actions as "a clear interpretation demonstrated by parallel

56. 603 F.2d at 802.
57. 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).
58. 602 F.2d at 930.
59. *Id.* at 931-33.
60. *Id.* at 933-34.
61. *Id.* at 931.
62. *See* 7 U.S.C. § 1428b (Supp. III 1979).
63. 602 F.2d at 932.
64. *Id.*
65. 7 U.S.C. § 1441 (1976) (emphasis added).
66. *Id.* § 1421(a) (emphasis added).
67. 602 F.2d at 933.
68. *Id.*

programs,"[69] and, in keeping with the judicial policy of according great weight to an administrative body's construction of the laws it is directed to execute,[70] the court found this evidence sufficient to uphold the challenged regulations.[71] The court of appeals also presumed congressional awareness of the agency's prior conduct with respect to price supports,[72] implying that Congress could have acted to prohibit loans to cooperatives had it disapproved of the practice.

In disposing of the plaintiff's allegation that procedural infirmities attended the promulgation of the regulation,[73] the appellate court noted that the agency had furnished a reasoned decision based on an economic analysis and an impact statement. Furthermore, it had complied with the Administrative Procedure Act's rulemaking requirements.[74] Thus, the regulation was free of defects.

B. *Distribution of Royalty Oil*

Unlike the administrative interpretation of the controlling statute in *Hiatt Grain & Feed*, which the Tenth Circuit found to be consistent with a reasonable interpretation and with congressional directives,[75] the Secretary of the Interior's construction of the O'Mahoney Amendment[76] to the Mineral Lands Leasing Act of 1920[77] was rejected by the court in *Plateau, Inc. v. Department of the Interior*[78] as being inconsistent with the legislative intent.[79] Accordingly, the court of appeals upheld the district court's invalidation of certain regulations enacted by the agency governing the distribution of royalty oil[80] to refineries.[81]

The plaintiff, a small oil refinery, objected to the Secretary's conditioning eligibility for sales of royalty oil on satisfaction of the Small Business Administration's criteria for a "small business enterprise."[82] Plateau argued that Congress had expressly limited recipients to refineries lacking a source for crude oil supplies; thus, any attempt by the agency to impose further restrictions exceeded the scope of its authority.[83]

Following a brief review of the legislative history,[84] the Tenth Circuit sided with the plaintiff, concluding that "the amendment itself identifies the

69. *Id.*
70. *See* Udall v. Tallman, 380 U.S. 1, 4 (1965).
71. 602 F.2d at 934.
72. *Id.* at 933.
73. *Id.* at 934.
74. *See* 5 U.S.C. § 553 (1976).
75. 602 F.2d at 934.
76. Act of July 13, 1946, Pub. L. No. 79-506, 60 Stat. 533 (1946) (codified in 30 U.S.C. § 192 (1976)).
77. 30 U.S.C. §§ 181-263 (1976).
78. 603 F.2d 161 (10th Cir. 1979).
79. *Id.* at 164.
80. According to the appellate court, "[r]oyalty oil is received as in-kind payment for royalties from oil and gas leases on federal lands." *Id.* at 161 n.1. The Secretary of the Interior is authorized to sell such oil to refineries. *Id.* at 161 n.2.
81. *Id.* at 164.
82. *Id.* at 161. *See* 30 C.F.R. § 225.2 (1978); 13 C.F.R. § 121.3-9(a)(1) (1980).
83. 603 F.2d at 163.
84. *Id.*

refineries it is intended to benefit. The challenged regulation goes beyond what Congress authorized."[85] The court rejected the Secretary's claim to broad, unfettered discretion in the administration of the royalty oil program. Noting the variations in the agency's application of the statute, as reflected in regulations promulgated through the years since its enactment,[86] the court advised that "even if the Secretary had followed a consistent pattern of administrative interpretation, to the extent such interpretation might have been inconsistent with the congressional mandate, it would have been unavailing."[87]

C. *Product Effectiveness Standards*

On a question of first impression concerning the Environmental Protection Agency's (EPA) power under the Federal Insecticide, Fungicide, and Rodenticide Act[88] to establish and regulate effectiveness standards for pesticides, the Tenth Circuit rejected the agency's interpretation of its statutory authority and confined it to a limited regulatory scheme. In *S.L. Cowley & Sons Manufacturing Co. v. EPA*[89] the petitioner appealed the EPA's cancellation of the registration of Cowley's Original Rat and Mouse Poison. The EPA justified its action on the ground that the poison did not meet minimum effectiveness standards for rodenticides.[90]

The court of appeals distinguished the agency's legitimate authority to sanction the misbranding and inaccurate labelling of products from the EPA's assumed ability to enforce effectiveness criteria. "[T]he agency has a duty under the statute to insure that the product satisfies" claims of efficacy accompanying it; but, "[n]othing in either the scheme or the specific language hints at a broader standard."[91] In reversing the EPA's cancellation order, the appellate court directed that the registrant manufacturer was entitled to a hearing only on charges of improper labelling.[92]

D. *Transportation Matters*

In *Walker Field, Colorado, Public Airport Authority v. Adams*[93] the Tenth Circuit held that the Secretary of Transportation has broad discretion under the Airport and Airway Development and Revenue Act[94] in granting financial assistance for airport improvements. The plaintiff challenged the Secretary's attempt to require Mesa County and the City of Grand Junction, Colorado to act as sponsors and assume financial obligations for the local airport's construction project. The two political subdivisions refused to cosponsor the venture. The plaintiff airport authority made improvements

85. *Id.* at 164.
86. *Id.* at 163.
87. *Id.* at 164.
88. 7 U.S.C. §§ 135-135k (1976).
89. 615 F.2d 1312 (10th Cir. 1980).
90. *Id.* at 1313.
91. *Id.* at 1314.
92. *Id.*
93. 606 F.2d 290 (10th Cir. 1979).
94. 49 U.S.C. §§ 1701-1742 (1976).

with its own funds, but the government declined to reimburse it without the participation of the City and the County in the grant agreement.[95]

Agreeing with the Secretary of Transportation's contention that he had statutory authority to impose reasonable and necessary terms and conditions on grants made under the Airport Development Act,[96] the district court dismissed the complaint for failure to state a legally cognizable claim.[97] The Tenth Circuit also adopted the Secretary's argument and further pointed to statutory provisions directing the Secretary to insure that sufficient funds are available to cover construction expenses not shared by the federal government.[98] Relying on these broad mandates, the appellate court ignored the airport authority's argument that neither the City nor the County fell within the statutory definition of a sponsor.[99]

The plaintiff, joined by the State of Colorado as *amicus*, also claimed a violation of the constitutional doctrine of intergovernmental immunity, alleging that the Secretary's actions effectively overrode the State's express policy of promoting the financial independence of airport facilities.[100] The court, however, disposed of this argument in short order, citing the federal government's recognized authority to impose conditions on the funds it disburses to the states. Furthermore, the court of appeals found no conflict between the Secretary's requirement and the Supreme Court's instruction in *National League of Cities v. Usery*[101] that financial conditions cannot "displace the States' freedom to structure integral operations in areas of traditional governmental functions."[102]

Judge McKay, in dissent, opined that the majority's insistence that the challenged administrative action imposed "no direct, mandatory terms and conditions" on the state and its subdivisions and the majority's further assumption that the state and its agencies, such as the Walker Field Airport Authority could, by declining federal grants, easily avoid obligations exacted by the federal government,[103] were superficial rationales for the decisions. The dissenting judge noted that few states are financially able to provide all services to their citizens without some federal assistance.

> The possibility of refusing federal grants is often only apparent, not real . . . . When grants have risen to this level of necessity, attached conditions must withstand close constitutional scrutiny similar to that applied in *National League of Cities* to direct regulation of state governmental structure. The federally imposed requirements here fail to survive that scrutiny.[104]

---

95. 606 F.2d at 293.

96. The Secretary pointed to statutory language directing him to offer project grants "upon such terms and conditions as [he] considers necessary to meet the requirements of this subchapter and the regulations." 49 U.S.C. § 1719 (1976).

97. 606 F.2d at 294. The district court also found that if a cause of action did in fact exist, the United States Court of Claims had exclusive jurisdiction over it. *Id.*

98. *Id.* at 296.

99. *See id.* at 295-96.

100. *Id.* at 297.

101. 426 U.S. 833 (1976).

102. 606 F.2d at 297 (quoting National League of Cities v. Usery, 426 U.S. at 852).

103. 606 F.2d at 297.

104. *Id.* at 299 (McKay, J., dissenting).

On constitutional grounds and on general principles of federalism, Judge McKay would have reversed the district court's judgment.[105]

In what was probably a last frantic effort, the States of Kansas and Minnesota and the City of Nashville, Tennessee requested judicial assistance to avert the termination of passenger rail service in their respective locales. Their action on appeal, *Kansas v. Adams*,[106] sought reversal of a lower court's dissolution of an order temporarily restraining the cessation of service. To support their position, they urged that the Secretary of Transportation's preparation of a plan for reduction of passenger service violated a number of federal laws,[107] including the National Environmental Policy Act (NEPA)[108] and the Clean Air Act,[109] and was, therefore, improper and unauthorized.

The Tenth Circuit upheld the district court's action and affirmed its denial of a preliminary injunction. After reviewing the language and the legislative history of the Amtrak Reorganization Act of 1979,[110] which incorporated and adopted the Secretary of Transportation's recommendations, the court of appeals concluded that the Congress had closely scrutinized and ultimately ratified the plan and had approved the procedures the agency used to restructure the rail system.[111] In thus lending its imprimatur to the administrative report, the Congress effectively made the plan its own. "[W]e have," the court said, "a direct Congressional decision designing the basic rail system, without the necessity of following [NEPA's procedural provisions]."[112] Mindful of the sacred principle of the separation of powers, the Tenth Circuit refused to inquire further into the wisdom of the surrogate legislative determination.[113]

Even in this era of airline deregulation, it appears from the Tenth Circuit's third transportation decision that air carriers remain subject to some administrative oversight. In fact, the court's holding in *Frontier Airlines, Inc. v. CAB*[114] indicates that the Airline Deregulation Act of 1978[115] implies that with respect to attempted departures from established routes, airlines are still at the mercy of the federal regulators.

Frontier notified the Civil Aeronautics Board (CAB) early in 1979 of its intention to discontinue service to Alamogordo and Silver City, New Mexico. When the ninety-day notice period had elapsed without a replacement carrier having entered the market, the CAB ordered Frontier to continue its

105. *Id.* at 300.
106. 608 F.2d 861 (10th Cir. 1979), *cert. denied*, 445 U.S. 963 (1980).
107. *Id.* at 863-64.
108. 42 U.S.C. §§ 4321-4361 (1976). The other acts and regulations allegedly violated by the Secretary's action were the Amtrak Improvement Act of 1978, Pub. L. No. 95-421, 92 Stat. 923 (1978) (codified in scattered sections of 45 U.S.C.), the National Historic Preservation Act, 16 U.S.C. §§ 470-470t (1976), and certain guidelines issued by the Council on Environmental Quality, 40 C.F.R. §§ 1500.1-1501.4 (1980).
109. 42 U.S.C. §§ 7401-7642 (Supp. II 1978).
110. Pub. L. No. 96-73, 93 Stat. 537 (1979) (codified in scattered sections of 45, 49 U.S.C.).
111. *See generally* 608 F.2d 864-66.
112. *Id.* at 866.
113. *Id.* at 867.
114. 621 F.2d 369 (10th Cir. 1980).
115. Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered sections of 49 U.S.C.).

service for several additional thirty-day intervals. Even after a new airline offered to establish routes to the two communities, the CAB ordered Frontier to maintain "back-up" service until it could be certain the new carrier was capable of handling the routes. Disgruntled by its inability to ease out of the Alamogordo and Silver City runs, the airline sought judicial review of the Board's "back-up" orders.[116]

Disposing quickly of the CAB's mootness argument[117] and the agency's allegation that Frontier had not exhausted its administrative remedies,[118] the Tenth Circuit proceeded to review the Board's authority under the 1978 Airline Deregulation Act. The court found that concomitant with the agency's express statutory authority to order an airline to serve a route until a replacement carrier steps in[119] is the implied authority to request an airline to provide support service until the new carrier is established on the route. "The statutory grant of the greater implies a grant of the lesser, i.e., the power to compel actual service carries with it the power to order back-up service."[120] The court considered this ruling necessary to effectuate the legislative intent "that no small community shall be left without essential air services, on a continuing basis."[121] As in *Hiatt Grain & Feed, Inc. v. Bergland*[122] the Tenth Circuit found additional support for its decision in the agency's construction of the applicable statute insofar as it was reasonable and comported with the apparent congressional intent.[123]

V. SUFFICIENCY OF THE ADMINISTRATIVE RECORD

Two cases required the Tenth Circuit to consider the need for and sufficiency of an administrative record. *United States v. X-Otag Plus Tablets*[124] involved a challenge to the district court's refusal to remand a case for development of an administrative record. In *Midwest Maintenance & Construction Co. v. Vela*,[125] on the other hand, the inadequacy of the existing record precluded the district court from upholding an agency's decision.

The appellant in the *X-Otag Plus Tablets* case was a pharmaceutical manufacturer of a prescription drug used to relieve muscular pain.[126] The

116. 621 F.2d at 370.

117. "A 30-day order of the type here involved is almost a classic example of a matter which is 'capable of repetition, yet evading review.'" *Id.* (citing Roe v. Wade, 410 U.S. 113, 125 (1973)).

118. In light of the Board's virtual certainty that it had authority to issue back-up orders, "it is very doubtful that the Board would have vacated its back-up orders had a motion for reconsideration been filed." 621 F.2d at 371. Apparently, the court felt that the likely futility of an appeal to the agency exempted Frontier from the exhaustion requirement. *See* American Fed'n of Gov't Employees v. Acree, 475 F.2d 1289 (D.C. Cir. 1973). Additionally, administrative remedies need not be pursued "where the question is solely one of statutory interpretation." 621 F.2d at 371 (citing McKart v. United States, 395 U.S. 185, 197-98 (1969)).

119. *See* 49 U.S.C. § 1389(a)(6) (Supp. III 1979).

120. 621 F.2d at 372.

121. *Id.* at 371-72.

122. *See* 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). For a discussion of *Hiatt Grain & Feed*, see text accompanying notes 57-71 *supra*.

123. 621 F.2d at 372.

124. 602 F.2d 1387 (10th Cir. 1979).

125. 621 F.2d 1046 (10th Cir. 1980).

126. 602 F.2d at 1389.

Food and Drug Administration (FDA) seized a quantity of the drug and instituted condemnation proceedings.[127] It also sought an injunction to prevent shipments of the drug in interstate commerce.[128] To justify these enforcement actions, the government contended that X-Otag Plus was a "new drug" within the meaning of the Food and Drug Act[129] and could not be introduced into interstate commerce until a new drug application or an abbreviated new drug application had been approved by the FDA.[130] The manufacturer had in fact submitted the required applications[131] but had not done so prior to circulating the drug for public consumption.[132]

The district court was called upon to determine whether the FDA's decision to commence an enforcement action by way of condemnation constituted a declaratory order[133] requiring development of an administrative record.[134] That court concluded the FDA's allegation that X-Otag Plus was a "new drug" was not such an order but was, rather, an assertion of probable cause, which was necessary to support the enforcement action.[135]

The Tenth Circuit agreed and affirmed the lower court's refusal to remand the case to the FDA. Crucial to its decision was a finding that the condemnation proceeding had been brought against only one drug manufacturer and involved only a limited quantity of the drug.[136] These circumstances removed it from the realm of a declaratory order and obviated the need for a formal record. The court distinguished *Rutherford v. United States*,[137] which, the appellant urged, required a remand to the FDA, noting that in *Rutherford* the agency had classified laetrile as a "new drug" and banned its distribution without issuing a formal rule or producing a record to support its decision. The court found that the district court had ample evidence to uphold the FDA's assertion that X-Otag Plus was a "new drug" for probable cause purposes, and the appellate court concluded that the manufacturer had had an opportunity at trial to rebut the FDA's case before an injunction or destruction order was issued.[138]

The Tenth Circuit also upheld the trial court's finding that the government had established by a preponderance of the evidence that X-Otag Plus was a "new drug" for purposes of the condemnation proceeding.[139] But, the court of appeals reversed the lower court's destruction order, concluding that

127. The FDA has authority to seize any misbranded or adulterated food, drug, or cosmetic item introduced into interstate commerce. *See* 21 U.S.C. § 334 (1976).

128. *See* 21 U.S.C. §§ 331(d), 332(a) (1976).

129. *Id.* § 321(p)(1).

130. *See id.* § 355(a).

131. 602 F.2d at 1389-90.

132. *Id.* at 1390.

133. The Supreme Court has defined a declaratory order as a "self-operative industry-wide regulation." Abbott Laboratories v. Gardner, 387 U.S. 136, 147 (1967). *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.10 (1958).

134. United States v. X-Otag Plus Tablets, 441 F. Supp. 105, 108 (D. Colo. 1977).

135. *Id.* at 109.

136. 602 F.2d at 1390.

137. 542 F.2d 1137 (10th Cir. 1976).

138. 602 F.2d at 1390.

139. *Id.* at 1391.

the statutory language allowing destruction of condemned articles[140] is "advisory rather than mandatory and clearly implies that the court has some discretion over the time and manner of destruction."[141]

In *Midwest Maintenance & Construction Co. v. Vela*[142] the appellant sought review of a ruling by the Secretary of Labor declaring its ineligibility to bid on government contracts for a three-year period. The appellant corporation was awarded a contract to maintain and repair certain federally owned equipment in several regions in Texas. Federal law requires contractors working for the government to pay wages compatible with those paid to other employees "in the locality"[143] but in no event should compensation fall below the minimum wage[144] provided in the Fair Labor Standards Act.[145] Many government contracts include a wage determination with which a contractor must comply. Midwest had received such a scale for counties adjacent to where it performed its contract, but it had been given nothing to indicate appropriate remuneration in the county where the work was to be done.[146]

As Midwest was nearing completion of the contract, the Department of Labor disclosed that the company had paid its employees less than the amounts specified in the wage determination for the neighboring regions, although it had paid more than the federal minimum wage.[147] Midwest, of course, challenged the agency's attempts to force Midwest to compensate for the alleged underpayments, and the dispute culminated in the filing of an administrative complaint that charged the company with violations of certain sections of the Service Contract Act.[148] An administrative law judge found Midwest liable for underpayments totalling $61,337.24;[149] the administrator of the Wage and Hour Division upheld the decision; and the Secretary of Labor imposed the ineligibility sanction. The district court subsequently affirmed these rulings.[150]

On appeal, the Tenth Circuit rejected the finding that Midwest had waived or relinquished its rights to obtain a clarification of the applicable wage scale by failing to do so in a timely manner. The appellate court also repudiated a finding that the company had taken advantage of competing bidders when the contract was initially awarded. Both conclusions, the court said, lacked support in the administrative record.[151]

The court also had to consider the meaning of "locality" as used in the Service Contract Act[152] because the locality determines the appropriate

140. 21 U.S.C. § 334(d)(1) (1976).
141. 602 F.2d at 1391.
142. 621 F.2d 1046 (10th Cir. 1980).
143. 41 U.S.C. § 351(a)(1), (2) (Supp. III 1979).
144. *Id.* § 351(b)(1).
145. 29 U.S.C. § 206(a)(1) (1976).
146. 621 F.2d at 1047.
147. *Id.*
148. *See* 41 U.S.C. § 351(a)(1), (2) (Supp. III 1979).
149. 621 F.2d at 1048.
150. *Id.*
151. *Id.* at 1049.
152. 41 U.S.C. § 351(a)(1) (1976). *See* text accompanying notes 143-145, *supra.*

wage. Midwest argued that locality meant the place of performance, but the agency disagreed and designated it as the location of the federal contracting facility.[153] The Tenth Circuit attempted to find support for the agency's contention in the record of the proceeding.[154] Observing that neither the administrative law judge nor the wage and hour administrator had discussed the terms of the bid invitation or the contract, the court noted the ambiguities in both documents and chided the government for failing to specify the meaning of "locality."[155] Furthermore, the agency's failure to analyze the contract and to indicate the reasoning underlying its ultimate definition of the word proved fatal. On the basis of the "miserable administrative record"[156] the appellate court refused to decide whether the place of performance or the location of the contracting facility controlled the compensation rate. Thus, the court was unable to alleviate the void created by the absence of appellate decisions on the issue.[157] The Tenth Circuit Court further concluded that the agency had failed to establish a "rational basis" for its decision.[158] Accordingly, the court set aside the ineligibility sanction and remanded the case to the district court with instructions that the matter be returned to the Department of Labor for further proceedings.[159]

VI. ADMINISTRATIVE SEARCH WARRANTS

The United States Supreme Court's decision in *Marshall v. Barlow's, Inc.*[160] indicates that administrative inspections of private premises conducted without warrants violate the fourth amendment's[161] prohibition against unreasonable searches. In conformity with the Court's mandate, and after officers of the Occupational Safety and Health Administration (OSHA) had been denied entry, the Department of Labor obtained a warrant ex parte to search the New Mexico plant of the W & W Steel Company to confirm the existence of unsafe conditions as alleged by an employee. The company subsequently contested the validity of the warrant in *Marshall v. W & W Steel Co.*,[162] charging that the agency had had no authority to obtain the warrant ex parte and without notice. W & W Steel argued that the regulation enabling the Department to secure inspection warrants[163] was invalid. The company asserted that the regulation had been improperly amended by reason of the agency's failure to provide notice of the change and opportunity for comment.[164]

153. 621 F.2d at 1049.

154. The applicable standard for judicial review in this case provided that the agency's finding would be conclusive if supported by a preponderance of the evidence. *Id.* at 1048.

155. *Id.* at 1050.

156. *Id.*

157. *Id.* at 1049.

158. *Id.* at 1051.

159. *Id.*

160. 436 U.S. 307 (1978).

161. U.S. CONST. amend. IV.

162. 604 F.2d 1322 (10th Cir. 1979).

163. 29 C.F.R. § 1903.4 (1979).

164. 604 F.2d at 1325. The regulation was amended in 1978 to define "compulsory process," which the agency is authorized to employ to gain entry to private establishments for inspections, to include ex parte warrants. *See* 29 C.F.R. § 1903.4(d) (1979).

In its review of the matter, the Tenth Circuit observed that the Supreme Court seemed to approve the issuance of ex parte warrants in its *Barlow's* opinion.[165] Having thus briefly considered the constitutionality of ex parte warrants[166] and thereby implicitly holding that the Secretary of Labor could properly procure one, the Tenth Circuit accepted the agency's argument that the challenged amendment was an interpretive rule.[167] As such, it was expressly exempt from the Administrative Procedure Act's notice and comment requirements[168] and was, therefore, validly promulgated.

The court of appeals also agreed that the employee's written complaint and his supplemental written statement together with the OSHA compliance officer's account of his attempts to verify the complaint were sufficient evidence to justify a finding of probable cause to support issuance of the inspection warrant. The court rejected the company's contention that the scope of the warrant was too broad.[169] Accordingly, the Tenth Circuit affirmed the lower court's order holding the W & W Steel Company in contempt and imposing a fine for its repeated refusals to admit an OSHA inspector bearing the search warrant.[170]

VII. COMPULSORY PROCESS

One realm of the administrative scheme in which the judiciary is able to take an active role is that involving the enforcement of compulsory process. Although many agencies have statutory authority to issue subpoenas and summonses,[171] the documents have no independent force.[172] Thus, if a party chooses not to comply with an agency's request for information during the course of a proceeding, the agency must seek judicial assistance to compel submission to its directive.[173]

The Tenth Circuit considered several compulsory process cases during the past year. Significant for their sheer numerosity are those cases the court summarily disposed of involving the enforcement of Internal Revenue Service (IRS) summonses. Three opinions[174] merit brief consideration here be-

165. *See* 436 U.S. at 319-20.

166. 604 F.2d at 1325 n.1.

167. *Id.* at 1325-26. For a discussion of the force and effect of interpretative rules, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03 (1958); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.8-.18 (2d ed. 1978).

168. *See* 5 U.S.C. § 553(b) (1976).

169. 604 F.2d at 1326.

170. *Id.* at 1326-27.

171. *See, e.g.*, 12 U.S.C. § 1464(d) (1976) (Federal Home Loan Bank Board); 15 U.S.C. § 79r(c) (1976) (Securities and Exchange Commission); 49 U.S.C. § 1484(b) (1976) (Civil Aeronautics Board); 49 U.S.C. § 1903(b)(1) (National Transportation Safety Board).

172. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3.11, 3.12 (1958).

173. The Administrative Procedure Act authorizes courts to enforce compulsory process and establishes the appropriate standard for review.

> On contest, the court shall sustain the subpoena or similar 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.

5 U.S.C. § 555(d) (1976).

174. The opinions discussed in this section were ordered by the court to be published. Two additional compulsory process opinions were issued for publication, both of which were consoli-

cause they were the bases for the court's multiple affirmances of the district courts'[175] decisions to enforce the challenged process.

In *United States v. Income Realty & Mortgage, Inc.*[176] and in *United States v. MacKay*[177] the court of appeals relied on two Supreme Court decisions to reject the taxpayers' arguments that the IRS summonses had been issued improperly for the purpose of pursuing tax fraud investigations. The leading case of *United States v. Powell*[178] established, and the case of *United States v. LaSalle National Bank*[179] further refined, the test for ascertaining whether an IRS summons has been issued for the permissible function of determining civil tax liability or for the impermissible purpose of substantiating suspicions of criminal conduct. To justify its use of the summons power, the Service must show that its investigation is being conducted for a legitimate, that is, a civil, purpose; that its request for documents or testimony relates to that purpose; that the information sought is not already in its possession; and that the statutory procedure has been followed.[180] Furthermore, the summons must be issued before the IRS has recommended a criminal investigation by the Department of Justice, and it must appear that the civil liability claims will be pursued as well.[181] Finally, the taxpayer carries the substantial burden of proving that the IRS has instituted compulsory process in bad faith.[182]

On the basis of the record before it, which apparently indicated to the appellate court that the Supreme Court's requirements had been met, the Tenth Circuit concluded in *Income Realty* that the district court had properly ordered enforcement of the summonses at issue. The court of appeals also found insufficient evidence of harrassment to support the taxpayer's charge.[183] Similarly, in *MacKay*, the court carefully reviewed the *Powell* and *LaSalle* decisions[184] and scrutinized the record for evidence that the requisite conditions had been met.[185] Ultimately, it affirmed the district court's judgment enforcing the challenged IRS summons.[186] Despite substantial criminal overtones to the Service's investigation, the court could not conclude that the effort was solely in pursuit of a criminal sanction. "The activities of the

dations of multiple appeals. *See* United States v. Omohundro, 619 F.2d 51 (10th Cir. 1980); United States v. Traynor, 611 F.2d 809 (10th Cir. 1979). Eighteen more enforcement opinions were not issued for publication.

175. The federal court for the District of Colorado was beseiged by these summons challenges. It heard 17 cases. The District of Wyoming and the Western District of Oklahoma were responsible for the balance.

176. 612 F.2d 1224 (10th Cir. 1979).

177. 608 F.2d 830 (10th Cir. 1979).

178. 379 U.S. 48 (1964).

179. 437 U.S. 298 (1978). *See generally* Note, *The Institutional Good Faith Test for Enforcement of an Internal Revenue Service Summons*: United States v. LaSalle National Bank, 56 DEN. L.J. 639 (1979).

180. United States v. Powell, 379 U.S. at 57-58; United States v. LaSalle Nat'l Bank, 437 U.S. at 312.

181. United States v. LaSalle Nat'l Bank, 437 U.S. at 318.

182. *Id.* at 316. "Without doubt, this burden is a heavy one." *Id.*

183. 612 F.2d at 1226.

184. 608 F.2d at 832-33.

185. *Id.* at 833-34.

186. *Id.* at 834.

agents were entirely consistent with the [*LaSalle*] concept that criminal tax fraud charges and civil penalties are interrelated."[187]

In *United States v. Fahey*[188] two taxpayers attempted to prevent enforcement of a summons with the novel contention that the federal government has no constitutional authority to initiate civil suits against United States citizens. Therefore, the taxpayers argued, a court is without jurisdiction to enforce an IRS summons or, apparently, any other agency's compulsory process. The Tenth Circuit's four-paragraph opinion, cited frequently in subsequent enforcement decisions,[189] rejected this admittedly "creative" argument as "frivolous."

The court of appeals also had occasion to consider the exercise of an agency's subpoena power. *NLRB v. Dutch Boy, Inc.*[190] challenged a district court's enforcement of three subpoenas duces tecum issued by the National Labor Relations Board (NLRB). While preparing for hearings on unfair labor practice charges that had been filed against Dutch Boy, the NLRB subpoenaed certain documents belonging to the company. When the latter refused to produce all of the requested materials, the Board sought judicial assistance. Dutch Boy also attempted to enforce a subpoena initially granted it to obtain certain of the NLRB's records, which was subsequently revoked by an administrative law judge. The lower court, however, dismissed Dutch Boy's application for enforcement, asserting that it lacked jurisdiction over the matter.[191]

The Tenth Circuit, affirming the decision below, carefully limited the issues on appeal to those concerning enforcement of the NLRB subpoenas and thwarted Dutch Boy's attempts to interject for review certain alleged procedural irregularities in the administrative law judge's revocation of its subpoena.[192] The court found no fault with the district court's dismissal of the company's claim, holding that a district court has no power "to hear a private application for enforcement of a subpoena."[193] Additionally, the court found evidence in the record indicating that the documents sought by the NLRB satisfied the prerequisites for issuance of a subpoena in that they " 'relate[d] to or touch[ed] the matter under investigation.' "[194] Therefore, it

187. *Id.* at 833. In the course of its analysis, the Tenth Circuit rejected, as contrary to *LaSalle*'s directive, the taxpayers' "somewhat ingenious argument" that the burden of proving bad faith should shift to the government when a taxpayer has shown that the IRS is seeking information for a criminal prosecution. *Id.* at 833.

188. 614 F.2d 690 (10th Cir. 1980).

189. A number of taxpayers in the court's unpublished opinions, perhaps unaware of the *Fahey* decision, raised this argument. *See, e.g.*, United States v. Youmans, No. 79-1437 (10th Cir. Mar. 28, 1980); United States v. Pielstick, No. 79-1885 (10th Cir. Mar. 28, 1980); United States v. Kelderman, No. 79-1873 (10th Cir. Mar. 28, 1980).

190. 606 F.2d 929 (10th Cir. 1979).

191. *Id.* at 931.

192. *See id.* at 933.

193. *Id.* at 932. The appellate court's statement seems broad enough to include any subpoena issued by an agency to a private party. The case cited in support of this proposition, however, holds only that the NLRB's subpoenas may not be enforced by a private party in a district court. Judicial action is appropriate only in a proceeding to review the Board's final order in a matter. *See* Wilmot v. Doyle, 403 F.2d 811, 814-16 (9th Cir. 1968).

194. 606 F.2d at 932 (quoting Cudahy Packing Co. v. NLRB, 117 F.2d 692, 694 (10th Cir. 1941)).

concluded that the lower court had not arbitrarily enforced the Board's subpoenas or abused its discretion and therefore could not be reversed.[195] Dutch Boy also failed in its attempt to assert that the NLRB had issued its subpoenas solely to harrass the company. The court of appeals held that Dutch Boy had not met its burden of establishing the agency's improper purpose.[196]

VIII. GOVERNMENT LARGESSE

An apparent conflict between state and federal welfare laws occasioned the controversy before the Tenth Circuit in *Nolan v. De Baca*.[197] In implementing its plan for the federally funded Aid to Families with Dependent Children program (AFDC), the State of New Mexico promulgated a regulation that reflected an aspect of its community property system. Specifically, the State required one-half of the income earned by the spouse of an eligible child's natural or adoptive parent to be treated as income of the natural or adoptive parent.[198] The spouse's legal obligation to support the child was not a concern. In the Nolans' situation this computation substantially reduced the AFDC payments to the children.[199] Although the mother had no actual income, she was credited with one-half of the sum that her husband, who was her children's nonadoptive stepfather, earned. This constructive income was deemed available to meet the children's needs.

Claiming that New Mexico's regulation blatantly conflicted with the pertinent regulation enacted by the Federal Department of Health, Education and Welfare (HEW), which prohibits consideration, in the calculation of AFDC benefits, of funds available to family members who have no legal duty to support the dependent children,[200] Mrs. Nolan instituted an action against the State's Department of Health and Social Services. She sought an injunction forbidding the agency to enforce the regulation and succeeded in district court. That tribunal found the Supremacy Clause[201] controlling and granted a motion for summary judgment in Mrs. Nolan's favor.[202]

Acknowledging the well-established rule[203] that local AFDC regulations "may not contravene Social Security Act provisions or valid HEW regulations," the Tenth Circuit affirmed the lower court's decision.[204] "Operation of appellant's community property regulation obviously contravenes the federal act and HEW's regulation."[205]

---

195. 606 F.2d at 932.

196. *Id.* at 933.

197. 603 F.2d 810 (10th Cir. 1979).

198. *Id.* at 812-13.

199. Before the regulation was adopted their benefits totaled $163.00 per month; after promulgation of the regulation the monthly payments dropped to $2.00. *Id.* at 811.

200. 45 C.F.R. § 223.90(a) (1979).

201. U.S. CONST. art. VI, § 2.

202. *See* 603 F.2d at 811.

203. *See* King v. Smith, 392 U.S. 309, 333 (1968).

204. 603 F.2d at 812-13.

205. *Id.* The Tenth Circuit heard several other cases during the year involving various forms of federal financial assistance to individuals. Edwards v. Califano, 619 F.2d 865 (10th Cir. 1980) and Markham v. Califano, 601 F.2d 533 (10th Cir. 1979), concerned social security benefits. In *Edwards*, the court reversed the district court's affirmance of HEW's denial of child

IX. RIGHTS OF FEDERAL EMPLOYEES

Two cases reviewed by the Tenth Circuit considered the rights of governmental employees under certain federal statutes.[206] Both involved relatively narrow issues.

In *Hurley v. United States*[207] the appellant, making his second appearance before the court of appeals, sought construction of the Back Pay Act,[208] which authorizes payment to a federal employee of all remuneration that he or she would have received had he or she not been the victim of "an unjustified or unwarranted personnel action."[209] He contended that the damages award he received following a determination that he had been unjustifiably transferred from his Federal Aviation Administration post in Texas to a position in Oklahoma should have included his sizeable claim for a per diem travel allowance. Hurley reasoned that during the period of his illegal transfer he was on travel status and, accordingly, was entitled to appropriate compensation.[210]

The court of appeals, however, ruled that the Back Pay Act does not encompass travel expenditures, thereby affirming the district court's denial of the appellant's claim. The statute permits reimbursement only of pay an employee would normally have received in the absence of the government's erroneous action.[211] Finding support in a decision from the United States Court of Claims,[212] which rejected an identical argument, the Tenth Circuit declined the proffered invitation "to engraft a provision that is not a part of the Act."[213]

Resolution of the petitioner's claim in *Phillips v. Merit Systems Protection Board*[214] necessitated an analysis of the application of the Civil Service Re-

---

insurance benefits on the ground that the agency had not rebutted the statutory presumption of death arising from the father's unexplained absence of seven years. 619 F.2d at 868. The court affirmed a denial of disability benefits in *Markham*, holding that the evidence sustained a finding that the claimant was not so disabled as to be incapable of engaging in gainful employment. 601 F.2d at 536. Finally, in Gutierrez v. Califano, 612 F.2d 1247 (10th Cir. 1979), the Tenth Circuit reversed the lower court's order declaring a claimant eligible for Black Lung benefits after HEW had reached a contrary decision. The appellate court determined that data relied upon by the lower court to reach its decision had been improperly evaluated and were insufficient to overcome substantial evidence offered by the agency to support its denial of an award. *Id.* at 1249.

206. A third case, Stritzl v. United States Postal Serv., 602 F.2d 249 (10th Cir. 1979), reviewed a discharged federal employee's right to a hearing; it is therefore treated in *Part X: Procedural Due Process, infra* at 231. A fourth decision interpreting federal employees' rights under the Privacy Act, 5 U.S.C. § 552a (1976), is discussed in detail in *Part XII: The Privacy Act, infra* at 238.

207. 624 F.2d 93 (10th Cir. 1980).

208. 5 U.S.C. § 5596 (1976).

209. Federal regulations define "unjustified or unwarranted personnel action" as "an action of commission . . . or of omission . . . which thereby resulted in the withdrawal, reduction, or denial of all or any part of the pay, allowances, or differential . . . otherwise due an employee." 5 C.F.R. § 550.802(c) (1980).

210. 624 F.2d at 94.

211. *Id.* at 94-95.

212. Morris v. United States, 595 F.2d 591 (Ct. Cl. 1979).

213. 624 F.2d at 95.

214. 620 F.2d 217 (10th Cir. 1980).

form Act of 1978.[215] Phillips was removed from his position in the Merchant Marine in 1973. He appealed to the Civil Service Commission, which upheld the action, and to the Board of Appeals and Review, which affirmed the Commission's decision. Subsequently, a federal district court heard the case and remanded it to the Merit Systems Protection Board, successor to the Civil Service Commission,[216] for a new hearing including certain witnesses who had previously been unavailable. Following this hearing the Board affirmed the Commission's initial decision, and Phillips sought review by the court of appeals. The Merit Systems Protection Board, asserting that the appellate court lacked jurisdiction, moved for dismissal.[217]

The Tenth Circuit examined the provisions of the Civil Service Reform Act that authorize judicial review of the Board's final orders in a federal court of appeals. It focused, however, on a savings clause that makes the statute inapplicable to administrative proceedings pending on the statute's effective date. With the assistance of a regulation promulgated by the Merit Systems Protection Board specifying that an agency proceeding is considered pending or "existing" when "the employee has received notice of the proposed action,"[218] the court concluded that the new law did not apply to the case under consideration.[219] The petitioner had been notified of the personnel action before the Reform Act became effective even though the final adverse decision had been rendered after the statute's effective date. Granting the motion to dismiss, the court of appeals explained that Phillips' suit could be initially instituted only in a federal district court or in the court of claims.[220] The Tenth Circuit thus joined five other circuits that have reached a similar conclusion.[221]

X. Procedural Due Process and the Right to a Hearing

In two very different factual settings the Tenth Circuit rejected contentions that requirements of due process and of correct administrative procedure mandated hearings. *Stritzl v. United States Postal Service*[222] involved a discharged federal employee, and *Colorado v. Veterans Administration*[223] concerned the liability of state-supported educational institutions for overpayments of veterans' educational benefits.

Edwin Stritzl, a post office employee, was terminated for poor work habits and low productivity prior to the expiration of his ninety-day probation period. He was discharged without a hearing, and, after unsuccessful attempts to appeal the action through the American Postal Workers Union

215. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5, 15, 28, 31, 38, 39, 42 U.S.C.).

216. For the court's summary of the 1979 reorganization of the Civil Service Commission, see 620 F.2d at 218.

217. 620 F.2d at 218.

218. 5 C.F.R. § 1201.191(b) (1979).

219. 620 F.2d at 219.

220. *See* 28 U.S.C. §§ 1346, 1491 (1976).

221. The court's ruling conforms with those of the First, Third, Fifth, Eighth, and District of Columbia Circuits. *See* cases cited in 620 F.2d at 219.

222. 602 F.2d 249 (10th Cir. 1979).

223. 602 F.2d 926 (10th Cir. 1979).

and the Civil Service Commission, he filed suit in the District Court for the District of Colorado. He alleged that the conditions of his termination violated the Postal Reorganization Act[224] and the due process clause of the fifth amendment.[225] The trial court rejected Stritzl's arguments, and, on appeal, the Tenth Circuit upheld the judgment for the Postal Service.[226]

The appellate court, in its review of the statutory and constitutional claims, first observed that the federal government has traditionally imposed a probationary status on new employees. During the period of probation an employee's rights are limited, and he or she is subject to termination for good cause without either a hearing or an opportunity to appeal. The court also noted that the postal workers' union acknowledges, and apparently accepts, this "historical fact," for the collective bargaining agreement affords probationary employees no access to the union's grievance procedures.[227]

The court then turned to Stritzl's contention that the Postal Reorganization Act's hearing requirement[228] changed this policy. The statute expressly protects "employment rights,"[229] and the appellate court agreed with the district court that a probationary employee, lacking such rights, cannot be considered a true employee for purposes of the statutory directive.

> We do not regard this statutory language as creating new substantive "employment rights." Specifically, we do not regard the statutory language here relied on as creating a right whereby probationary employees are entitled to receive a hearing before their probationary employment is terminated. If Congress had intended to create such an employment right for probationary employees, it would have said so in clear and understandable language. Congress did not do so, however.[230]

Accordingly, the Tenth Circuit refused to step where Congress had deemed it unnecessary to tread.[231]

In dictum, apparently intended to shed additional light on the Postal Reorganization Act's fair hearing requirement, the court instructed that this provision is limited by other sections of the statute authorizing the inclusion of grievance procedures in collective bargaining agreements.[232] Thus, such procedures may be valid although they conflict with the notion of a fair hearing as contemplated by the Act.[233]

Finally, the Tenth Circuit held that the Postal Service had not deprived Stritzl of a liberty interest by disseminating information about his perform-

224. Pub. L. No. 94-421, 90 Stat. 1303 (1976) (codified in scattered sections of 39 U.S.C.). The act directs that employees be given "an opportunity for a fair hearing on adverse actions." 39 U.S.C. § 1001 (1976).

225. U.S. CONST. amend. V, cl. 3.

226. 602 F.2d at 250-51.

227. *Id.* at 251.

228. 39 U.S.C. § 1001(b) (1976).

229. *Id.*

230. 602 F.2d at 251.

231. *See id.* at 251-52.

232. *Id.* at 252.

233. The court cited a decision from the Seventh Circuit, Winston v. United States Postal Serv., 585 F.2d 198 (7th Cir. 1978), as authority for this proposition.

ance as a postal clerk.[234] Stritzl had argued that the Golden, Colorado post office's release of a negative evaluation of Stritzl's performance to the Littleton, Colorado postmaster violated a liberty interest and required a hearing. The court of appeals ruled, however, that the Postal Service's unfavorable characterization of Stritzl was not comparable to the "badge of infamy" identified by the Supreme Court in *Wisconsin v. Constantineau*[235] nor was it the type of "stigma" the Court contemplated in *Board of Regents v. Roth*.[236] Quoting from one of its 1976 opinions,[237] the Tenth Circuit concluded that Stritzl had failed to establish a liberty interest worthy of constitutional protection. " '[N]othing present in this case indicates appellant has had such a stigma imposed upon him as to foreclose future employment opportunities.' "[238]

In *Colorado v. Veterans Administration*,[239] the State of Colorado attempted to establish its right to a hearing in matters concerning its liability to the Veterans Administration (VA) for excess educational benefits paid by the VA to veterans enrolled in local colleges and universities. In an action brought in the United States District Court for the District of Colorado,[240] the State challenged the constitutionality of a provision of the Educational Assistance Program[241] that authorizes the VA to seek reimbursement from an educational institution for payments made to an ineligible student through some fault or omission attributable to the institution.[242] Additionally, the State contended that the procedure used by the VA to establish liability violated constitutional and statutory hearing requirements.[243]

The district court held the disputed statute constitutionally sound, finding the state's liability "a simple matter of a contractual duty flowing from the school to the state certifying agency to the VA,"[244] which had been incurred when the state agreed to monitor and report on student status as a condition to participation in the benefit program. The trial court ruled that such imposition of liability is rationally related to a legitimate governmental

234. 602 F.2d at 252-53.

235. 400 U.S. 433 (1971).

236. 408 U.S. 564 (1972).

237. Weathers v. West Yuma County School Dist., 530 F.2d 1335 (10th Cir. 1976).

238. 602 F.2d at 253 (quoting Weathers v. West Yuma County School Dist., 530 F.2d 1335, 1339 (10th Cir. 1976)).

239. 602 F.2d 926 (10th Cir. 1979).

240. The district court's decision in this suit is reported in Colorado v. Veterans Administration, 430 F. Supp. 551 (D. Colo. 1977).

241. The Educational Assistance Program is established and administered according to the provisions set forth in 38 U.S.C. §§ 1651-1698, 1700-1766, 1770-1796 (1976). The challenged statute provides that:

> Whenever the Administrator finds that an overpayment has been made to an eligible person or veteran as the result of (1) the willful or negligent failure of an educational institution to report as required . . . to the Veteran's Administration excessive absences from a course, or discontinuance or interruption of a course by the eligible person or veteran, or (2) false certification by an educational institution, the amount of such overpayment shall constitute a liability of such institution, and may be recovered . . . in the same manner as any other debt due the United States.

38 U.S.C. § 1785 (1976).

242. Colorado v. Veterans Administration, 430 F. Supp. at 558.

243. *Id.* at 560.

244. *Id.* at 558.

function,[245] and it also concluded that the practice does not offend the doctrine of intergovernmental immunity.[246] After a consideration of the alleged procedural defects, however, the lower court agreed with the state's contention that the Administrative Procedure Act (APA)[247] required a hearing as a part of the VA's adjudication of a school's liability for overpayments.[248] While acknowledging that the agency had in fact afforded some opportunity for a hearing, the court nevertheless reasoned that "[b]ecause liability determinations against educational institutions are subject to judicial review, . . . those determinations [must] follow the procedures outlined in the Administrative Procedure Act."[249]

Both the State of Colorado and the VA appealed the district court's judgment to the Tenth Circuit, which upheld the finding of constitutionality, agreeing with the lower court's contractual analysis.[250] An amendment[251] to the challenged statute, however, justified—and perhaps necessitated—a modification of the decision on the procedural issue. The appellate court observed that the amendment allows an offset of overpayments against fees owed to an institution as compensation for compliance with the statutory reporting requirements only if a school does not contest the VA's claim or if a court has reviewed and upheld the VA's finding of liability.[252] The court also noted that the VA must sue to collect overpayments it believes are due just as it would sue to collect any other debt.[253] Given this express access to a judicial forum, "the administrative proceedings . . . become somewhat less significant."[254]

The Tenth Circuit found neither an express directive nor a "clear indication" that the applicable statute required an adversary hearing on the record as contemplated by the APA.[255] Stating that the APA creates no hearing rights that do not already exist, the court of appeals concluded that the Act did not apply to the VA's overpayment claims. Satisfied that a collection action would assure the accuracy of the VA's determinations of overpayment liability,[256] the Tenth Circuit modified the district court's judgment to the extent that it imposed on the Veterans Administration the

245. *Id.*

246. *Id.* at 559.

247. 5 U.S.C. §§ 500-559, 701-706 (1976).

248. 430 F. Supp. at 561.

249. *Id.* (citing Wong Yang Sung v. McGrath, 339 U.S. 33, *modified*, 339 U.S. 908 (1950)).

250. Colorado v. Veterans Administration, 602 F.2d 926, 927 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 663 (1980).

251. GI Bill Improvement Act of 1977, Pub. L. No. 95-202, tit. III, § 304(a)(1), 91 Stat. 1433 (1977) (amending 38 U.S.C. § 1785 (1976)).

252. Prior to its amendment, the statute had authorized the VA to recover overpayments to a school by referring the claim to the General Accounting Office for collection in court and by offsetting the payments against other amounts due the school from the VA. 38 U.S.C. § 1784 (Supp. I 1977).

253. 602 F.2d at 928. *See* 38 U.S.C. § 1785 (Supp. I 1977) (overpayments "may be recovered . . . in the same manner as any other debt due the United States.").

254. 602 F.2d at 928.

255. *See* 5 U.S.C. § 554 (1976).

256. "[T]he section expressly provides for a suit for collection at the end of the administrative road, and there is no setoff for reporting fees any longer . . . . Any right to review the agency determination is during the course of the suit brought by the United States to collect." 602 F.2d at 928-29.

requirement of a hearing.[257]

XI. THE SUNSHINE ACT

The Tenth Circuit had occasion during this past year to construe the Government in the Sunshine Act (the Sunshine Act).[258] In *Hunt v. Nuclear Regulatory Commission*[259] the court of appeals considered the Sunshine Act's applicability to deliberations of the Atomic Safety and Licensing Board (ASLB) and concluded that it does not apply. Thus, meetings[260] of the ASLB need not be open to the public. The decision is especially significant in light of the present controversies attending the use of nuclear power and the structural soundness of existing and proposed nuclear facilities. Additionally, the basis for the court's ruling is instructive because it highlights the value of statutory definitions.

The case had its origin in a request submitted to the Nuclear Regulatory Commission (NRC) by the Public Service Company of Oklahoma for a license to construct a nuclear power plant. During the agency's consideration of the application an internal report prepared by the General Electric Company became relevant to several matters. General Electric had previously contracted with the Public Service Company to furnish the nuclear steam supply system for the proposed power plant, and it was reluctant to disclose the report, which allegedly contained trade secrets. Eventually, however, the company agreed to produce the document on the condition that the sessions of the ASLB at which it was used would be closed to the public.[261]

The appellant, a resident of Tulsa, which is near the site of the proposed facility, challenged in federal district court the decision to hold in camera hearings. His complaint asserted that this practice would violate the Sunshine Act and sought a temporary restraining order as well as permanent injunctive relief.[262] The lower court, however, after a detailed analysis of the legislative history,[263] concluded that the statute does not apply to adjudicatory hearings before the Atomic Safety and Licensing Board.[264] It dismissed the case, and the disappointed plaintiff appealed.

In its opinion affirming the district court's judgment, the Tenth Circuit examined the composition and functions of the NRC and the ASLB, as well as the relationship between the two.[265] The NRC consists of five members who are presidential appointees. It is responsible for processing the applications of utility companies wishing to construct nuclear power facilities, and its staff conducts the initial review of all such applications. Subsequently,

257. *Id.* at 929.
258. 5 U.S.C. § 552b (1976).
259. 611 F.2d 332 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 1084 (1980).
260. The word "meetings" must necessarily be used liberally here, given the court's ultimate construction of the statute. *See* text accompanying notes 266-272, *infra*.
261. 611 F.2d at 333.
262. *Id.*
263. *See generally* Hunt v. NRC, 468 F. Supp. 817, 820-22 (N.D. Okla. 1979).
264. *Id.* at 822.
265. *See generally* 611 F.2d at 334-35.

hearings are conducted by a three-member Atomic Safety and Licensing Board, and, at this stage, the NRC becomes an independent party in the licensing process. The Board is established by the NRC, but it is not a fixed entity; its members are selected from a panel of experts appointed by the Commission, and the composition of any given Board may change from hearing to hearing. Essentially, the ASLB is the Commission's adjudicatory arm.

The court of appeals undertook to discover whether the ASLB is an agency within the meaning of the Sunshine Act. Agencies subject to the open meeting requirements of the statute are those "headed by a collegial body," the majority of whose members are appointed by the President with the Senate's advice and consent.[266] The composition of the ASLB obviously precludes its characterization as such an agency.[267]

The Sunshine Act also encompasses agencies' subdivisions, however, and the lower court went to great lengths to determine whether the statutory language, "subdivision thereof,"[268] referred back to agency or to collegial body. With the assistance of the legislative history, the district court decided that the reference was to collegial body.[269] Were agency not defined in terms of its presidentially appointed fellows, the Board would seem by any ordinary understanding to be a subdivision of the NRC. But, because the ASLB includes no Commission members, it cannot be a subdivision of the collegial body.

The Tenth Circuit agreed with the district court's interpretation of the statute's definition of subdivision[270] and found additional support for the position in the definitions of "meeting" and "member."[271] The former consists of the deliberations of agency members, who are, in turn, defined as those individuals belonging to the "collegial body heading an agency."[272] Only these specific deliberations are open to the public. Whatever else the Atomic Safety and Licensing Board may do, it clearly does not hold "meetings" because it has no "members."

Although the court of appeals found adequate support for the district court's decision in the Sunshine Act itself, it briefly considered the NRC's regulations implementing the statute, which specifically exclude from coverage those "subdivisions" of the "agency" not composed of members of the governing collegial body.[273] It also observed that other agencies have promulgated similar rules.[274] Thus, the court implicitly exercised a form of the traditional judicial deference to an agency's reasonable interpretation of the laws it must execute.[275]

266. 5 U.S.C. § 552b(a)(1) (1976).
267. 611 F.2d at 335.
268. Hunt v. NRC, 468 F. Supp. at 820-21.
269. *Id.* at 821.
270. 611 F.2d at 336 & n.2.
271. 5 U.S.C. § 552b(a)(2), (3) (1976).
272. *Id.* § 552b(a)(3).
273. 611 F.2d at 337.
274. *Id.* at 337 n.3.
275. *See Part IV: Scope of Authority, supra* at 217.

Without having to resort to the Sunshine Act's authorized exemptions,[276] which the court probably would have had to strain to apply,[277] the Tenth Circuit declared that the NRC may properly close meetings of certain of its branches lying beyond the reach of the statute's definitions. Clearly, the Sunshine Act does not expose administrative deliberative processes as completely as might be desired.[278] The Tenth Circuit's opinion in *Hunt* highlights the loopholes, and its close definitional analysis may prove helpful to other agencies seeking solid support for their endeavors to escape the mandate of the Sunshine Act.[279]

Appellant Hunt lost his battle with the NRC on another front as well. When the Chairman of the ASLB panel hearing the Public Service Company's application for a construction permit requested spectators to leave the hearing room prior to the Board's consideration of General Electric's internal report, Hunt and a companion refused to leave. To make their point they chained themselves to the doorframe of the hearing room. The hearing was delayed while a marshall cut the chains and removed the two men, who were ultimately charged and convicted by a magistrate for disrupting government employees in the performance of their official duties.[280] The district court affirmed the conviction, and the defendants appealed.

In *United States v. Rankin*[281] the Tenth Circuit upheld the lower court's judgment. To justify their conduct, the defendants had argued that the Sunshine Act forbade the closure of the ASLB hearing and that, therefore, the federal employees were not performing official duties when conducting—or attempting to conduct—the in camera hearing.[282] The *Hunt* decision disposed of the first part of their contention, but the court of appeals added that even if the defendants had correctly construed the Sunshine Act, they would have had no defense to the charges against them. An individual's good faith belief in the propriety of his or her actions does not excuse conduct that impedes administrative proceedings.[283] "[T]he defense of 'good faith belief' is no defense. The defendants could not thus take the law in their own hands."[284]

---

276. *See* 5 U.S.C. § 552b(c) (1976).

277. The statute does, however, allow closed meetings when disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential" is likely to occur. 5 U.S.C. § 552b(c)(4) (1976).

278. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5:44 (2d ed. 1978).

279. The district court found only one other judicial interpretation of the statutory definitions in Philadelphia Newspapers, Inc. v. United States Parole Comm'n, No. 78-1016 (E.D. Pa. Mar. 30, 1978). Hunt v. NRC, 468 F. Supp. at 821. The Pennsylvania court reached a similar conclusion.

280. Hunt and his companion had violated 41 C.F.R. § 101-20.304 (1978).

281. 616 F.2d 1168 (10th Cir. 1980). The facts discussed in the preceding paragraph are set forth in 616 F.2d at 1169.

282. *Id.* at 1169-70.

283. *Id.* at 1170. *See also* United States v. Young, 614 F.2d 243 (10th Cir. 1980); Armstrong v. United States, 306 F.2d 520 (10th Cir. 1962).

284. 616 F.2d at 1170.

XII. THE PRIVACY ACT

It has been suggested that the Privacy Act[285] may not prove to be as universally significant a law as the Freedom of Information Act.[286] But, "[f]or some individuals, for example federal employees concerned about the contents of their personnel files, the Act may provide new rights and remedies of substantial importance."[287] In *Parks v. Internal Revenue Service*,[288] the Tenth Circuit gave substance to this prediction.

The *Parks* plaintiffs, employees of the Internal Revenue Service (IRS), complained to the federal district court in New Mexico that lists of IRS employees who had not purchased government savings bonds were supplied to other IRS employees for use in soliciting additional sales of the bonds. Plaintiffs contended that this disclosure violated the Privacy Act's general prohibition against furnishing "any record which is contained in a system of records" without the consent of the "individual to whom the record pertains."[289] The use made of the lists could not, they argued, be characterized as "routine"[290] and as such be made exempt from the disclosure proscription;[291] nor could the agency establish that its officers and employees needed the lists "in the performance of their duties."[292] The district court was not persuaded, however, and it dismissed the plaintiffs' action after concluding that the disclosure was, in fact, part of a "routine use."[293]

On appeal, the Tenth Circuit reversed the lower court's judgment of dismissal, declaring that the plaintiffs had stated a claim under the Privacy Act sufficient to entitle them to monetary compensation from the agency.[294] The court of appeals found evidence in the statute's legislative history that indicated that by restricting dissemination of personnel records Congress expressly intended to protect federal employees "who do not comply with organization norms and standards" from "internal blacklisting."[295] Furthermore, the appellate court concluded that the agency's use of the lists in question could not be routine, primarily because the IRS had not followed the notice and comment procedure required by the Privacy Act for designating a routine use.[296] Therefore, the Tenth Circuit found that the plaintiffs' claims adequately alleged a violation of the Privacy Act's general proscription against disclosure.

---

285. 5 U.S.C. § 552a (1976).

286. 5 U.S.C. § 552 (1976).

287. W. GELLHORN, C. BYSE, & P. STRAUSS, ADMINISTRATIVE LAW, CASES AND COMMENTS 622 (7th ed. 1979).

288. 618 F.2d 677 (10th Cir. 1980).

289. 5 U.S.C. § 552a(b) (1976).

290. A "routine use" is "the use of [a] record for a purpose which is compatible with the purpose for which it was collected." *Id.* § 552a(a)(7).

291. *See id.* § 552a(b)(3).

292. *See id.* § 552a(b)(1).

293. 618 F.2d at 680.

294. *See* 5 U.S.C. § 552a(g)(4) (1976) (allows minimum damage award of $1,000 for intentional or willful violations of the Act).

295. 618 F.2d at 681 n.1 (quoting S. REP. NO. 93-1183, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6916, 6966). Congress specifically cited nonparticipation in savings bond programs as an example of a failure to follow "organizational norms." *Id.*

296. 618 F.2d at 681-82. *See* 5 U.S.C. § 552a(e) (1976).

To be entitled to relief for an allegedly illegal disclosure, a party must also plead that he or she has suffered some "adverse effect" from the circulation of the confidential information.[297] Thus, the court's inquiry was not complete upon its conclusion that the complaint sufficiently alleged a violation of the statute. Noting that the Privacy Act is rooted in the tort of invasion of privacy, the court of appeals reasoned that "the invasion of the right . . . is the essence of the action."[298] Such conduct may not cause pecuniary damage, but mental and psychological harm are foreseeable consequences. Therefore, the appellate court found the plaintiffs' allegations of psychological distress and embarrassment sufficient to establish the requisite adverse effect.[299] That the claims tended to show an injury personal to the plaintiffs necessarily alleviated any standing problem.[300]

Having found the allegations concerning a violation of the Privacy Act and its resultant harmful impact ample to sustain the plaintiffs' cause of action, the Tenth Circuit next considered whether the plaintiffs had adequately contended that the actions of the agency's officials were so intentional and willful as to warrant the award of damages authorized by the statute.[301] Notwithstanding the absence of specific declarations of intentional and willful conduct, the court concluded that the facts which the plaintiffs had alleged permitted an inference of misconduct descending to the prescribed levels of impropriety.[302] While the employees were entitled to seek damages, the court of appeals held that they were not entitled to the injunctive relief which they had requested. Those sections of the Privacy Act authorizing the issuance of injunctions contemplate their use as aids in amending an individual's record and in ordering production of records improperly withheld from a requesting party.[303] The court found no provision permitting injunctions to restrain other violations of the Act. "[W]here . . . the statute provides for certain special types of equitable relief but not others, it is not proper to imply a broad right to injunctive relief."[304]

Several of the district court's holdings in the *Parks* case did survive the Tenth Circuit's scrutiny. Specifically, the court of appeals affirmed the ruling below that certain IRS employees were improperly joined as defendants inasmuch as the Privacy Act only authorizes suits against an agency.[305] In addition, the appellate court agreed that, under the existing circumstances, the National Treasury Employees Union had no standing to sue the IRS, either on its own behalf or for its members.[306]

---

297. *See* 5 U.S.C. § 552a(g)(1) (1976).
298. 618 F.2d at 683.
299. *Id.*
300. *Id.*
301. When a court determines that an agency "acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of (A) actual damages . . . but in no case . . . less than the sum of $1,000; and (B) the costs of the action . . . ." 5 U.S.C. § 552a(g)(4) (1976).
302. 618 F.2d at 683.
303. *See* 5 U.S.C. § 552a(g)(2), (3) (1976).
304. 618 F.2d at 684.
305. *Id. See also* 5 U.S.C. § 552a(g)(1) (1976).
306. 618 F.2d at 684-85.

In this case of first impression[307] the Tenth Circuit construed the Privacy Act with an eye toward effectuating Congress' "self-help enforcement program" that encourages litigation by individuals. "[I]t is only through this process that the objects of the Act can be realized."[308] The court strictly enforced the congressional directive to the administrative agencies to publish information about the records they maintain and to give notice and an opportunity for comment on all routine uses of such records. It is clear from the court's opinion that an agency cannot claim routine use as a defense to a challenged disclosure if the use has not been specifically included in the required public notice.[309]

While holding the agencies to a high standard in the use and circulation of the records they maintain, the Tenth Circuit was liberal in its application of the statutory conditions for a damages action. It gleaned from the Act three sets of allegations necessary to shield a complaint from a dismissal motion, but it is apparent from the *Parks* decision that a plaintiff's pleading burden is not heavy. A complaint must first allege a cognizable violation of the Privacy Act. Next, it must contain evidence of some personal detriment to plaintiff arising from the alleged violation. The Tenth Circuit has made it clear that psychological harm qualifies as an "adverse effect," although it remains to be seen both how severe the damage must be to warrant compensation and what financial awards it may yield. And, finally, the complaint must indicate, although it need not specifically allege, that the agency's conduct was willful or intentional. Some evidence that administrative officials knew of the improper disclosure and did nothing to prevent it is likely to suffice. The allegations must reveal the conduct to be something more than mere negligence but less than "premeditated malice."[310] The requirements identified by the court should prove to be useful guidelines to future plaintiffs seeking to vindicate their statutory privacy rights.

In *Parks*, the Tenth Circuit made clear its intention to interpret the Privacy Act "in the spirit which attended its enactment" so as to afford maximum protection for the "very sensitive . . . right of an individual to be free of unnecessary invasions of his privacy."[311] Soon after rendering the *Parks* decision, the court had an opportunity to indulge in construction of another section of the statute. Resolution of the dispute in *Volz v. Department of Justice*[312] required an analysis of an investigatory-materials exemption[313] to the Privacy Act's general mandate that allows an individual access to federal records concerning the individual. In its review, the court of appeals acknowledged and endeavored to uphold the legislative desire to protect the privacy not only of those about whom the federal government collects information but also of those who assist the government in compiling its informa-

307. *Id.* at 679.
308. *Id.* at 685.
309. *Id.* at 681-82.
310. *Id.* at 683.
311. *Id.* at 685.
312. 619 F.2d 49 (10th Cir.), *cert. denied*, 101 S. Ct. 397 (1980).
313. *See* 5 U.S.C. § 552a(j), (k) (1976) (general and specific exemptions to statute's disclosure policy).

tion. As *Volz* indicates, sometimes the interests of the latter group outweigh those of the former.

James Volz was an agent for the Federal Bureau of Investigation (FBI) who was suspended briefly for disciplinary reasons. While probing his conduct, the FBI obtained information from a lawyer acquainted with Volz. The information was provided under an express promise from the agency that it would preserve the informant's confidentiality. Subsequently, the FBI agreed to relinquish to Volz all materials compiled during its disciplinary investigation, and the lawyer informant released the Bureau from its promise as to almost all of the information he had furnished. Volz demanded disclosure of the balance of the lawyer's communications to the FBI but his request was refused. He commenced an action in federal district court under the Privacy Act and obtained an order for the release of the withheld material.[314] On the government's appeal, however, the Tenth Circuit reversed the lower court's decision.[315]

The court of appeals stated the issue in the case to be whether the statutory exemption from disclosure of information furnished under a promise of confidentiality[316] is applicable when "the source of the information is known but the specific confidential information itself is not known to the party seeking disclosure."[317] After observing that the primary purposes of the exemption are to protect the privacy of the government's informants and to encourage the divulging of material, but confidential, information that would otherwise elude the government's grasp, the court concluded that disclosure of information provided by a source whose identity is no longer a secret would, nevertheless, defeat these ends. The court also found that such disclosure would discourage individual cooperation with the agencies as well as deter future voluntary disclosures to requesting parties. Therefore, the court of appeals nullified the order for production.[318]

---

314. Like the plaintiffs in *Parks*, Volz availed himself of the statutorily authorized private civil action, *see id.* § 552a(g)(1); unlike those individuals, however, he requested a form of injunctive relief explicitly recognized by the statute. *See id.* § 552a(g)(3)(A).

315. 619 F.2d at 49-50.

316. *Id.* at 50.

317. The head of any agency may promulgate rules . . . to exempt any system of records within the agency from [disclosure] . . . if the system of records is—

. . . .

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, *but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence*, ...

5 U.S.C. § 552a(k)(5) (1976) (emphasis added).

318. 619 F.2d at 50. The court also reversed the district court's award of attorney's fees and costs to the plaintiff, reasoning that he had not "substantially prevailed" to the extent necessary to justify recovery of such expenses. *Id.* The Privacy Act authorizes an assessment against the federal government of fees and costs incurred in obtaining relief from an agency's unlawful refusal to release records if "the complainant has substantially prevailed." 5 U.S.C. § 552a(g)(3)(b) (1976).

Judge Doyle filed an opinion dissenting from the reversal of the attorney's fee award. He enumerated six factors courts are to weigh when determining whether to order the reimbursement of a prevailing party, *see* 619 F.2d at 51 (Doyle, J., dissenting), and observed that the court of appeals had considered none of them in rendering its decision. He expressed a desire to "approve the modest award in the interests of promoting the public interest." *Id.*

The key to the Tenth Circuit's decision lies in its recognition of an "inextricable connection between the source and the substance of a confidential disclosure."[319] But, it appears that in its fervor to promote the objectives of the Privacy Act, the court of appeals neglected the plain language of the exemption.[320] Certainly the source and the information are connected, but the bond may not be "inextricable." The exemption voices concern for the identity of the source;[321] the promise of confidentiality it contemplates seems to extend to that identity and not to the substance of the knowledge furnished. It would seem that material acquires its confidentiality because the informant desires anonymity. Likewise, this special status should change when the donor's identity is known, provided that his or her identity has not been revealed by the agency either deliberately or inadvertently in breach of its promise or has not been otherwise improperly disclosed. Indeed, the source's voluntary release of an agency from its undertaking to preserve confidentiality would seem to indicate a lack of concern for continued secrecy.

The Tenth Circuit's opinion in *Volz v. Department of Justice* effectively precludes a literal reading of the Privacy Act's investigatory materials exemptions and extends the restriction, which should be narrowly construed,[322] beyond its statutory scope. This result may have no substantial effects, but the court's gloss seems clearly at odds with the statute's direction. Under the *Volz* facts, the Tenth Circuit's eagerness to protect privacy is misplaced.[323]

---

319. *Id.* at 50.

320. *See* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1973).

321. 5 U.S.C. § 552a(k)(5) (1976). For the text of the statute see note 317 *supra.*

322. *See* Nemetz v. Department of the Treasury, 446 F. Supp. 102, 105 (N.D. Ill. 1978).

323. The federal district court in Nemetz v. Department of the Treasury, 446 F. Supp. 102 (N.D. Ill. 1978) emphasized throughout its opinion that protection of the *identity* of a confidential source is the primary focus of the section 552a(k)(5) exemption.

> It is clear on the face of the statute that *only information which would identify the source of confidential information may be exempted by agency regulation.* Thus, the government's argument that all information received under a promise of confidentiality is exempt must be rejected at the outset. To the extent Section 552a(k)(5) applies it *exempts only information which would reveal the identity of the source.*

Id. at 104 (emphasis added). *See also id.* at 106-07. The district court expressly distinguished the Privacy Act's confidentiality exemption from that included in the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(D) (1976), which exempts *all* information obtained from a confidential source. 446 F. Supp. at 104 n.1.

Both the *Nemetz* case, and a recent decision from the Fourth Circuit, Ryan v. Department of Justice, 595 F.2d 954 (4th Cir. 1979), would have an agency seeking to claim a disclosure exemption under the Privacy Act make certain specific showings. In *Ryan*, the court of appeals required evidence that the agency had promulgated rules specifically exempting designated systems of records from the Privacy Act's disclosure provisions. The Fourth Circuit Court also expected explicit evidence of the agency's reasons for invoking a claim of exemption for such records. 595 F.2d at 957-58. *See also* 5 U.S.C. § 552a(j) (1976). The *Nemetz* opinion similarly required promulgation of regulations exempting the records at issue, 446 F. Supp. at 104, and further insisted that "general averments of promises of confidentiality are insufficient" to justify immunity from disclosure under section 552a(k)(5). *Id.* at 105. The narrow scope of the exclusion "requires finding a promise of confidentiality as to each source sought to be withheld." *Id. See also* Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978) (dictum); Mervin v. Bonfanti, 410 F. Supp. 1205 (D.D.C. 1976).

In *Volz*, the Tenth Circuit imposed no similar conditions on the agency's claim for exemption of the information gathered from its "confidential" source.

XIII. STANDING

Although standing lurked as a peripheral issue in *Parks v. Internal Revenue Service*,[324] it created no major obstacle to jurisdiction. The Tenth Circuit did have one opportunity, however, to consider exclusively whether a plaintiff had "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness"[325] necessary to create a case or controversy, which is a constitutional prerequisite of judicial review.[326] Resolution of the customarily difficult standing question was further compounded by the plaintiff's status as an association seeking to vindicate the interests of its members.[327]

In 1976, the National Collegiate Athletic Association (NCAA) brought suit in the United States District Court for the District of Kansas challenging the Department of Health, Education and Welfare's (HEW) controversial regulations[328] that require educational institutions to provide equal athletic opportunities for both male and female students.[329] The NCAA purported to represent both itself and its member institutions; the latter did not join individually in the action. After an extensive review of the extent law of standing as articulated by the Supreme Court in a number of opinions[330] and after a detailed analysis of the NCAA's allegations, the district court dismissed the case.[331] It held that the NCAA lacked standing to challenge the regulations on its own behalf for the principal reason that "the prospect of any injury at all is . . . purely speculative and dependent upon the hypothetical actions" of its member institutions.[332] The court further ruled that

---

324. 618 F.2d 677, 633, 685 (10th Cir. 1980). *See Part XII: The Privacy Act, supra* at 238.

325. Baker v. Carr, 369 U.S. 186, 204 (1962).

326. U.S. CONST. art. III, § 2.

327. For a discussion of the problems attending associations' standing, see Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974); Note, *From Net to Sword: Organizational Representatives Litigating Their Members' Claims*, 1974 U. ILL. L.F. 663.

328. 45 C.F.R. § 86.41 (1979).

329. Critics argue that HEW exceeded its authority under title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1976), in promulgating the regulations. The contention is that the agency impermissibly extended the scope of the statute by forbidding sex discrimination not only in educational programs receiving federal financial assistance but also in those programs deemed to be benefiting from funds used by actual recipients. "In HEW's view, the only test of coverage is whether the . . . institution is a recipient of any federal assistance; if so, all activities of the agency come within the provisions of the Act." Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 63 (1976).

Athletic programs are not routinely funded by the government, but the regulations require schools and universities receiving federal benefits in other programs to provide equal opportunities "in any interscholastic, intercollegiate, club or intramural athletics offered . . . and no recipient shall provide any such athletics separately" on the basis of sex. 45 C.F.R. § 86.41(a) (1979). The stakes for noncompliance are high; an institution found to have permitted or condoned sex discrimination may lose its federal financial assistance. *See* 20 U.S.C. § 1682 (1976).

For a detailed discussion of specific ways HEW has allegedly expanded the reach of title IX, see Note, *Title IX Sex Discrimination Regulations: Impact on Private Education*, 65 KY. L.J. 656, 684-88, 689-94 (1977).

330. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

331. NCAA v. Califano, 444 F. Supp. 425, 439 (D. Kan. 1978).

332. *Id.* at 433. The NCAA alleged that the regulations, insofar as they conflicted with the

the association had no standing to sue as a representative of its members because it had not alleged facts sufficient to support a finding of actual or threatened harm to them.[333] Likening the NCAA's action to a request for pre-enforcement judicial review, the district court concluded that

> [j]udicial consideration of the claims . . . would merely embroil the court in abstract disagreement over the scope and validity of the entire Title IX regulatory scheme so far as it relates to athletic programs and activities at the post-secondary educational level. Because the parties have through various possibilities of judicial review an adequate forum for testing the [regulations] in a concrete enforcement situation, the court sees neither a practical need nor a lawful excuse for . . . review of the kind sought here.[334]

To its undoubted chagrin, the district court may well find itself involved in that "abstract disagreement," for on appeal the Tenth Circuit reversed and remanded the decision.[335] Although the court of appeals agreed with the lower tribunal's holding that the NCAA lacked standing to sue on its own behalf,[336] the appellate court concluded that the complaint alleged sufficient facts to confer standing on the association as a representative of its members.[337]

In most instances, an individual or an organization cannot assert the rights of third parties in a legal action. Those parties must protect their interests themselves.[338] The Supreme Court has recognized, however, that in some circumstances, an entity, such as a trade association, may be an appropriate vehicle for vindicating the rights of its members.[339] Accordingly, the Court has developed three conditions that must be met before an association may represent its members in a judicial proceeding. First, it must appear from the facts alleged that the individual members themselves would have standing to sue.[340] It must further appear that "neither the claim asserted nor the relief requested" requires the active participation of an individual member.[341] And, finally, the interests that the association seeks to protect in its suit must be "germane" to the purpose for which it exists.[342]

The Tenth Circuit reviewed the NCAA's allegations in light of these

association's rules, would force members to withdraw from the NCAA or compel the NCAA to change its rules. *Id.* at 431-32.

333. *Id.* at 434-39.

334. *Id.* at 439.

335. NCAA v. Califano, 622 F.2d 1382, 1392 (10th Cir. 1980).

336. *Id.* at 1387.

337. *Id.* In a concurring opinion Judge McKay expressed agreement with the majority's holding that the NCAA had standing as a representative of its members. He submitted, however, that that ruling obviated any need for deciding whether the association could sue in its own right. The section of the court's opinion discussing this issue he termed "mere dictum." *Id.* at 1392 (McKay, J., concurring).

338. Tileston v. Ullman, 318 U.S. 44 (1943).

339. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Warth v. Seldin, 422 U.S. 490 (1975).

340. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. at 341; Warth v. Seldin, 422 U.S. at 511.

341. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. at 333.

342. *Id.*

three requirements. Turning first to the standing of the members as individuals, the court scrutinized the complaint for evidence that the members had sustained "injury in fact" from the challenged regulations.[343] It rejected the district court's "ungenerous reading" of the pleadings and found that injury to the educational institutions comprising the NCAA could effectively be inferred from the allegations. "Compulsion by unwanted and unlawful government edict is injury *per se*. Certainly the cost of obeying the regulations constitutes injury."[344] The court also found that the schools were harmed insofar as the regulations prevented them "from developing their intercollegiate sports programs as they see fit."[345] The court of appeals saw further evidence of injury in a "change in the status quo" compelled by the regulations.[346] Although the complaint itself included no specific claim of direct injury to the members' rights and interests, the court was willing to find such injury on the basis of the information it did contain.[347]

Because the NCAA challenged a governmental agency's authority, the Tenth Circuit ruled that the members, if they sued individually, would have to satisfy the Administrative Procedure Act's (APA) standing requirement. The APA requires a showing that the complaining party has suffered a "legal wrong" from the agency's action or has been otherwise "adversely affected or aggrieved . . . within the meaning of a relevant statute."[348] The Tenth Circuit adopted the Supreme Court's "zone of interests" test[349] to determine whether the member institutions could qualify under the APA.[350] In a rather strained interpretation, the court determined that the NCAA and its members had an interest in invalidating HEW's regulations, an interest that properly lay within Title IX's instruction to the agencies to implement the prohibition against sex discrimination using rules and regulations "con-

343. " 'Injury in fact' means concrete and certain harm. . . . [I]t must be certain to happen." 622 F.2d at 1386. The court implicitly acknowledged the substantial confusion shrouding the standing doctrine when it observed that "[s]uch injury in fact is the one constant element in the judicial statements about standing." *Id.*

344. *Id.* at 1389.

345. *Id.*

346. *Id.* at 1390.

347. *See generally id.* at 1388-89.

348. 5 U.S.C. § 702 (1976).

349. *See* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). Standing concerns "whether the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Id.* at 153.

350. *See generally* 622 F.2d at 1386, 1389-90. The court equated *Data Processing*'s zone of interests analysis with the APA's "adversely affected or aggrieved" requirement. Thus, it concluded that to be aggrieved means to be arguably within the statute's protected zone of interests. *Id.* at 1386. Admittedly, the issue is confused and eludes precise definition, but it seems that the more proper analysis is just the reverse of the court's suggestion; that is, if one can identify the rights and interests that a law is intended to protect and can "arguably" find one's own interests within its reach, then when an agency allegedly violates the statute, one becomes an aggrieved or adversely affected party with standing to sue. To have an interest lying within the statutory zone is not the same as to be aggrieved by an agency's action. Rather, the former is a condition precedent to the latter. *See generally* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. at 153.

In any event, the Tenth Circuit liberally interpreted the zone of interests requirement, concluding that it would be satisfied if a "sensible relation" could be found "between some subject of the statute and the plaintiff's interest in the outcome of the litigation." 622 F.2d at 1386.

sistent with achievement of the objectives of the statute."[351] The court considered this directive as indicative of a statutory design to protect against unnecessary and unwarranted regulation.[352] Accordingly, the court found that the interest of the NCAA and its members fell within the statute's protective zone. An alleged violation of the statute gave them standing to seek redress.[353]

Having found that the institutional members of the NCAA had sustained actual injury sufficient to entitle them to sue HEW in their own right, the Tenth Circuit next inquired whether the interests at stake in the case related to the NCAA's organizational objectives. Among the association's avowed purposes are the initiation and improvement of intercollegiate athletic programs and the preservation of institutional control of intercollegiate sports.[354] Although the member institutions' interests necessarily extend beyond those of the NCAA to other educational programs, the court found that inasmuch as the litigation attacked regulations affecting sports activities, the members' interests could be deemed compatible with the association's purposes. Therefore, the NCAA was arguably a suitable representative.[355] The court, however, was not willing to assume that the members supported the association's endeavor on their behalf. In fact, it acknowledged that many NCAA member institutions also belonged to the Association for Intercollegiate Athletics for Women (AIAW), which had intervened as a defendant to support HEW's regulations, and the court recognized that the NCAA's litigation goals could be entirely incompatible with the dual members' desires.[356] This potential absence of uniform interests is relevant to the constitutional standing requirement, for if an organization's members do not support its motives but instead align themselves with the opposition, then no case or controversy actually exists, and a court has no authority to exercise its jurisdiction.[357] Thus, the Tenth Circuit imposed a qualification on the test for associational standing, which would in some circumstances compel an organization to identify precisely its members' concerns and to ascertain whether a true identity of interests exists. If this task is not performed, then a court might not be able to determine whether the interests which an association purports to represent are "germane" to its purpose.

> We hold that when an association does not have standing in its own right, and it is not clear which side of the lawsuit the association's members would agree with, one or more of the members

351. 20 U.S.C. § 1682 (1976).

352. *See* 622 F.2d at 1390. In fact, Title IX was enacted to assure women of educational opportunities equal to those available to men. In a broader sense, the statute protects both sexes' interests in equal access to education by attempting to insure that discrimination on the basis of sex does not occur in federally funded educational programs. If anything, the statute endorses additional regulation rather than discouraging it. Perhaps, however, the Tenth Circuit found this connection sufficient to satisfy its "sensible" relationship variation on the zone of interests test. *See* note 350 *supra*.

353. 622 F.2d at 1390.

354. *Id.* at 1391.

355. *Id.*

356. *Id.*

357. *Id.* at 1391-92.

> must openly declare their support of the association stance, and they must do so through those officials authorized to bring suit on their behalf. Moreover, if more members of the association declare *against* the association's position than declare in favor of it, the association does not have standing, for then the parties in the lawsuit most likely would not be adverse.[358]

Apparently, an additional allegation must henceforth appear in complaints filed by organizations seeking to represent the interests of third parties who comprise their membership. Even those that would seem to have standing to sue in their own right would be well advised to allege an identity of interests because it seems impossible to predict when a court will agree with an association's claim of injury in fact. Because the NCAA's complaint included a statement evidencing its members' support for the lawsuit,[359] the NCAA satisfied not only the Tenth Circuit's new requirement but the Supreme Court's test as well. The organization and its constituents were not at odds.

Finally, the appellate court considered whether individual participation of the NCAA's members was necessary to a fair resolution of the controversy. Finding issues of law common to all and observing that the injunctive and declaratory relief requested would, if granted, benefit the members equally, the court concluded that their direct involvement was not essential.[360] Having completed its analysis of the NCAA's claims and their relationship to the standing prerequisites for a representative of third parties' interests, the Tenth Circuit found no bar to the association's maintenance of its suit challenging HEW's athletic regulations. Accordingly, the court of appeals reversed and remanded the district court's decision.[361]

Certainly the two decisions in *NCAA v. Califano* exemplify the flexibility of the third party standing doctrine.[362] Whereas the district court was strict and exacting in its interpretation of the rule and its application to the plaintiff's allegation, the Tenth Circuit Court of Appeals was more generous in its analysis and was willing to infer claims of injury where no specific ones were made. The appellate court's examination of existing standing law does not illuminate this muddled realm, and segments of its reasoning are notably contorted;[363] nevertheless, the Tenth Circuit's identity of interests criterion represents a concrete addition to the law of standing.[364]

The case, however, has a significance apart from this contribution. The Tenth Circuit's holding that the NCAA has standing to bring its action may

---

358. *Id.* (emphasis in original).
359. *Id.* at 1392.
360. *Id.*
361. *Id.*
362. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 79-82 (1978).
363. *See* notes 350 & 352 *supra* and accompanying text.
364. A student commentator observed in 1974 that the courts have not often considered how to resolve the problem of competing interests within an organization, which eliminate the organization's efficacy as a true representative of its members. "[O]ffensive use of organizational representation is relatively new and organizations usually use it in safe situations. As the procedure becomes more established, organizations will make less conservative use of it. The courts will then have to consider the permissible limits of the action." Note, *From Net to Sword: Organizational Representatives Litigating Their Members' Claims, supra* note 327, at 671.

facilitate a significant challenge to the validity of the athletic regulations. A federal district court in Ohio found one of HEW's requirements unconstitutional,[365] but there has apparently been no broad attack on the entire regulatory scheme. HEW's employment regulations,[366] purportedly promulgated pursuant to Title IX,[367] have been invalidated by several federal courts[368] on the ground that they exceed the agency's scope of authority under the statute and duplicate rules enacted in accordance with Title VII's[369] mandate. It is not inconceivable that upon close analysis a court would find the controversial athletic regulations similarly excessive.[370] And, certainly, the NCAA seems a logical entity to launch the offensive, if only for the sake of streamlining the litigation.[371]

CONCLUSION

The number of administrative law cases heard during the past year indicates that the federal government has made its presence known and felt within the realm of the Tenth Circuit's jurisdiction. In resolving the myriad controversies generated by governmental actions, the court of appeals adhered to traditional rules and applied established legal principles. Accordingly, its decisions seem sound, if not otherwise notable. The Sunshine and Privacy Act opinions, however, are likely to enhance the relatively meager collection of cases construing and interpreting those statutes. Furthermore, the standing ruling in *NCAA v. Califano* may ultimately have a significant impact on collegiate athletic programs. Only in *Volz v. Department of Justice* does the court seem clearly to have overstepped statutory bounds.

Diane L. Burkhardt

365. Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978). "To the extent it authorizes recipients of federal aid to deny physically qualified girls the right to compete with boys in interscholastic contact sports, Subsection (b) of 45 C.F.R. 86.41 is violative of the Fifth Amendment and must be held to be unconstitutional." *Id.* at 759.

366. 45 C.F.R. §§ 86.51-.61 (1979).

367. 20 U.S.C. §§ 1681-1686 (1976).

368. *See, e.g.*, Junior College Dist. v. Califano, 455 F. Supp. 121 (E.D. Mo. 1978), *aff'd*, 597 F.2d 119 (8th Cir.), *cert. denied*, 100 S. Ct. 467 (1979); Brunswick School Bd. v. Califano, 449 F. Supp. 866 (D. Me. 1978), *aff'd sub nom.*, Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 100 S. Ct. 467 (1979); Seattle Univ. v. United States Dep't of Health, Educ. & Welfare, 16 Empl. Prac. Dec. ¶ 8241 (W.D. Wash. 1978); Romeo Community Schools v. United States Dep't of Health, Educ. & Welfare, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S. Ct. 467 (1979).

369. 42 U.S.C. § 2000e (1976).

370. *See generally* Kuhn, note 329 *supra.*

371. The NCAA has approximately 862 member institutions. 1 ENCYCLOPEDIA OF ASSOCIATIONS (14th ed. N. Yakes & D. Akey eds. 1980). Their participation as plaintiffs could make the proceeding unwieldy and unnecessarily protracted. Structuring the suit as a class action might alleviate some problems, but obtaining class certification would impose additional hurdles. *See* FED. R. CIV. P. 23(c).