Administrative Enforcement in the United States

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Jeffrey S. Lubbers*

I am honored to be asked to contribute to this memorial compendium dedicated to Professor Sowa Toshifumi. As an Administrative Law Professor myself who has had the good fortune to spend 10 summers in Kyoto teaching *ei-bei* at Ritsumeikan University School of Law, I was early-on introduced to Sowa-sensei at Kwansei Gakuin University. He (and his wife), along with his former student and now Doshisha Professor Kotani Mari, have been great friends to me, bringing me into their circle of his devoted former students for various activities and trips around the Kansai area. I have learned from them just how great of a scholar and teacher he is and have seen for myself how loyal he is to his friends and students.

I know that one of his main scholarly interests is the administrative law enforcement system in Japan. I also know that he began his research career studying judicial control of administrative discretion in economic regulation, and wrote his dissertation on the subject of investigations by the u.s. Federal Trade Commission. Since then he has expanded his interest in how civil money penalties are assessed and in the possibilities of more collaborative

* Professor of Practice in Administrative Law, American University, Washington College of Law; Visiting Professor, Ritsumeikan School of Law, ten summers, 2004-2019.

methods of enforcement and governance.

With that in mind, I thought I would write about the u.s. federal government's approach to administrative enforcement, and some of the interesting issues that have arisen in that arena. It is one that is somewhat neglected in American legal scholarship.(1) Many of us write about how administrative regulations are promulgated and how they are challenged in court, but without fair and efficient enforcement procedures, the best substantive laws and regulations would lose their power to create a well-ordered society.

The U.S. Administrative Procedure Act (APA), enacted in 1946,(2) provides requirements for our administrative agencies to follow in issuing regulations and adjudicative orders, and it contains a set of ground rules for courts to apply when they review agency action, but the Act says very little of consequence about enforcement. The only provision in the APA concerning agency sanctions is section 558, which says so little that it is routinely ignored in u.s. Administrative Law courses. Its two relevant sentences are:

> (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law, and
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> (c) ****Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension,

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(1) A classic political science volume focusing on enforcement is Eugene Bardach & Robert A. Kagan, Going By the Book: The Problem of Regulatory Unreasonableness (1982).

(2) Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in §§ 551-559, 701-706, and other scattered sections of 5 U.S.C.).

revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.[3]

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Those sections simply make clear that before an agency can impose a sanction, it must be authorized by Congress to do so, acting within its jurisdiction, and that, except in emergency circumstances, before an agency can take away a federal license, the license-holder must be given adequate notice and an opportunity to comply with all of its conditions. The Act, thus, says little or nothing about limitations on agency powers to conduct investigations or inspections, the forum for any enforcement proceedings, the difference between criminal and civil penalties, the range of civil money penalties, where collected money penalties are deposited, the role of juries, double jeopardy considerations, etc. Instead, most of those issues have become constitutional law questions, with the APA fleshing out some of those doctrines or pointing the way towards implementing some of the constitutional norms.

This chapter endeavors to provide a concise description of the U.S. federal administrative enforcement process, not because I think it is a model that other countries should adopt, but because it might be instructive to readers of this volume since (for reasons we all know) Japan's Constitution has many similar attributes to ours. I also hope it might be interesting to Sowa-

(3) 5 U.S.C. § 558(c).

sensei, though he doubtless already knows much of what I am about to describe.

The Growth of the "Administrative State"

I will return to the APA and the post-1946 growth of the executive branch and the 1970s expansion of health, safety and environmental regulation, but what about the 150 years before the enactment of the APA? Our Executive Branch was quite small before the Civil War, and, even at the end of the Nineteenth Century, only comprised eight departments[(4)] and several free-standing agencies, notably the Civil Service Commission created by the Pendleton Act of 1883,[(5)] and the Interstate Commerce Commission (ICC), created by the Interstate Commerce Act of 1887 to regulate the railroads —the first independent regulatory agency whose members could only be removed by the President for cause.[(6)]

But with the advent of the Twentieth Century, the modern "Administrative

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(4) The Departments of Agriculture, the Interior, Justice, Navy, Post Office, State, Treasury and War. There was also a non-cabinet Department of Labor, created in 1888 but given independent cabinet status in 1913. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION—THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW, 240 and n.76 (2012).

(5) *See* U.S. OFFICE OF PERSONNEL MANAGEMENT, BIOGRAPHY OF AN IDEAL—A HISTORY OF THE FEDERAL CIVIL SERVICE 206-08 (2003), *available at* http://archive.opm.gov/BiographyofAnIdeal/PDF/BiographyOfAnIdeal.pdf.

(6) Originally the Commission was placed in the Department of the Interior, but two years later "the Secretary's authority over the commission was eliminated by statute and the commission became functionally independent of the executive branch." Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1129 (2000).

State" began to emerge.(7) The 1906 Hepburn Act gave the ICC rate-making authority, "making it a very powerful agency. In 1913, President Wilson signed the Federal Reserve Act, which required all national banks to join the Federal Reserve System, which in turn was overseen by a Board of Governors.(8) In 1916, a piece of social legislation was enacted creating the U.S. Employees' Compensation Commission (USEC) to administer workers' compensation benefits for civil employees of the United States suffering personal injuries while in the performance of official duties.(9) Congress created other new free-standing regulatory agencies such as the Federal Trade Commission in 1914,(10) and the Federal Radio Commission in 1927,(11) with very broad

(7) *See* DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014).

(8) At first, the Secretary of the Treasury chaired the Board, but this was changed in 1935. See the Board of Governors' home page at http://www.federalreserve.gov/aboutthefed/bios/board/boardmembership.htm. For more on the experimentation in the Nineteenth Century with national banks, see Mashaw, *supra* note 3, at ch. 9, 156–174. The Office of the Comptroller of the Currency had been created within the Department of the Treasury in 1863, see *id.* at 242.

(9) See the description in the U.S. Government Organization Manual (1945), *available at* http://www.ibiblio.org/hyperwar/ATO/USGM/USECC.html. The USEC's jurisdiction was broadened in 1927 to include administration of the Longshoremen's and Harbor Workers' Compensation Act, which provided workers' compensation benefits for employees in private enterprise while engaged in maritime employment on navigable waters of the United States.

(10) See the Federal Trade Commission Act, 38 Stat. 717. Section 5 contained the broad delegation that the FTC was charged with enforcing: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." (now codified at 15 U.S.C. § 45(a)(1) (2012)). For a legislative history of the Act,

delegations. To address the Great Depression many new financial regulatory agencies were created,(12) along with the Federal Power Commission in 1930,(13) the powerful but short-lived National Recovery Administration (NRA) in 1933, the National Labor Relations Board in 1935,(14) and the United States Maritime Commission in 1936.(15)

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see Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 27 B.C. L. REV. 227 (1980).

(11) See the Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, which created a Federal Radio Commission in section 3 and propounded the "public interest, convenience or necessity" standard for regulation in section 4. In 1934, the Act was superseded by the Communications Act, which replaced the Federal Radio Commission with the Federal Communications Commission. Pub. L. No. 416, June 19, 1934, 73d Cong.

(12) These included the Federal Home Loan Bank Board (1932); Farm Credit Administration and Federal Deposit Insurance Corporation (1933); Securities and Exchange Commission (SEC) and Federal Credit Union Board (1934).

(13) The Commission was actually created in 1920 to coordinate federal hydroelectric projects, but it was under the joint administration of the Secretaries of War, Interior, and Agriculture. The version created in 1930 was a classic independent regulatory commission. In 1977 the FPC became the Federal Energy Regulatory Commission. See History of FERC, http://www.ferc.gov/students/ferc/history.asp.

(14) National Labor Relations Act of 1935, 49 Stat. 449, codified at 29 U.S.C. §§ 151-169.

(15) According to the Federal Maritime Commission's [FMC's] website:

> In 1920, Congress passed the Merchant Marine Act, which charged the United States Shipping Board with monitoring and responding to foreign laws, regulations, or practices that create conditions unfavorable to shipping in the foreign trade.
>
> In 1933, President Franklin D. Roosevelt signed an executive order that transferred the United States Shipping Board's functions to the

At first, Congress and the Supreme Court showed skepticism about this growth. In 1894 the Supreme Court declared the income tax unconstitutional,[16] a decision that was ultimately addressed in 1913 by the ratification of the Sixteenth Amendment. The Court struck down two delegations to the NRA in 1935,[17] causing it to stop operating, and Congress passed, and came close to overriding President Franklin Roosevelt's veto of, the Walter-Logan bill,[18] which would have subjected administrative agencies to formal hearings in their rulemakings and in response to petitions to revise rules; required them to use three-person panels in adjudications; and made their actions subject to extensive judicial review.[19]

During World War II, the military agencies were expanded, and soon after-

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U.S. Shipping Board Bureau in the Department of Commerce. In 1936, Congress separated the Board from the Commerce Department, creating the United States Maritime Commission.... In 1950, the regulatory programs of the United States Maritime Commission were transferred to the Federal Maritime Board at the Department of Commerce, where they resided until the FMC's creation in 1961. Https://www.fmc.gov/about-the-fmc/our-history.

(16) Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), *aff'd on rehrg.*, 158 U.S. 601 (1895).

(17) A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935), Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

(18) See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557, 1593-1632 (1996) (describing the legislative action on the Walter-Logan bill). The vote to override the veto in the House was 153 to 127, or 34 votes short. *Id.* at 1630.

(19) *See* PETER WOLL, ADMINISTRATIVE LAW, THE INFORMAL PROCESS, 18-19 (1963) (describing the bill as an "extreme attempt on the part of the legal profession to judicialize administrative procedure"). *Id.* at 19.

wards Congress enacted the APA, which provided for procedural limits on agency action, but also implicitly recognized agency rulemaking and adjudicative power.[20] Since 1950, Congress created seven of the current fifteen departments and many new regulatory agencies, some of which, like the Departments of Transportation and Homeland Security and the Environmental Protection Agency, have broad regulatory power.

Several key Supreme Court decisions have stimulated the growth of agency power. An early one was the 1932 decision of *Crowell v. Benson*,[21] which upheld Congress's ability to delegate adjudicative power to the USEC.[22] That was followed closely by *Humphrey's Executor v. United States* in 1935,[23] which, in effect, recognized Congress's power to create independent agencies. After the passage of the APA, the Court enhanced the authority of agency administrative law judges (ALJs) (then called "hearing examiners") in *Universal Camera Corp. v. NLRB*[24] and *Butz v. Economou*.[25]

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(20) *See generally* Shepherd, *supra* note 18.

(21) 285 U.S. 22 (1932).

(22) In so doing, the Court distinguished cases involving matters of "public rights" in which the government and private persons were opposing parties, and matters of "private rights" where two private parties were opposed. The Court reasoned that because Congress could assign public rights disputes to itself or to executive officers, it could also assign them to administrative tribunals like the USEC. However, the USEC essentially was a referee between a private employer and employee in the Longshoremen and Harbor Workers context so that distinction did not apply. Nevertheless, the Court upheld the delegation because it found that Article III courts had the power to independently review all issues of law and "questions of constitutional and jurisdictional fact." *See* MICHAEL ASIMOW AND RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 457 (5th ed. 2020).

(23) 295 U.S. 602 (1935).

A series of cases sharply limited the non-delegation doctrine, ruling that delegations were proper as long as the legislation passed by Congress contained an "intelligible principle" to be followed by the agency in its regulations.[26] Occasional protests to this low bar were heard,[27] but Justice Scalia seemed to have resignedly accepted it in the 2001 case of *American Trucking Associations* when the Court rebuffed an attempt by the D.C. Circuit to revive the doctrine.[28] This may be changing, however, as members of the increasingly conservative Supreme Court have expressed interest in strengthening the non-delegation doctrine.[29]

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(24) 340 U.S. 474 (1951) (requiring reviewing courts to consider the initial decisions of hearing examiners as part of the record in reviewing agency final orders).

(25) 438 U.S. 478, 513 (1977) ("There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge.").

(26) This test actually originated in the 1928 case of *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."). Other than the two decisions involving the National Industrial Recovery Act in 1935, *supra* note 16, the Court has never struck down an Act of Congress on non-delegation grounds.

(27) *See* Industrial Union Dept., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J. concurring in the judgment, but finding a violation of the non-delegation doctrine).

(28) Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001) ("In short, we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'") (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

(29) See Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J.,

Two Models of Civil Money Penalty Statutes

Regardless of whether the non-delegation doctrine is revived, Congress has authorized most U.S. regulatory agencies to levy sanctions for violations of their statutes and regulations, and such sanctioning authority often includes the power to seek civil money penalties. The traditional civil money penalty statute enacted by Congress required that the enforcing agency resort to a court for collection. Under that scheme, the agency would notify the respondent of a violation. There would be some settlement negotiation, and if that failed, the agency would assess a penalty. If the respondent didn't pay, the agency would have to go through the Department of Justice (DOJ), normally meaning the local U.S. Attorney, and seek to collect in the appropriate U.S. District Court. In that proceeding, the respondent would have the right to a jury trial under the Seventh Amendment[(30)]. Needless to say, this was cumbersome, and many U.S. Attorneys did not want to prosecute cases that would require them to learn a whole new body of regulatory law and go through a time-consuming trial, potentially against a locally powerful defendant, all for a relatively small penalty that would flow into the general treasury.

The Administrative Conference of the U.S. (ACUS) looked at this problem in 1972 and suggested a different model—the "administrative imposition model"—in which the agency's civil penalty statute would provide that the agency could assess the penalty itself, but only after giving respondents a

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dissenting).

(30) U.S. CONST. AMEND. VII (providing a right to a jury trial in all suits at common law where the value of the controversy exceeds twenty dollars.)

right to a full APA hearing before one of its ALJs.[31] After that (and any agency appellate review[32]), the respondent could seek judicial review in the court of appeals—but only on the record of the agency proceeding—not a trial de novo. This model began to be accepted by Congress, and numerous statutes began to incorporate it. In 1978, in the *Atlas Roofing* case,[33] a respondent challenged this procedure, claiming it violated his right to a jury trial, but the Supreme Court rejected that claim because these statutory programs involved "public rights" not "private rights." But the Court later said that a jury trial right still obtains when a traditional court-collection statute like the Clean Water Act is invoked.[34]

ACUS followed up with a study and recommendation that showed the extent of the growth of civil money penalties and also focused on how agencies should craft their civil money penalty policies.[35] It recommended that agen-

(31) Administrative. Conf. of the U.S., Recommendation 72-6, "Civil Money Penalties as a Sanction," 38 Fed, Reg. 19,792 (July 23, 1973), *available at* https://www.acus.gov/sites/default/files/documents/72-6.pdf.

(32) For information on the variety of agency appellate systems, see Christopher J. Walker and Matthew Lee Wiener, *Agency Appellate Systems*, Final Report to the Administrative Conference of the U.S., (Dec. 14, 2020), *available at* https://www.acus.gov/report/final-report-agency-appellate-systems.

(33) Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977).

(34) *See* Tull v. United States, 481 U.S. 412 (1987).

(35) Administrative. Conf. of the U.S., Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 44 Fed. Reg. 38,824 (July 3, 1979), *available at* https://www.acus.gov/sites/default/files/documents/79-3.pdf. The underlying report found that of the 348 statutory civil penalties administered by agencies, in 141 "Congress has expressly conferred upon

cies with civil money penalty authority develop and publish policies for the assessment of penalties, including aggravating and mitigating factors. It also emphasized that "A penalty intended to deter or influence economic behavior should, at a minimum, be designed to remove the economic benefit of the illegal activity, taking into account the documented benefit and the likelihood of escaping detection."[36] This, of course, assumes that the agency keeps the penalty within the boundaries set by statute. Sometimes a statute provides direction as to the factors the agency should consider when it determines the amount of the penalty.[37]

But all this is not to say that the administrative imposition model is uncontroversial. The well-heeled lawyers who practice before the Securities and Exchange Commission (SEC) have long claimed that this model is unfair —because they think it is a conflict of interest for agency ALJs to hear agency "prosecutions." Interestingly, the SEC is one of the few agencies that has statutory authority to choose which model to use.[38] But this unfairness claim has not been accepted by the courts, which recognize that the APA's formal (trial-type) adjudication procedures provide sufficient due process even for significant civil money penalties. I will discuss these procedures more below.

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an administrative agency an authority to 'assess' the penalty." Colin S Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM L. REV. 1435, 1441 (1979), *available at* https://www.acus.gov/report/project-report-recommendation-79-3.

(36) ACUS Recommendation 79-3, para. 1.

(37) *See, e.g.*, the Clean Air Act, 42 U.S.C. § 7413(e).

(38) *See e.g.*, David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155 (2016).

Many statutes include both civil and criminal penalties—the Occupational Safety and Health Act for example. But criminal penalties not only involve a higher burden of proof, and a much more difficult trial, the agency also must persuade DOJ to bring the criminal prosecution. Therefore, the Occupational Safety and Health Administration（OSHA）generally reserves its criminal charges for cases where the violation led to a fatality, but otherwise brings an administrative civil money penalty case. Nevertheless, Congress has in recent years enacted more and more regulatory statutes that have included criminal sanctions.(39)

Indeed, one of the weak points in U.S. administrative law is the rather fuzzy distinction between civil and criminal penalties. One place this manifests itself, given that many statutes have both criminal and civil penalties, is whether a civil penalty enforcement action followed by a criminal prosecution for the same wrongdoing（or vice versa）violates the Double Jeopardy Clause of the Fifth Amendment.(40) This issue can arise in three ways, bearing in mind the government's higher burden of proof in criminal cases:（1）the agency conducts a civil penalty action first, which is successful, then asks

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（39） See D.K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J. OF LAW, ECON. & POLICY 657（2011）. In 2013, ACUS organized a congressional symposium on the increasing criminalization of regulatory crimes, https://www.acus.gov/sites/default/files/documents/May%2013%20Workshop%20on%20Criminal%20Law%20and%20the%20Administrative%20State%20_%20Program%20Description.pdf.

（40） U.S. CONST. AMEND XIV（providing that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"）.

DOJ to seek a criminal penalty; (2) the agency (through DOJ) achieves a criminal conviction first, then seeks a civil penalty; or (3) the agency (through DOJ) fails to achieve a criminal conviction first, but nonetheless seeks a civil penalty. Note that if the agency first attempted (unsuccessfully) to impose a civil penalty, it would not likely try for a criminal conviction.

In the case of *United States v. Halper*[(41)], the Supreme Court unanimously said the Double Jeopardy Clause could be violated if the subsequent civil penalty that followed a criminal conviction was so large as to be punitive. Halper was a manager of a medical service provider who had been convicted, fined $5,000, and imprisoned for two years for having submitted 65 false claims for Medicare reimbursement. The government then sought over $130,000 in the 65 civil penalty counts—despite the fact that the defendant had only overcharged the government by a total of $585. The Supreme Court said the penalty amount was so disproportionate as to be punishment, and held that under the Double Jeopardy clause, the government could only sue for remedial purposes—for actual damages and costs—once it had also sought criminal punishment. The current Chief Justice of the United States, John Roberts, represented Halper in that case in the first case he argued before the Supreme Court as a private attorney.

The result in *Halper* was of great concern to the government because it seemed to say that it was impossible for an agency to use both criminal penalties and civil penalties against the same defendant. And that would mean that the government would be afraid to seek criminal prosecutions for regulatory violations for fear of losing, and thereby foreclosing any sanction.

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(41) 490 U.S. 435 (1989).

So only eight years later in *Hudson v. United States*,[42] the Supreme Court took this issue up again and this time eight of the nine Justices disavowed the unanimous reasoning of *Halper*. In *Hudson*, the government first imposed civil money penalties and administrative debarment on several bank officers. The civil penalties were originally assessed at $100,000 against one officer and $50,000 against two other officers. These were later negotiated into consent agreements of between $12,500 and $16,500. Then the bank officers were criminally indicted for the same conduct. When the indictments were challenged on double jeopardy grounds, the district court denied the officers' motion to dismiss. On appeal, the Tenth Circuit said the debarment sanction did not raise double jeopardy concerns, but the money penalty might, and remanded the case. The district court then *granted* the motion to dismiss. This time the government appealed, and the Tenth Circuit reversed on the grounds that under *Halper*, the civil fines were not disproportionate. The Supreme Court affirmed, but in doing so, jettisoned the *Halper* analysis.

The majority opinion ruled that unless the "statute on its face" clearly shows that both penalties are criminal in nature, the Double Jeopardy Clause does not apply. It also referenced a series of factors derived from an earlier case, *Kennedy v. Mendoza–Martinez*,[43] for determining "whether a particular punishment is criminal or civil."[44] These factors are:

(1) "[w]hether the sanction involves an affirmative disability or re-

(42) 522 U.S. 93 (1997).

(43) 372 U.S. 144 (1963).

(44) *Hudson*, 522 U.S. at 99.

straint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."[45]

Investigations and Inspections.

Agencies have to gather a lot of information—either in connection with their general oversight of an industry or in connection with a particular enforcement action. This raises a number of legal issues.

Although the APA says little about this, some provisions in our Bill of Rights[46] apply to agency civil investigations and inspections, but in a more limited way than they do to criminal investigations. For example, the Fourth Amendment's prohibition on unreasonable searches and seizures applies, but the requirements are loosened. As a general rule, a search warrant is required for an administrative inspection of a home or non-public area. So, for example, would OSHA be required to obtain a search warrant before it sends an inspector to a grocery store's meat cutting department? Not necessarily; the store probably would let him in without one. If, however, the store did not consent to the inspection, the agency would have to obtain a warrant, ab-

(45) *Id.* at 99-100, citing *Kennedy*, 372 U.S. at 168-69.

(46) The first ten amendments to the U.S. Constitution.

sent an emergency situation.[47] But OSHA can get its warrant from a judge in an ex parte process, and the agency need not show a probable violation, only an inspection based on neutral criteria. But at least this "tends to prevent inspections motivated by harassment or other improper purposes."[48]

On the other hand, even this unburdensome process does not apply to inspections of "pervasively regulated businesses." The Supreme Court has identified four such industries in its cases, liquor sales, firearms dealing, mining, and running an automobile junkyard.[49] In the last case the Court suggested that the test is whether the industry could present a "clear and significant threat to the public welfare."[50] Moreover, some agencies, such as the Nuclear Regulatory Commission will only grant licenses conditioned on allowing warrantless inspections.

Subpoenas

Related to investigations, is an agency's ability to compel production of information though a subpoena. There are some limits. The first is that the agency must have statutory authority. The APA itself does not authorize agency subpoena power, but it does contain two applicable provisions: section 556(c) gives ALJs power to "issue subpenas authorized by law,"[51] and sec-

(47) *See* Marshall v. Barlow's Inc., 436 U.S. 307 (1978). See also OSHA Fact Sheet on inspections, https://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf.

(48) Asimow & Levin, *supra* note 22, at 176.

(49) This list comes from *City of Los Angeles, Calif., v. Patel*, 576 U.S. 409, 424 (2015) (declining to allow a warrantless seizure of hotel registration records).

(50) New York v. Burger, 482 U.S. 691, 709 (1987).

tion 555(d) states:

> Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena 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.(52)

In addition to the requirement that the agency have statutory authority to issue subpoenas, a century-old Supreme Court case, *ICC v. Brimson*,(53) held that it would violate due process for Congress to give agencies the power to enforce their own subpoena by holding parties in contempt. In other words, as the APA provision implies, agencies must go to court to enforce them, although, in the national security laws, the FBI has been given stronger powers.(54)

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(51) 5 U.S.C. § 556(c). The codified APA uses the spelling "subpena."

(52) 5 U.S.C. § 555(d).

(53) 154 U.S. 447 (1894).

(54) The FBI was may issue "National Security Letters" (NSLs) to telephone and internet companies, financial institutions, and credit agencies to obtain customer records "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." USA PATRIOT ACT of 2001, Pub. L. No. 107-56, sec. 215, § 501(a)(1), 115 Stat. 272, 287

When administrative subpoenas are contested, the courts give agencies much leeway in enforcing them. There are some limited grounds for challenging them, such as lack of jurisdiction, too broad or burdensome, or issuance in bad faith, but it is difficult to win these cases. The Supreme Court has held that a subpoena should be enforced if the investigation is for "a lawfully authorized purpose within the power of the [legislature] to command" and the subpoenaed documents are "relevant" to the inquiry.(55) More recently in a federal tax investigation, the Court, in reviewing a challenge to an Internal Revenue Service subpoena, held that the taxpayer must make a "showing of facts that give rise to a plausible inference of an improper motive" before the district court can even allow discovery on such a claim.(56)

Some privileges may be invoked as defenses to agency demands for information, testimony, or documents. For example, the attorney-client, marital, doctor-patient, and therapist-patient privileges can be invoked just as they can be in a civil or criminal court proceeding. The "work-product" privilege can also be a defense to requests for information. But the biggest difference between a criminal investigation and an administrative one is the reduced scope of the Fifth Amendment's privilege against self-incrimination. It applies in administrative cases, but with significant limitations. For example it

(codified as amended at 50 U.S.C. § 1861 (2012)). In some circumstances the FBI can prohibit recipients of NSLs from disclosing that they received them. NSLs are judicially reviewable but the courts are very deferential. For information and critical commentary on NSLs, see Electronic Frontier Foundations, National Security Letters : FAQ, https://www.eff.org/issues/national-security-letters/faq#1 (last visited January 30, 2021).

(55) Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

(56) United States v. Clarke, 573 U.S. 248 (2014).

cannot be invoked by corporations. Nor may persons (e.g., corporate officers) called to give testimony refuse to testify entirely; they can only refuse to answer specific questions, and unlike in the criminal trial context, the agency can draw adverse inferences from a refusal to answer. Finally in an administrative context, the privilege can be overcome by an offer of immunity from criminal prosecution. With regard to documents, the Fifth Amendment privilege can only be asserted by a person in possession of them (e.g., not if an accountant has them). Nor can the privilege be asserted if the documents are required by statute to be maintained[57], or if the documents were voluntarily compiled (not produced by state compulsion[58]), unless the mere act of keeping and producing them is itself incriminating[59]. Finally, the privilege cannot be asserted if the documents are seized under a valid search warrant. Thus it covers only the act of producing, under state compulsion, papers that were not voluntarily prepared already nor required to be kept by statute.

Rights to a Hearing—Either Administrative or Judicial

Under an old-style court collection penalty statute, the alleged violator has the right to a full federal district court trial under the Federal Rules of Civil Procedure, with the option of seeking a jury trial. The APA hearing provided in the administrative imposition model is nearly as formal, although it lacks

(57) Shapiro v. United States, 335 U.S. 1 (1948).

(58) United States v. Doe, 465 U.S. 605 (1984).

(59) Marchetti v. United States, 390 U.S. 39 (1968) (*Shapiro* rule does not apply to law requiring gamblers suspected of illegal activity to keep business records).

the jury trial option and it is presided over by an ALJ rather than a life-tenured federal judge.

The latter process begins by the agency providing a notice of (1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law that are asserted.[60] The agency must then give all parties the opportunity to present facts, arguments, and offers of settlement.[61] An ALJ (a judicial officer within agencies who is independent of the policymaking and enforcement parts of the agency) then presides over the hearing.[62] The ALJ has the normal judicial authority to regulate the hearing[63] and make the initial or recommended decision in the case.[64] In addition, the APA provides for "separation of functions," meaning that staff engaged in investigation or prosecution may not communicate with decisionmakers about a case while it is in progress.[65] The formal rules of evidence do not apply in agency proceedings, and hearsay evidence is normally allowed.[66] Agencies often take "official notice" of broad general facts, but they are required to allow a party to demonstrate that the assumption is not accurate if the unproven fact is material to the decision.[67]

(60) 5 U.S.C. § 554(b).

(61) 5 U.S.C. § 554(c).

(62) 5 U.S.C. § 556(b); the agency itself or one of the members of the collegial body governing the agency may also preside.

(63) 5 U.S.C. § 556(c).

(64) 5 U.S.C. § 557(b). "Initial" decisions may become final if not appealed or reviewed by the agency head; "recommended" decisions must be reviewed.

(65) 5 U.S.C. § 554(d).

(66) 5 U.S.C. § 556(d).

Typically, the agency will also provide at least one and sometimes more levels of appeal or review within the agency itself.[68] Agencies, and agency heads acting in a review capacity, are allowed to have a particular point of view or general bias. Thus, for example, it is fully appropriate for a Federal Trade Commission that is avowedly pro-competition to hear a case in which it has charged a company with anti-competitive activity.[69] There are limits, however, and courts will disqualify an adjudicator if the person has a specific, personal bias, such as having pre-judged major issues of fact,[70] animus against a litigant, or a personal interest in the outcome.[71] And *ex parte* communications—those between a decisionmaker and outsiders of the parties—are prohibited.[72]

There are some other statutes that bear on agency enforcement. One, the Small Business Regulatory Enforcement Fairness Act, provides a series of special rights for "small entities" (primarily small businesses and small local governments) charged with regulatory violations.[73] Agencies are directed to

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(67) 5 U.S.C. § 556(d).

(68) *See, e.g.*, 5 U.S.C. § 557 and the Walker & Wiener report, *supra* note 32. The agency may issue a rule stipulating that a party must exhaust administrative remedies before seeking judicial review. Darby v. Cisneros, 509 U.S. 137 (1993).

(69) FTC v. Cement Institute, 333 U.S. 683 (1948).

(70) Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964); the Chairman of the Federal Trade Commission made a speech that clearly indicated that he had already decided central issues of fact in a case that was currently pending before his agency.

(71) In Gibson v. Berryhill, 411 U.S. 564 (1973), the Court concluded that the composition of a state licensing agency was unacceptably biased as having too substantial a pecuniary interest in the outcome.

(72) 5 U.S.C. § 557(d)(1).

"establish a policy or . . . to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability-to-pay in determining penalty assessments on small entities."[74] The Act does make clear that this lenience should not be extended to entities that have been repeat offenders, have engaged in willful or criminal conduct, or committed violations that pose serious health, safety, or environmental threats.[75]

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Judicial Review and Penalty Collection

But aside from these special provisions for enforcement actions against "small entities," once the agency has assessed a penalty under an administrative imposition statute, any respondent would have a right to judicial review, normally in the appropriate U.S. Court of Appeals, which would review the agency decision on the administrative record (usually without allowing any new evidence at that point). The court would apply the standards of review outlined in Section 706(2) of the APA[76] and set aside the agency order if it was found to have violated the Constitution, an applicable statute or procedural requirement, or was not supported by substantial evidence. But the appropriateness of the penalty amount itself, is reviewed on an abuse-of-discretion standard, and it would likely be sustained if it were within the statutory

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(73) Pub. L. 104-121, title II, § 223, Mar. 29, 1996, 110 Stat. 862, codified at 5 U.S.C. § 601 note.

(74) *Id.*, § 223(a).

(75) *Id.*, § 223(b).

(76) 5 U.S.C. § 706(2)(A-F).

parameters.[77]

Once all such judicial appeals were exhausted, the penalty would be subject to collection. If the respondent refused to pay at that point, the government could bring a collection proceeding in federal district court and the defendant would not be able to raise any additional defenses and would be subject to contempt of court, and possible jailing, if payment were not forthcoming and the court determined that assets were available. But such proceedings are rarely necessary.

Civil money penalties normally are paid directly into the U.S. Treasury's general fund and not to the agency itself.[78] Occasionally, however, Congress will specify another use of the monies. For example, the Sarbanes-Oxley Act of 2002 provides:

> If, in any judicial or administrative action brought by the [Securities and Exchange] Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.[79]

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(77) See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 186 (1973) (agency choice of sanction should be upheld unless "found to be "unwarranted in law or without justification in fact").

(78) See the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b), requiring that all monies "received" by the government be deposited in the General Treasury Account and not be spent until appropriated by Congress.

The Supreme Court had earlier upheld a provision of the Fair Labor Standards Act providing that money collected as civil penalties for employment of child labor in violation of the Act must be returned to the Department of Labor as reimbursement for amounts expended in determining the violation. The Court said this "did not violate the Due Process Clause by creating an impermissible risk of bias in the enforcement and administration of the Act, since no government officials stood to profit from vigorous enforcement of child labor provisions, there was no realistic possibility that [the] assistant regional administrator's judgment would be distorted by the prospect of institutional gain, and civil penalties actually collected under the section represented less than 1% of [the agency's] budget."(80)

Reviewability of Non-Enforcement Decisions

In the context of criminal prosecution, it is generally understood that "prosecutorial discretion" precludes legal challenges to decisions by prosecutors to indict or not indict persons who might be involved in criminal behavior. While the reasons for it are understandable, this is not entirely a salutary situation. Professor Kenneth Culp Davis recognized this in his classic book, *Discretionary Justice*, in which he devoted one chapter to the problem of selective enforcement and another to the need for "confining, structuring, and confining the prosecuting power."(81) Of course in many states and local

(79) Pub. L. No. 107-24, § 308(a), 116 Stat. 745, 784 (codified at 15 U.S.C. § 7246).

(80) Marshall v. Jerrico, 446 U.S. 238 (1980). The quotation is from the Court's synopsis.

(81) KENNETH CULP DAVIS, DISCRETIONARY JUSTICE : A PRELIMINARY INQUIRY (1969) chapters VI & VII.

governments, chief prosecutors are elected and are therefore accountable to the electorate.

This general acceptance of prosecutorial discretion has carried over to federal agency decisions to bring or not bring an enforcement action. The APA does provide that a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed."[(82)] However, in *Heckler v. Chaney*, the Supreme Court held that an agency's decision on a petition to initiate an enforcement action is committed to the agency's discretion by law.[(83)] The Court explained:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.[(84)]

(82) 5 U.S.C. § 706(1).

(83) 470 U.S. 821 (1985) (applying 5 U.S.C. § 701(a)(2)).

(84) *Id.* at 831-32.

Moreover, in an another case, the Supreme Court rejected a challenge to an agency's failure to take appropriate action to enforce a programmatic statute—protecting public lands from environmental harm caused by off-road vehicles. The Court held that such suits could "proceed only where an agency failed to take a discrete agency action that it is required to take."(85)

Hence, there is a presumption that the courts will not review an agency's decision not to take enforcement action. The Court said that this presumption may be rebutted by showing that: the underlying statute either provides a duty to enforce(86) or provides guidelines the agency must follow in enforcement; the agency has simply refused to enforce the law; or the agency has either based its refusal "to institute proceedings based solely on the belief that it lacks jurisdiction" or adopted a policy that is "so extreme as to amount to an abdication of its statutory responsibility."(87)

If lawsuits are generally unavailable to challenge questionable acts of federal agency enforcement discretion, what is the solution? It is easy to say what the solution is, but harder to achieve it. The solution is giving enough discretion for inspectors and other enforcement officers to adjust their enforcement practices to the situation at hand while providing them with regulations for them to enforce that are clear enough to provide predictability and avoid inconsistent application and unfairness. As Bardach and Kagan point out, regulated businesses want this kind of predictability, advocates of stringent regulation want to close off loopholes, and even inspectors them-

(85) Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004).

(86) Dunlop v. Bachowski, 421 U.S. 560 (1975).

(87) Heckler v. Chaney, 470 U.S. at 833 n.4 (citing Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

selves like having precise regulations to invoke when undertaking their inspections.[88] The problem of course is finding the right balance and also drafting regulations with optimal precision.[89]

The Influence of Politics

Finally, the influence of politics on enforcement cannot be ignored.[90] In the United States, especially in recent years, we have see-sawed between conservative and liberal administrations—and this has been reflected in enforcement priorities and levels. Conservative administrations have emphasized deregulation in the spheres of health, safety, environmental, and consumer protection regulation as well as stricter regulation of immigration, while liberal administrations have taken the opposite tack. Although there are no centralized statistics of federal enforcement actions, there is plenty of anecdotal evidence. Environmental cases brought by the Department of Justice fell sharply in the first two years of the Trump Administration,[91] and the number of animal welfare citations dropped by 65 per cent.[92] This sort of drastic

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(88) Bardach & Kagan, *supra* note 1 at 34–36.

(89) *See, e.g.*, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 72–74 (1983);

(90) For a recognition that there needs to be more scholarship about this issue, see Jodi L. Short, *The politics of regulatory enforcement and compliance: Theorizing and operationalizing political influences*, REGULATION AND GOVERNANCE (2019), available at https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12291.

(91) *See* Steven Mufson, "What happens when the government stops doing its job?," WASH POST (Aug.10, 2018), https://www.washingtonpost.com/outlook/what-happens-when-the-government-stops-doing-its-job/2018/08/10/74cc7a52-9b53-11e8-8d5e-c6c594024954_story.html

pendulum swing is not conducive to consistent enforcement.

Conclusion

An ordered society needs efficient enforcement procedures. A democratic society needs fair procedures and accountable enforcers. The American two-tiered system of providing heightened rights for criminal defendants and lesser but still formal hearing rights for civil respondents is a sensible one even though the distinction is sometimes difficult to delineate. Within the civil enforcement system, the modern agency imposition system with agency ALJ hearings, de novo judicial review of legal issues, and deferential ("substantial evidence") review of agency fact finding provides a good balance of fairness and efficiency.

The basic structure is sound, but its success depends on adequate resources and a bi-partisan commitment to enough investigations, charges, and sanctions to provide the necessary level of deterrence of illegal behavior and the maintenance of the rule of law. These are the main challenges as we continually retool the modern administrative state in the United States.

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(92) *See* Karen Brulliard & William Wan, "Caged raccoons drooled in 100-degree heat. But federal enforcement has faded," WASH POST (Aug.22, 2019), https://www.washingtonpost.com/science/caged-raccoons-drooled-in-100-degree-heat-but-federal-enforcement-has-faded/2019/08/21/9abf80ec-8793-11e9-a491-25df61c78dc4_story.html.

Administrative Enforcement in the United States

Jeffrey S. Lubbers

This contribution to Sowa-sensei's tribute volume covers a topic that he know a lot about—administrative enforcement in the United States. It attempts to be a concise overview of legal issues pertaining to administrative enforcement by U.S. federal agencies. The U.S. Administrative Procedure Act, which provides detailed requirements for agency rulemaking and adjudication and for judicial review, says little about agency enforcement procedures. Moreover, the robust constitutional restrictions in the Bill of Rights applicable to criminal prosecutions apply only weakly to agency enforcement actions. Nevertheless, the traditional statutes that required agencies to go to court to seek civil money penalties did not work well. They were gradually replaced by a system of agency imposition of penalties in which respondents could defend themselves in formal agency adjudications, with judicial review based on the administrative record created in that proceeding. This system has proven to be more effective and efficient, but its ultimate success is ultimately dependent on the dedication of sufficient staff and budgets for the enforcing agencies, and on political support for the enforcement agenda from the President and the agency heads in the Executive branch.