ADMINISTRATIVE AGENCIES ARE JUST LIKE LEGISLATURES AND COURTS—EXCEPT WHEN THEY'RE NOT

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INTRODUCTION

I have always found administrative law to be a difficult course to teach and for students to learn, a view that is shared by most people who have taught or studied it. There are many reasons for this, but one is that the course seems to lack an overall framework on which to hang the various quite disparate parts.

In the spring of 2004, I taught administrative law at New York University Law School (NYU Law School) in the most challenging setting one could imagine: The class was comprised entirely of first-year students. While preparing for a session in which I was hoping to explain why certain procedural requirements under the Administrative Procedure Act (APA)[1] were imposed on agencies when they are not applicable to similar actions taken by a legislature, an insight came to me. That afternoon I told the

* Senior Lecturer, Stanford Law School. Many thanks go to those who read early drafts of this Article and offered many valuable suggestions. These include David Vladeck, Andrew Stanner, Tino Cuellar, Justice Stephen Breyer, Bill Simon, and Jeffrey Lubbers. My research assistant Tim Hurley saved me many hours in finding citations for propositions that I knew to be true but could not substantiate. I also appreciate the careful work done by the editors of the *Administrative Law Review* in putting the manuscript into final form.

1. 5 U.S.C. § 551 (2000).

class that I had discovered the Rosetta Stone of administrative law: "Administrative agencies are just like legislatures and courts—except when they're not." The class started to laugh, and then I explained how my thesis applied to the issues we were discussing that day. They began to understand my point, increasingly so when I came back to it in other contexts. At our final meeting, after the class presented me with a T-shirt with those words printed on it, I pledged to write an article explaining what I meant. This is that article, and I dedicate it to the members of the class of 2006 at NYU Law School who pushed me so that I discovered these twelve magic words that may help unlock the mystery of administrative law.

By the time students take administrative law, they have some idea of how courts and legislatures work from middle school civics and constitutional law. However, most students have no meaningful conception of what agencies are or how they operate. Thus, the first part of these magic words conveys the fact that agencies act like both courts and legislatures; the fact that they are like only one, and not both, in a given proceeding comes out later. Early in the course, students learn that agencies were created as a practical response to the limits on what legislatures and courts could effectively do, both because of time constraints and legislators' lack of expertise in many areas of administrative regulation. The realization that agencies supplement the work of legislatures and courts enables students to analogize rulemaking to legislating and adjudication to judicial decisionmaking, thereby creating a starting place in understanding the administrative process. Then the phrase "except when they're not" tells students that the analogies only get them so far because there are significant differences between how agencies issue rules and make adjudications and how legislatures enact laws and courts decide cases.

The "except" phrase invariably raises the question: Is there a reason for those differences, or are they purely random? My answer, explained and illustrated below, is that various checks built into how legislatures enact laws and how courts decide cases either are lacking in administrative agencies, or agencies have organizational characteristics that require additional checks to counter-balance them. In other words, there are features in the legislative and judicial processes that are not present in the administrative process and, in order to restore a proper balance, other checks have been included to assure that agencies act in accordance with the law.

There is no evidence that Congress set out to create a complementary system of checks and balances to replace those found in the legislative and judicial areas. Rather, the system evolved in that manner because Congress

enacted the APA as a "compromise measure"[2] designed to afford "uniformity and fairness in administrative procedures without at the same time unduly interfering with the efficient and economical operation of the Government."[3] In hindsight, the APA has proven to be a solid compromise, overall neutral in its impact on agencies and outsiders, fitting within the accepted understanding that agencies would have considerable, but not unlimited, discretion. Although no one in 1946 could have predicted a world of administrative law in which almost as many claims would be made that agencies failed to regulate as that they overregulated, the deference that the APA gives to agencies has often come to the aid of those entities that seek to avoid or minimize regulation today, but who, in 1946, might have wanted more procedures and judicial review to prevent what they perceived as over-zealous regulators.[4]

These twelve words will not come close to explaining all of administrative law, not even all of federal administrative law. The world is too complicated to support unitary theories, and this theory post-dates, rather than precedes, the APA. It would be little short of a miracle if any concept perfectly fit the reality of administrative law. Indeed, all of the APA was not written at the same time,[5] and its meaning has evolved through court decisions over almost sixty years. As a result, the differences on which I focus will not address some of the differences between agencies on the one hand, and courts and legislatures on the other. Conversely, despite some of those differences, an agency will sometimes operate in ways much like a court or a legislature, depending on the function at issue. In short, this theory makes no pretense of being complete; rather, its primary goal is to help students understand how agencies operate and why they operate differently from courts or legislatures performing analogous functions.

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2. STEPHEN BREYER ET AL., ADMINISTRATIVE LAW & REGULATORY POLICY 21 (6th ed. 2006).

3. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5-7, 124 (1947) [hereinafter MANUAL] (quoting a letter that Attorney General Tom C. Clark sent to the chairs of the judiciary committees in both the House and Senate on October 19, 1945, endorsing the revised Administrative Procedure Act (APA)). The Manual further indicates that the Department of Justice had substantial involvement in the drafting of the APA as enacted, thereby validating the Manual as a reliable source for interpreting the Act, even with its potential for a pro-Government slant. *Id.*

4. When the APA has been found wanting for certain types of decisions, either because it imposes too many or too few procedures, Congress did not amend the APA, but instead amended the applicable substantive statute, which then trumped the APA, because that law "shall do so expressly." *Id.* at 122.

5. Government in the Sunshine Act, Pub. L. No. 94-409, § 4, 90 Stat. 1241, 1246-47 (1976) (adding ex parte rules to the APA).

Hopefully, this Article will have a secondary function. When scholars, legislators, practitioners, and judges analyze the administrative process and consider altering it, they should ask whether a proposed change is needed because some essential check that is available in either the legislative or judicial process is missing in administrative proceedings despite the APA. And, when there are calls for less agency process, the opposite question should be on the table: Will the agency still faithfully and effectively carry out its mission (or perhaps do a better job) because some unnecessary procedure or aspect of judicial oversight is removed? Similarly, when analogous issues are raised in litigation, courts should inquire as to whether the procedure in question provides a necessary check on the administrative process—to make it more like a court or a legislature—or whether it impedes the agency from performing its functions because, after all, agencies are not exactly like courts or legislatures. There are, of course, no general answers to those questions, but the questions are reminders that agency procedures exist to impose reasonable controls on agencies so that their results are, more or less, what legislatures or courts would have done.

Part I of this Article addresses the legislative and judicial processes and identifies the main checks that are imposed on them. I have confined my analysis to the federal system, but state administrative law regimes could usefully be viewed in similar terms. In Part II, I describe the controls placed on agencies during rulemaking and the functions that those controls play. In Part III, I go through the same process for formal adjudications and, in Part IV, I do so for informal and "semi-formal" adjudications.

Today, most agencies implement their mandates using both rulemaking and adjudication (both formal and informal), although some use more of one than the other. This combination of methods might raise issues of separation of powers if found in courts and legislatures,[6] but the combination is essential for modern agencies to carry out the responsibilities assigned to them. Thus, when I speak of an agency carrying out a legislative or judicial task, I am referring only to the particular role that it is playing in a particular situation, and not placing it in a general category. As discussed below, the fact that agencies issue both rules and adjudicate cases further complicates Congress's efforts to ensure separation of the prosecutorial and adjudicative functions in formal adjudications. Except where relevant to a separation of functions analysis, the reality that agencies both issue rules and make adjudications will not be

6. *See* Alan B. Morrison, *A Non-Power Looks at Separation of Powers*, 79 GEO. L.J. 281, 282 (1990) (describing the Framers' intention in creating a separation of power as a way to avoid the tyranny that could result from vesting too much power in any one branch).

repeated. This will simplify the discussion and avoid debates over whether an agency is or is not performing executive branch functions of the kind found in cases such as *Humphrey's Executor v. United States*.[7]

Before embarking on that path, there is one other qualification. To most lawyers, and probably most law students, the term "administrative agency" means an agency that regulates economic transactions, such as the Federal Communications Commission (FCC) or the Securities and Exchange Commission (SEC), or an agency that deals with issues of health, safety and the environment, like the Food and Drug Administration (FDA), the Consumer Product Safety Commission (CPSC), or the Environmental Protection Agency (EPA). But the APA definition of agency is much broader and includes all entities within the executive branch, except the president and his closest advisers.[8] It ranges from the Central Intelligence Agency to the Departments of Justice (DOJ), Agriculture, and Commerce; from the Small Business Administration and the National Institutes of Health to the regulatory agencies noted above.

As so defined, agencies are not a recent phenomenon, although their functions have increased dramatically since 1789. President George Washington had agencies, referred to as departments, with the titles of War, State, Treasury, and Justice. Like agencies today, they were part of the executive branch. Because they did not engage in what we would today refer to as regulation—either by issuing rules or adjudicating cases within the agency—they did not raise any of the separation of powers, due process, or other issues that are now dealt with in the APA and other laws. For modern examples, many of the decisions made by officials at the Departments of Defense and State are not regulatory in nature—training and deploying troops or negotiating agreements with foreign governments fall into the "non-regulatory" category—and the procedural and substantive checks supplied by the APA would not be necessary or even appropriate for them. Indeed, there are limited exemptions from both rulemaking and judicial review for certain functions of those departments.[9] Similarly, for decades before the passage of the APA, agencies in the executive branch filed criminal and civil cases in court, collected taxes and tariffs, gave out federal funds for a variety of purposes, managed federal property (such as forests and national parks), and even seized unsafe food and drugs, with or

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7. 295 U.S. 602, 611 (1935) (discussing the Federal Trade Commission's quasi-judicial and quasi-legislative functions).

8. 5 U.S.C. § 551(1) (2000) (defining agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . .").

9. *Id.* § 553(a)(1) (exempting military and foreign affairs functions from rulemaking procedures); *id.* § 701(b)(1)(F)-(G) (exempting military courts and commissions from judicial review).

without court assistance. These functions and more were carried out under substantive laws that gave the agencies the authority to act, in some situations with procedural requirements imposed on them.

Until agencies began to regulate directly, by providing detailed prescriptions about what regulated entities may and may not do, there was little need for procedures to deal with concerns about possible separation of powers and due process violations. Even after the APA was enacted, agencies' purely executive functions were not covered by specific APA procedural requirements, although they were subject to the substantive and procedural requirements of the statutes authorizing them. But for agencies that did most of their work through regulation (regardless of the form), and for those executive agencies that were assigned regulatory responsibilities that directly impacted non-governmental entities, the APA became the "rules of procedure" at the agency level and the basis for judicial review, unless Congress otherwise provided. Thus, most of this Article discusses agencies acting in their regulatory capacity, either through rulemaking or formal adjudication, to which the APA directly applies. At the end, I return to informal adjudications, for which the APA has no specific procedures, and discuss what impact the APA has on them and what remaining controls, including limited judicial review, are available.[10]

I. THE LEGISLATIVE AND ADJUDICATIVE PARADIGMS

Under the Constitution, a law is enacted by a process in which elected members of the House of Representatives and the Senate agree on the text of a bill and either the president signs it or both Houses override a presidential veto by a two-thirds vote.[11] Each Chamber has its own rules, but those rules have an internal effect only. Thus, for example, the House forbids substantive legislation in an appropriations bill, but if a bill contains forbidden provisions when it is introduced or they are added by an amendment, the validity of the law once it is enacted is not affected. Similarly, if there are violations of rules setting maximum time limits for voting—or minimum time limits before a bill that a committee has approved can be considered on the floor—but the bill has the requisite number of votes for approval, these violations are irrelevant. And if a bill is enacted but premised on a clear factual error—for example, that two plus two equals five, not four—the bill is still law once the president signs it.

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10. Although the APA is primarily concerned with controlling what agencies do, it also requires agencies to take action in some situations, *id.* § 555(e), and it provides for judicial review for agency action (inaction) that is "unlawfully withheld or unreasonably delayed," *id.* § 706(1).

11. For simplicity, the veto override will not be referred to again because nothing in this Article turns on which method is used for a bill to become law.

Not only is there no judicial review of claimed violations of procedural requirements for legislation, but substantive review is limited to claims that the law violates some express provision of the Constitution. The most important limitation is that, in contrast to the states, Congress does not have plenary legislative powers, but is confined to those subjects set forth in Article I. Until the twentieth century, those limitations were significant, but with the modern Supreme Court's expansive view of the Commerce Clause,[12] and its willingness to allow Congress to condition the acceptance of federal funds on the recipient's consent to conditions that Congress could not otherwise impose directly under Article I,[13] there are relatively few substantive limitations on congressional power. Among those limitations, some are procedural in nature, principally based on separation of powers considerations;[14] others are reviewable because they may violate principles of federalism;[15] others may transgress prohibitions in the Bill of Rights;[16] and others may be challengeable on due process or equal protection grounds.[17] Although opinions differ on how free courts should be to disagree with Congress on matters of constitutional interpretation, there is no dispute that the grounds for challenging most duly enacted federal laws are quite confined.

The very limited nature of external checks on the result of the legislative process is understandable because of the significant checks already built into the lawmaking process. The most obvious and potent check requires the concurrence of the two branches of the legislature and the president before a bill can become a law. Further, within Congress, the two Houses are elected for different terms—two years for the House and staggered six year terms for the Senate—and by different constituencies—the House by local districts and the Senate by the entire state.[18] Although not constitutionally based, the committee structure and the rules of each House also result in significant brakes on the process. If there is one truism about elected officials, it is that they are always considering the impact of their votes on their chances of reelection or, for those not running, the impact of their votes on the member of their political party whom they hope will replace them. This serves as an additional check on congressional power.

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12. *See* Wickard v. Filburn, 317 U.S. 111, 120-22 (1943) (recounting the development of Commerce Clause jurisprudence).

13. South Dakota v. Dole, 483 U.S. 203, 206 (1987).

14. INS v. Chadha, 462 U.S. 919, 951-59 (1983).

15. United States v. Morrison, 529 U.S. 598, 617-19 (2000) (invalidating a statute under both the Commerce Clause and Section Five of the Fourteenth Amendment).

16. Buckley v. Valeo, 424 U.S. 1, 12-15 (1976).

17. Mathews v. Eldridge, 424 U.S. 319, 323 (1976); Bolling v. Sharpe, 347 U.S. 497, 498 (1954).

18. In states with only a single House member, the district is the state, in which case only the term of office differs.

For the judicial branch, the Constitution permits federal judges to decide only the limited types of lawsuits described in Article III, a rough analogy to the limits on legislative powers imposed on Congress by Article I. The principal bases for federal court jurisdiction are claims that arise under federal law (mainly statutes, treaties, and the Constitution), cases involving the United States, cases where the opponents are either citizens of different states or where one party is an alien, suits between two states, or suits based on admiralty law. In addition, Congress has imposed a further restriction in diversity and alienage actions—the amount in controversy must exceed $75,000.[19] Furthermore, the Supreme Court has interpreted the "case or controversy" language in Article III to forbid advisory opinions, to impose fairly strict requirements of standing and ripeness, and to limit the ability of federal courts to decide "political questions." Although the lower federal courts may decide issues of state (or foreign) law in resolving cases before them, the Supreme Court may decide only issues of federal law.[20] In addition, in "suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[21] And to assure that the decisions of juries on factual matters are not overturned by judges, that same amendment states that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[22] Moreover, at the direction of Congress, and subject to override by a duly enacted statute, the Supreme Court has issued detailed rules of procedure for all cases in the lower federal courts.[23] All of these provisions check the powers of the federal courts to various degrees.

One difficulty with considering these restrictions to be a real check is that they are enforced by the federal courts, which are the very institution they are designed to control. Any law student who has spent more than a passing moment examining the meaning of the case or controversy requirement in Article III knows how malleable it is and how the Supreme Court can choose to decide—or not to decide—a dispute more or less at will, although, overall, the outcomes do not range that widely. The question of whether a given lower court ruling is based on federal or state law generally is not in dispute, but in some cases, such as those involving the contested presidential election of 2000, it was far from clear that the Court was simply applying federal law. When the Court was faced with the question of the meaning of the re-examination clause, and whether a

19. 28 U.S.C. § 1332(a) (2000).
20. *Id.* § 1257(a).
21. U.S. CONST. amend VII.
22. *Id*.
23. 28 U.S.C. §§ 2071-2074.

particular determination was one of fact or law,[24] it was the Court that decided where the boundaries lay, and it gave a broader rather than a narrower role for federal judges in both instances. In June 2005, the Court declined to construe a statute granting supplemental jurisdiction to the federal district courts narrowly, despite the fact that there was no indication that Congress had contemplated such an expansive reading.[25] Thus, although there are statutory and constitutional limits that govern the federal courts, the other two branches of government have no formal mechanism by which to guard against possible excesses.

Indeed, unlike the other two branches, federal judges not only do not have to stand for reelection or even reappointment but, under Article III, they "hold their Offices during good behavior," a standard that essentially requires a finding that a judge has violated a criminal statute before she or he can be removed. Even then, it can be done only by the cumbersome process of impeachment, which has happened only fourteen times in more than 200 years. Thus, federal judges essentially have life tenure, which makes them unaccountable in the ordinary political sense.

Nonetheless, although lacking many formal controls, the federal judiciary is reigned in by several means. The most prominent is the right of a losing party to seek review in a higher court. That has the greatest effect on district courts, whose decisions are generally appealable as of right to the courts of appeals, although the standard of review on many issues makes it difficult to overturn the ruling below. As for Supreme Court review, that is entirely discretionary, with very few exceptions. With the Court receiving more than 8,000 petitions each year, and agreeing to hear only about 80, the chances of the Court taking a case are very small.

Moreover, the traditions of an independent judiciary and the practices arising from the common law provide significant checks on the ability of federal judges to disregard the law and decide a case the way that a legislator would decide whether to support an amendment to a bill. Cases are confined by the pleadings, and the decisions must be based on the record, using rules of evidence that exclude unreliable types of proof. Judges are forbidden from conducting their own factual investigations or receiving information from one party that is not available to the others. Also, judges may not participate in a case in which they have a financial or other personal stake or in which, for any other reason, their "impartiality may be reasonably questioned."[26] In cases that are tried by a judge alone,

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24. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437-40 (2001); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 418-19 (1996).

25. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).

26. 28 U.S.C. § 144. If a lower federal court judge refuses to recuse himself under this statute, that may be reviewed on appeal. However, in a recent Supreme Court case in which Justice Antonin Scalia was asked to step aside because of his participation in a duck hunting

Rule 52(a) requires the judge to issue findings of fact and conclusions of law, and all rulings are made in writing or in open court where the parties and lawyers are present. Although there is no formal requirement that judges explain their decisions, the common law practice of doing so—to inform the parties of why the judge ruled, to assist in the development of the law, and to justify the decision if an appeal is taken—are deeply ingrained in our legal culture. To be sure, the press of judicial business has increasingly led to the issuance of many "unpublished opinions" at the appellate level, but even they at least explain to the parties the general basis for the decision. The bottom line is that, while the formal constraints on judicial decisionmaking are not extensive, the traditions of judging significantly confine the way that judges decide cases in the real world, producing a similar effect to that by which Congress is controlled, albeit by very different means.

II. AGENCIES AS LEGISLATURES

The activities of administrative agencies fall into two broad categories: rulemaking and adjudication. In this Part, I discuss the former, which is sometimes described as "quasi-legislative" because the product is a rule that generally looks and acts like legislation, with differences described below.[27] I decline to use the "quasi" modifier because "[t]he mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."[28] One further introductory point: a single individual heads most agencies, although commissions with between three and five members run some agencies. For purposes of this Article, nothing turns on that difference, and I therefore treat all agencies as headed by one person, unless otherwise stated.

The essential elements of the term "rule," as defined in the APA, are that it is "the whole or a part of an agency statement of general or particular applicability and future effect . . . ."[29] Thus, a rule could be general, as in the Occupational Safety and Health Administration rule directing all employers to

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trip with a party in the case (Vice President Richard Cheney), he rejected the motion on his own, which is consistent with Supreme Court practice under which the individual who is the subject of the motion, rather than the entire Court, decides the question. Cheney v. U.S. Dist. Court for the Dist. of Columbia, 541 U.S. 913 (2004). Disclosure: I was lead counsel for the Sierra Club, which made the motion seeking Justice Scalia's recusal.

27. *See* 5 U.S.C. § 553(c) (2000) (defining two kinds of rulemakings under the APA: formal rulemaking, which closely resembles a formal adjudication (or a trial), and informal rulemaking, which resembles a legislative process). This part is limited to informal rulemakings.

28. FTC v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

29. 5 U.S.C. § 551(4).

do (or not to do) some particular act to further workplace safety. Or, it could apply only to the particular use of a specific workplace substance and hence affect only a portion of all employers.[30] In either case, a statute enacted by Congress could do the same thing. Like a statute, once a rule is in place, it must be obeyed unless a court overturns it or the agency revokes it. Thus, for example, if an agency with jurisdiction over roads in the National Parks issues a rule setting a speed limit of 35 miles per hour in certain locations, a driver must follow that rule just as if it were enacted by Congress.

Perhaps the more significant aspect of the definition of rule is the "future effect" phrase. The Supreme Court has read this phrase to prohibit agencies from giving substantive rules retroactive application.[31] This is consistent with the Supreme Court's refusal to give statutes retroactive application, unless Congress clearly intended that result, because of the constitutional issues raised by retroactivity.[32]

Unlike substantive rules, which set standards to be followed by the public and the agency, an interpretative rule is primarily a guidance document that tells the world how an agency construes a particular provision in an existing statute and, for reasons to be discussed below, generally is given limited deference by courts. The result is that the failure of a private party to follow an interpretative rule does not automatically subject that person to liability. To be sure, if the Internal Revenue Service issues an interpretative rule explaining the meaning of a phrase in the tax code, that rule may have an impact on how a court decides a case, even for a transaction that took place before that rule's issuance. That would not be a prohibited retroactive application because, almost by definition, an interpretation of an existing law—or rule—is retroactive, at least in part. To the extent that there is a retroactivity issue, it is mitigated, if not avoided, by courts giving interpretative rules less deference than other rules because it is ultimately the meaning of the existing statute that governs, and the rule provides merely some help in discerning that meaning. An agency's ability to issue interpretative rules that impact the meaning of existing statutes distinguishes it from Congress, which has no interpretative powers regarding laws that have already been enacted. For that reason, courts have refused to give any weight to the views of Congress on a law that it has already passed, except in the context of an amendment to that law.[33]

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30. *See* MANUAL, *supra* note 3, at 13 (making it clear that if an agency action is a rule, the fact that it applies to a single entity does not take it out of the requirements of § 553 and citing examples of a corporate reorganization approved by the SEC or a determination of future rates for a single utility as constituting rulemaking).

31. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1988).

32. Landgraf v. USI Film Prod., 511 U.S. 244, 265-66 (1994).

33. Tennessee Valley Auth. v. Hill, 437 U.S. 159, 189-93 (1978).

As noted above, Congress is limited in the subjects on which it can legislate to those enumerated in Article I, Section Eight, and therefore the agencies that it creates are also limited to those subjects. In practice, agencies will have even more limited missions, some confined to a single industry (such as airlines or nuclear power plants), while others have a broader reach (such as the environment or occupational safety), although with more limited mandates. But whatever the mission, the agency is limited to it, and in many cases to certain aspects of that mission as circumscribed by Congress. And just as the courts check Congress to assure that it does not stray beyond the constitutional subjects allotted to it, so too do the courts review agency actions to prevent them from going beyond the topics assigned to them by Congress. Most of those borders are subject matter limitations, but agencies lack the authority to issue substantive rules that affect the primary conduct of others in some situations because they have been directed to proceed through adjudications. Finally, the non-delegation doctrine prevents Congress from simply turning over a subject area to an agency without an "intelligible principle."[34] The doctrine has a very limited effect today, much like the nominal limits on the powers of Congress under Article I, Section 8—there are some vague boundaries to ensure that Congress or the Constitution, respectively, retain some ultimate control over what has been delegated.[35]

Here the similarities end, and the differences start to take on significance. The most striking difference between agency rulemaking and congressional legislation is that the APA, in 5 U.S.C. § 553, imposes significant procedural requirements on agencies issuing rules and, unlike comparable procedural rules of Congress, courts enforce them. Section 553(a) requires agencies to publish a notice of proposed rulemaking in the *Federal Register* and allow for written public comment on the proposed rule, which is normally at least thirty days, and often considerably longer.[36] The notice must include the text of the

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34. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

35. *See* Gonzales v. Raich, 545 U.S. 1 (2005) (upholding the power of Congress under the Commerce Clause to forbid possession of marijuana grown locally and not held for sale). Although two recent Supreme Court cases have invalidated federal statutes enacted under the Commerce Clause, the Court has not found a violation of the non-delegation doctrine since 1935, which suggests that the concept is practically, if not legally moribund. BREYER ET AL., *supra* note 2, at 71-74.

36. *See* 5 U.S.C. § 553 (2000) (listing exceptions to these requirements for certain subjects—those involving a military or foreign affairs function or those relating to agency management or personnel, or to public property, loans, grants, benefits or contracts, §§ 553(a)(1) & (2)—and for interpretative rules, general statements of policy, or agency rules of organization, procedure or practice, § 553(b)(A)). The latter exclusion is only from the notice and comment requirement, whereas the former is from all of § 553. Agencies may, and some often do, treat rules in these areas like all other rules and provide notice and an opportunity for public comment. The meaning as well as the advisability of these exclusions has been the subject of considerable litigation and debate. Their existence does not alter the thesis of this Article, but makes the procedural point in the text inapplicable to this subset of agency activities.

proposed rule, along with a statement of basis and purpose. Section 553 requires agencies to identify in the notice the principal factual bases for the proposed rule, which often is done through a public file (paper or now, more likely, electronic) that contains the key documents and, subsequently, the comments submitted in response to the notice. Once the agency has evaluated the comments, it may issue a final rule that must have an accompanying statement describing the changes made in response to public comments, identifying the main issues raised by the comments, and explaining why it did not adopt the principal alternatives by those who suggested changes. If the agency makes changes that could not have been reasonably anticipated by the notice, the agency must provide the public an opportunity to comment on those changes through a supplementary proceeding. The rule cannot be effective sooner than thirty days after its publication. However, these procedural requirements can be avoided if an agency finds "good cause" for dispensing with them and "incorporates the finding and a brief statement of reasons therefor in the rules issued" on the ground that compliance would be "impracticable, unnecessary, or contrary to the public interest."[37] And, like the rest of § 553, the courts limit the good cause exception so that agencies do not engage in wholesale violations of the requirements imposed by § 553.[38] Finally, interested persons have an absolute right to ask an agency to issue, amend, or repeal a rule, as well as a right to sue the agency if it fails to do so in a timely manner.[39]

By contrast, when Congress legislates, it is not required to provide public notice of what it is going to do and why, or provide any opportunity for public input of any kind, although it often provides both. With no requirement that it tell anyone what it is doing or why, or give interested persons a right to tell it why it should not do what it is about to do, Congress can change its mind on any part of a bill that has been introduced, at any time, for any reason or no reason at all. New matters can be included when the two Houses meet to reconcile their differences in a bill, and provisions that have been part of a bill in both Houses can suddenly vanish, with no procedural check whatsoever. Bills can also provide that they are effective upon enactment (typically when signed by the president), and the Supreme Court even has allowed some substantive laws to have limited retroactive effect.[40]

Why should the APA's rulemaking section contain notice and comment procedural requirements, enforceable by the courts, when there is nothing comparable to those requirements before laws, which are the functional

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37. 5 U.S.C. § 553(b)(3)(B).
38. New Jersey v. EPA, 626 F.2d 1038, 1049-50 (D.C. Cir. 1980).
39. 5 U.S.C. §§ 553(e), 555(e), and 706(1).
40. *See, e.g.*, United States v. Carlton, 512 U.S. 26, 30-32 (1994) (allowing a bill to close tax loopholes retroactively).

equivalent of rules, can be enacted? The answer is that the legislative process contains a built-in check that is designed to accomplish the same ends, but through different means: A bill must pass both Houses of Congress and be signed by the president before it can become a law. Requiring the concurrence of all three, at least in theory, prevents rash decisionmaking, provides alternative sources of information and viewpoints, and creates several avenues for public input on pending legislation. Because the three components that must approve a bill are elected by different means and with different, though partially overlapping, constituencies, the legislative process provides a check that is largely political rather than procedural. Because there are three components required for adopting any law, the opportunity for public input and democratic participation by interested persons is increased, albeit not guaranteed. And if the pressure from outside becomes significant, the same process that produced a law can amend or repeal it, with no required procedures to slow down the process.[41]

I make no claim that the legislative and administrative processes were designed to prevent the same kinds of problems. Whatever its purpose, APA rulemaking as supplemented by judicial review over the procedural and substantive aspects of a final rule does, as a practical matter, compensate for the absence of political checks that are a central feature of the legislative process. "In a sense, notice-and-comment procedures serve as a Congressionally mandated proxy for the procedures which Congress itself employs in fashioning its 'rules,' as it were, thereby insuring that agency 'rules' are also carefully crafted (with democratic values served by public participation) and developed only after assessment of relevant considerations."[42] Thus, although Congress does not have to provide public notice comparable to what agencies must do under § 553, the general public nature of legislative proceedings, coupled with the bicameralism and presentment requirements, provides reasonable assurance that the public will have an opportunity to be heard on significant legislative issues. In addition, there are other political checks in the rulemaking process—important members of Congress may object, and Congress can always enact a law overturning a rule—but those are utilized relatively rarely and cannot be counted on to rectify most errors in the rulemaking process.[43]

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41. Section 551(5) defines rulemaking as the "process for formulating, amending, or repealing a rule," and the cases are clear that all of the rulemaking requirements applicable to issuing a rule apply to repealing it. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (finding National Highway Traffic Safety Administration's rescission of a regulation arbitrary and capricious for failing to provide an adequate basis and explanation).

42. Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 951 (D.C. Cir. 1987) (Starr, J., concurring in part and dissenting in part).

43. For a category of "major rules"—those with an annual impact of $100 million or more on the economy—Congress has provided that they may not go into effect for sixty

Other differences between what an agency must do to have a rule sustained as compared to what Congress must do are explainable by the lack of the tripartite check built into the legislative process. For example, Congress does not have to explain what it is doing or why it is doing it, either in advance or as part of the final product. Nor does it have to justify in any respect why it chose one alternative over another. Similarly, there is no requirement that Congress make available its evidence for public comment, or in most cases, that it even have evidence to sustain a law, including a law that imposes burdens (or gives benefits) to one party and not another. The lawyers defending the statute can offer any reasons they can create to persuade the court that the decision was rational.[44]

By contrast, if an agency issued a rule without an explanation, that would violate § 553(b). If it tried to defend a rule in court on a ground on which it did not rely when it issued the rule, the courts would require at least a remand if not outright reversal, even though a court of appeals could properly affirm a district court decision on a different ground than the one the court relied on below.[45] The short explanation for these differences is that the APA does not replicate the Constitution, but the more important inquiry is why the APA included these additional requirements. The answer is that, because agency decisions lack the tripartite political check present in lawmaking, Congress has imposed alternative checks on the rulemaking process to assure that agencies remain faithful to the authority Congress delegated to them. As to the requirement for a reasoned explanation, it exists to assure that the agency has in fact considered the relevant issues and properly exercised its discretion, including any relevant expertise, and not acted for reasons not authorized by Congress.

One of the central premises of the rulemaking process is that agencies will be receptive to public comments and make appropriate changes; otherwise, the process would be a farce. But to make a change, an agency head must be open to change which, in turn, logically means that the official has not irrevocably made up her mind on the desirability and contents of a proposed rule. The courts have indicated that if a regulator prejudged a rulemaking, at some point it would require her to step aside, although to date, no court has imposed that remedy.[46] Moreover, generally

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legislative days after they are transmitted to Congress to give Congress time to enact a law overriding the rule. 5 U.S.C. §§ 801-808. The law has been in effect for about ten years, and Congress has exercised its power under this provision only once: to reject the ergonomics rule issued in the last days of the Clinton Administration. Because the Bush Administration opposed the rule, opponents only had to obtain a simple majority in both Houses to overturn it. Presidential Signing Statement on S.J. Res 6, Mar. 20, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/03/20010321.html.

44. Vance v. Bradley, 440 U.S. 93, 109 (1979).

45. SEC v. Chenery Corp., 318 U.S. 80, 88 (1943).

46. *See* Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), *cert.*

applicable conflict of interest statutes would require a decisionmaker to disqualify herself if she had a financial conflict of interest, although in most cases the decisionmaker avoids those problems by divesting all investments that have a potential for conflicts of interest on a tax-free rollover basis before the issue arises.[47]

The situation is quite different in Congress (and for the president). A representative from a farm state, for example, is likely to have campaigned on the continuation of price supports and subsidies, and no one would suggest that he should not vote on a farm bill simply because his mind is not subject to change based on reasoned discussion. In many cases, the member of Congress was elected precisely because of his views, which will often be closely aligned with those whom he represents. To disqualify those members from voting would effectively disenfranchise their constituents. A legislator's personal financial interests also do not disqualify him from voting on a bill, nor should they, except in the most extreme case. Annual financial disclosure is part of the reason why an additional check is not needed, as are regular elections and the fact that each member has only one vote.

Agency officials participating in rulemaking are in a rather different position because they are carrying out the will of the people, as reflected in laws enacted by Congress, rather than making their own judgments. Moreover, they are either the sole decisionmakers or one of a small group of decisionmakers. Therefore, they are required to step aside in proceedings in which they have a financial interest.[48] Recusals are also necessary because voters and Congress cannot remove agency officials—only the president can.[49] Again, this check is more pronounced than in the legislative context, but not so much that it interferes with the administration of the laws, which Congress has directed the elected president and his appointed agency officials to implement.

Another difference relates to what are known as ex parte communications, such as those that are not on the record. In informal rulemaking, the record is not like a trial record, but consists of the documents placed in the agency file, material referred to in its notice of proposed rulemaking, comments submitted by the public, and anything else on which the agency relied in making its final rule.[50] If today an agency

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denied, 447 U.S. 921 (1980).

47. *See* 26 U.S.C. § 1043 (2000) (allowing a tax-free rollover for executive branch officials required to divest to avoid financial conflicts of interest).

48. 18 U.S.C. § 208 (2000).

49. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 604, 618 (1935); Myers v. United States, 272 U.S. 52 (1926).

50. Formal rulemaking is on the record, and so the discussion in text would not apply to it. Instead, the ex parte prohibitions in § 557(d) would apply.

receives a written communication, whether or not it is labeled a comment, the agency will almost always place it in the public file so that everyone can see it, although that was not always true. A more difficult question arises when an agency official receives oral comments about a pending rulemaking. A cautious official would reduce the conversation to writing and place a copy in the file, but what if the conversation took place after the comment period had closed, or the memo to the file became available only after that date? Must the agency re-open the proceeding, and what happens if it does not do so, or if the agency official does not include a memo to the file? The answers from the courts are not entirely clear, except to suggest that timing does matter (pre-notice—no problem; after comment period—much bigger problem); the nature of the rulemaking may matter (will the rule produce winners and losers, or is the impact much more diffuse?); and does the ex parte communication add new material or simply rehash points previously made?[51] Again, at some point, the courts seem willing to step into a rulemaking to assure that everyone works from the same record and that certain participants do not receive unfair access to the decisionmakers so that agencies will produce democratically made rules.[52]

Neither Congress nor the president is subject to any such restrictions in the legislative process. They are free to talk to anyone, at any time, about anything, and many would insist that they have a responsibility to do just that, and that ex parte rules would prevent them from carrying out their constitutional mandates as elected officials if their access to information was impeded in any way.[53] The election system plus a vigilant press provides additional necessary checks, as does the tripartite system of enacting laws, including the fact that no one member of Congress can act without the concurrence of a majority of both Houses and the president. Because those checks apply to agency heads in rulemaking only to a very limited degree, alternatives are needed to assure fairness in the process.

There is another check built into the administrative process that is never found in the legislative arena. If a group of concerned citizens exercising their First Amendment right to petition the government made a detailed written proposal to Congress to amend a law that they consider harsh or unwise, they might get a polite reply promising to look into the matter, but

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51. *See* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977); Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959).

52. The special status of the White House and OMB in rulemaking is beyond the scope of this Article.

53. *See* Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 467 (1989) (finding that Congress did not intend to apply Federal Advisory Committee Act requirements to the confidential advice given by the ABA Committee regarding Presidential appointments to the federal bench).

almost nothing would ever happen. To my knowledge, no one has had the temerity to sue members for not acting on the petition, but if someone did, the Speech and Debate Clause,[54] among other defenses, would result in the lawsuit's rapid removal from the court's docket. If that same group of citizens filed their petition with a federal agency with jurisdiction over the subject of their petition seeking a new rule or an amendment to an existing rule and the same kind of non-response ensued, the court could not dismiss the case out of hand. Section 553(e) requires agencies to give interested persons "the right to petition for the issuance, amendment, or repeal of a rule," and the definition of agency action in § 551(13) includes the "failure to act." Furthermore, § 706(1) directs courts reviewing claims under the APA to "compel agency action unlawfully withheld or unreasonably delayed." The result is that the courts uniformly recognize that at some point, they have the power to require agencies to reach a final decision on a request for rulemaking, although they have shown a reluctance to do so except in extreme cases.[55] Aside from states where the initiative process is available to force a decision on a bill that is stalled in the legislature, the only remedy that citizens have is the ballot box—a remedy that does not apply to unelected administrators and that would apply very weakly to the president who appoints them, as it is almost inconceivable that a substantial number of voters would oppose the president for that reason alone, even assuming they made the connection.

A final requirement imposed on agencies is that they act consistently. They are not forbidden from changing their minds, but if they do so, they must explain why—or at least how they reconcile the disparate treatment of similar matters.[56] Congress is under fewer restraints in terms of consistency, even among what appear to be similarly situated groups. As with many of the other differences, the checks built into the legislative process that are not present for agencies explain much of this, with the rest explained by the need to control agency discretion without having the courts become, in effect, super-administrators. Insisting on consistency, or at least reasoned distinctions, is a lesser form of control that results in fewer intrusions on the agency than would direct review of substantive decisions. The tradeoff is reduced judicial scrutiny and greater agency discretion.

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54. U.S. CONST. art. I, § 6, cl. 1.

55. *See* Public Citizen Health Research Group v. Chao, 314 F.3d 143, 145 (3d Cir. 2002) ("[W]hile competing policy priorities might explain slow progress, they cannot justify indefinite delay and recalcitrance in the face of an admittedly grave risk to public health.").

56. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); SEC v. Chenery Corp., 318 U.S. 80 (1943).

There are other differences between legislatures enacting laws and agencies issuing rules, but they generally follow the same pattern. While there is a basic similarity in the two processes, there are additional requirements imposed on agencies that largely can be explained by the fact that various checks that control the legislative process are absent from rulemaking. These requirements thus fill a void in the system of checks and balances, but while they do not replicate the legislative process, they do produce a rough approximation of it.

This discussion of the utility of procedural requirements in reining in agencies should not be read as a paean to procedures as an unmitigated good. Assuming that additional procedures, such as a trial-type hearing, produce "better" results in some cases, they also inevitably bring with them added costs and delays. Indeed, when the Office of Management and Budget (OMB) proposed requiring substantial additional peer review requirements for certain categories of scientific information used in rulemaking and other agency proceedings, one of the major objections was the cost and delay that the added requirements would impose. The final OMB guidelines were much less demanding, largely in recognition of those problems.[57]

Whether the benefits of additional procedures outweigh the costs is, at least in the rulemaking context, a question that the Supreme Court concluded in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,[58] was one that Congress had decided, and it was not up to the courts to impose additional procedural requirements not found in the APA. The ruling finds support from the fact that the APA itself was a compromise between those who wanted agencies to be tightly controlled and those who wanted them to be generally free of restraints in carrying out their missions.[59] This "procedural hands-off" approach is most clearly justified for rulemaking and formal adjudications, where Congress has spoken directly on what the proper procedures should be. However, as discussed in Part IV, it should be less applicable to informal adjudications, where Congress has provided no directions at all, and hence the inference that courts would overturn a compromise is not a compelling rationale for courts to back away from assuring some degree of procedural regularity and basic fairness.[60]

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57. *See* 69 Fed. Reg. 74,976 (Dec. 15, 2004).
58. 435 U.S. 519 (1978).
59. *See supra* note 4 and accompanying text.
60. This argument does not apply to statutory schemes such as those for immigration matters and social security disability, which I label "semi-formal adjudications," where there is clearly a compromise on what procedures are and are not necessary or even appropriate. *See infra* Part IV.

III. AGENCIES AS ADJUDICATORS

A. Adjudications in General

Under the APA, any agency action that is not a rulemaking is an adjudication, although it takes a little work to see how that happens because the definitions in 5 U.S.C. § 551 are not arranged alphabetically or in another logical order. The all-inclusive term under the APA is "agency action," defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[61] Under § 551(7), "adjudication means agency process for the formulation of an order,"[62] and under § 551(6) an "order means the whole or a part of a final disposition . . . of an agency in a matter other than rule making, but including licensing."[63] Thus, unless the final product of an agency action is a rule, it must be an order, which is the product of an adjudication.

Adjudications sound like court cases in an agency setting, and in some cases, they resemble what goes on in a courtroom. If the statute requires that the proceedings be held on the record, they are "formal adjudications," governed by §§ 554, 556 and 557, which are more like court cases. But there are other forms of adjudications under the APA (because they are not rulemakings) that look much less like court cases and in some instances do not resemble court adjudications at all. Because they are not formal adjudications, and therefore do not have to follow the requirements applicable to that category of APA actions, they are generally referred to as informal adjudications. They are, in essence, the residue of everything that is neither a rulemaking nor a formal adjudication. Because every agency action, including such mundane matters as granting, or denying, a pass to enter a government building, ordering a carton of toilet paper, denying Social Security or other government benefits, or ordering an alien to leave the country, culminates in an "order" under the APA, the proceeding leading to it is an adjudication. Where there are no APA procedures applicable to those adjudicative-type decisions, they are known as informal adjudications, although the APA does not use that term.[64]

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61. 5 U.S.C. § 551(13) (2000).
62. *Id.* § 551(7).
63. *Id.* § 551(6).
64. Under § 554(a), the test for whether a proceeding must be conducted as a formal adjudication is whether the substantive statute governing the matter requires that it be "determined on the record after opportunity for agency hearing," which the Supreme Court has construed as requiring that the applicable statute include those precise words, or perhaps something very close to them. United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 229 (1973). The Administrative Law Judges (ALJ) who work for the Social Security Administration take the position that their proceedings are "APA proceedings," although they do not claim that they are governed by §§ 554, 556, or 557. *See* Robin J. Arzt,

I will return to informal adjudications in Part IV, but for now it may be helpful to know that although the APA itself prescribes no specific procedures for informal adjudications, some statutes specific to certain substantive laws do contain other procedural requirements. The two most prominent of these statutes deal with Social Security disability benefits and immigrants, both of which have their own set of procedures that are more formal than what the APA alone would require, but less formal than a formal adjudication. I shall refer to these alternative, non-APA based proceedings as "semi-formal adjudications," to distinguish them from the truly informal adjudications and from formal adjudications.

Because agency adjudications are similar to court adjudications, contrasting court cases with legislation may help illuminate the nature of agency adjudications. Legislation is generally prospective only, prescribing consequences for conduct that will take place in the future. Court decisions, on the other hand, ascribe consequences to events that have already taken place, such as deciding whether A or B breached a contract or whether C negligently injured D and owes monetary damages for that conduct. Sometimes, courts issue orders that are purely prospective—E can no longer occupy a strip of land because it is on F's property—but, even then, the facts at issue arose before the case was filed, and hence the adjudication can be seen as looking back to determine the future consequences of prior conduct.

As noted in Part II, agency rules are forward-looking, like legislation, while many agency adjudications are, like court adjudications, backward-looking, in that they focus on prior conduct, often involve disputed issues of fact, and impose consequences based on that conduct.[65] Some agencies have the power in an adjudication, similar to the power that courts possess, to order the payment of money, either to the Government or to a third party, subject to judicial review.[66] More typically, agencies will issue orders that resemble court-issued injunctions, though they may be called something else, such as "cease and desist orders" (Federal Trade Commission (FTC)), "exclusion orders" (SEC), or "deportation orders"

Adjudications By Administrative Law Judges Pursuant to the Social Security Act Are Adjudications Pursuant to the Administrative Procedure Act, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 279 (2002). Because Social Security cases rarely, if ever, raise issues of ex parte communications or separation of functions, and there is generally no agency attorney on the other side from a claimant, there seems to be little practical significance to claimants or the agency as to the characterization of Social Security hearings and how they operate. Because they are not literally required to be on the record, they are informal—not formal—adjudications.

65. *See* MANUAL, *supra* note 3, at 14-15 (making this very point).

66. The National Labor Relations Board (NLRB) has authority to order reinstatement, plus back pay under 29 U.S.C. § 160(c) (2000), and the Commodity Futures Trading Commission may order fines of the higher of $100,000 or the gain of the wrongdoer, as well as restitution to persons injured by the wrongful conduct. 7 U.S.C. §§ 9(3)-(4) (2000).

directing an alien to leave the country (U.S. Citizenship and Immigration Service). Some orders, as in Social Security disability cases, can result in payments both for the past and, assuming no change in the claimant's status, for the future, with the latter often overshadowing the former in terms of significance.

But there are whole groups of adjudications, mainly but not exclusively in the informal category, in which the relief sought is prospective and in which the agency does not make its decision based on what happened in the past, but rather on what the party requesting or opposing the order argues is likely to happen in the future. In that sense, the relief looks more like a rule (future effects, based on predictions of the consequences of various alternatives) than an adjudication. The prime example of this phenomenon is the issuance of a license, such as for a television station by the FCC. In this instance, Congress specifically dealt with the issue in § 551(6) by including licensing as proceedings that produce orders, and excluding rulemaking from that process. In addition, the APA defines license broadly to include "an agency permit, certificate, approval, registration, charter membership, statutory exemption, or other form of permission."[67] Thus, when the FDA allows a new drug to go on the market, the EPA approves a discharge permit, or Customs allows a product to enter the country without charging a duty, the agency has engaged in an adjudication even though, as described in Part IV, the procedures that it followed did not remotely resemble what takes place in a courtroom.

B. Formal Adjudications

While many agencies implement laws that contain criminal penalties, the agency law enforcement proceedings carried out through formal adjudication are civil. Most adjudications involve a request for some form of injunctive relief, which can have far more significant consequences for a business than a fine of a few thousand dollars. Thus, an FTC antitrust cease and desist order can fundamentally alter the manner in which a company, or perhaps an entire industry, operates. The SEC can prevent an individual from continuing in the investment business or conclude that a company's financial statements are false and misleading, thereby guaranteeing stockholder suits. The National Labor Relations Board (NLRB) can require an employer to recognize a union, triggering the duty to bargain and, in all likelihood, add payroll costs and impose significant burdens on its relationships with its employees. In short, there is no doubt that these civil adjudications can have significant economic consequences, even without the payment of money.

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67. 5 U.S.C. § 551(8).

Formal adjudications are the most judicial-like of agency proceedings, but there are a number of significant differences—some that are obvious, and some that are less so. To understand the differences, it is important to understand the variety of reasons why Congress has assigned these judicial-like proceedings to agencies instead of the federal courts, which is where they generally would go because it would be federal law that would be at issue.[68]

One reason is numbers. In fiscal year 2005, in the 92 United States District Courts, there were 322,848 civil cases filed, 338,314 terminated, and 5,294 in which a trial was held.[69] By way of comparison, the Secretary of Labor, who enforces the Longshore and Harbor Worker Workers Compensation Act,[70] handles 72,000 cases for injured workers annually under that law alone.[71] Similarly, the NLRB in fiscal year 2005 received 24,720 unfair labor practice charges and, after review by its professional staff, filed 1,373 complaints, setting the cases for hearings.[72] Recognizing that all cases are not equal in difficulty or complexity, the Longshore cases would, if added to the federal civil docket, result in an increase of over 18% in civil cases, and if all the NLRB cases set for hearing were tried, that would constitute more than 25% of all federal civil trials—and this is just from one agency (the NLRB) and one part of another agency (the Department of Labor). Of course, Congress could add more federal judges, but their appointments are for life, and they are much more expensive to support than judges who work for agencies. In addition, for political and other reasons, Congress has been very reluctant to create more federal judgeships, and at least some people who choose to become federal judges now would not do so if their dockets were filled with the kinds of cases that agency judges now handle.

Second, agencies develop an expertise in their subject areas that allow them to operate more efficiently and consistently because they handle those cases on a regular basis. In addition, their familiarity with an industry or,

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68. Under 28 U.S.C. § 1331 (2000), there would automatically be subject matter jurisdiction in the district courts for all claims arising under a federal statute and, under 28 U.S.C. § 1441(b), a case raising such a claim could always be removed from state to federal court. Under some statutes creating federal causes of action, such as 42 U.S.C. § 1983 (2000), the claims can be filed in state court and some plaintiffs choose to file there, because, for example, the lawyer is more familiar with state practice and the local courthouse may be more convenient than the federal court.

69. Judicial Facts and Figures, Fed. Court Mgmt. Statistics, tbls. 6.1, 6.4, http://www.uscourts.gov/judicialfactsfigures/contents.html (last visited Feb. 11, 2007).

70. 33 U.S.C. § 902(6) (2000).

71. H.R. REP. NO. 109-161, at 4 (2005).

72. NLRB, SEVENTIETH ANNUAL REPORT, 2-3 (2005), *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2005Annual.pdf.

in the case of the NLRB, the relationships between employers and employees, enables them to craft better solutions and appreciate what is at stake better than many generalist judges.

Third, under the Federal Rules of Civil Procedure, the courts use the same rules for all cases. Because many federal court cases involve significant financial interests or major public policy questions, the Rules are designed so that litigants receive full procedural rights, so that all the relevant facts can be brought forth at trial, and so that juries are screened from marginally relevant and highly prejudicial evidence. However, the types of issues subject to agency adjudication differ from those in most federal court cases, and there are no juries. Therefore, Congress has concluded that more flexibility and less formality are appropriate in most agency adjudications.

Fourth, many agencies have the authority to carry out their missions either by issuing rules or by bringing individual cases in an administrative forum. If, however, all of those cases had to go to court, it would change the nature of the choices that administrators have and reduce their flexibility in deciding the best way to resolve a policy issue. There may be other reasons for placing certain kinds of adjudications in agencies rather than courts, but these will suffice to understand the general point.

There are two readily apparent differences between court and agency adjudications: The judges are different, and there is never a jury in an agency proceeding. In formal adjudications, the presiding officer is normally an administrative law judge (ALJ) who generally specializes in the work of that agency and sometimes even has a sub-specialty if the agency enforces several different statutory regimes. While ALJs can be appointed from the private sector, most of them are lawyers who have been with the agency (or some other agency) for much of their careers, and their elevation is a capstone. Their appointments lack a specific term, but they are protected from removal except for "good cause" in a proceeding brought before the Merit Systems Protection Board.[73] They also can lose their jobs because of national security concerns or a reduction in force,[74] in contrast to federal judges who are appointed "during good behavior," which means for life absent the commission of an impeachable offense.[75] In federal court, not every case has a jury, but for those in which there is one, that substantially affects the dynamics of the litigation.

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73. *See* 5 U.S.C. §§ 3105, 7521 (2000).
74. *See id.* § 7521(b).
75. Article III protects federal court judges, but not ALJs, from salary diminutions. As a practical matter, it is almost inconceivable that the salaries of ALJs would be cut, unless there was an across the board reduction in pay for all federal employees because of a national recession. ALJs also do not wear robes, but nothing turns on that difference.

In significant part because there are no juries, the rules of evidence are relaxed in adjudications, less so in formal adjudications, and more so the more informal the process. Under the Federal Rules of Civil Procedure, there is extensive discovery but, in keeping with differences in the nature of administrative adjudications and the desire for less formality, discovery in agency proceedings is less prominent and the opportunities for it are diminished, sometimes quite significantly.

These differences from court adjudications are fairly apparent and the reasons for them not hard to understand. But the more interesting differences are more subtle and generally result from the fact that, unlike courts whose only function is to adjudicate, agencies have rulemaking and, most problematically in this context, law enforcement functions that do not sit easily with the role as a neutral adjudicator. The focus of the remainder of this subpart will be on why Congress created special rules for agencies that enforce their laws through formal adjudications within their own agency.

Most formal adjudications at an administrative agency are commenced by the filing of a complaint or similar pleading. It is generally prepared by a member of the staff of the agency who will decide the merits of the complaint at the end of the administrative process.[76] In contrast, if the federal government initiates a civil complaint in federal court, the person who files the complaint works for the executive branch (normally the DOJ), and adjudication takes place before a judge who is a member of the judicial branch. In a case in which a state body both investigated charges against doctors and then adjudicated those charges, the Supreme Court has upheld such a mixing of functions within an agency in the face of a due process challenge.[77] But simply because such an arrangement does not violate due process does not mean that there are no problems with it. To alleviate the problems, Congress has imposed restrictions, known as separation of functions requirements, that create a substantial, albeit less than complete, separation between those performing adjudicative functions and those performing enforcement functions.

Before examining the congressional response, it is worth asking why Congress would have wanted the combination of functions that creates this problem. In fact, in some situations, Congress has provided additional protection for those subject to the agency's jurisdiction by creating a separate agency that carries out the administrative adjudications.[78] In other

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76. Aggrieved parties, such as those denied a license or some government benefit, may in some circumstances also have the right to commence a formal adjudication, in which case agency staff will defend the agency (or sub-unit within the agency) whose decision is being challenged.

77. *See* Withrow v. Larkin, 421 U.S. 35 (1975).

78. If an employer does not agree to the proposed finding of a violation by the

statutes, Congress has provided that a separate office within the agency make the decision as to whether to file a complaint,[79] and it even has required the Federal Election Commission to go to court for its law enforcement activities.[80] In most cases, however, Congress has preferred the combination of functions, concluding that it is not only less costly and more efficient than the alternatives, but that it is also the best way to enforce the laws assigned to that agency.

The FTC presents a good example of why an agency should control the cases that its staff files. A principal reason for wanting such control is to manage the agency's resources, especially today when funding is scarce. For example, if agency staff could bring a massive antitrust case, such as a challenge to a corporate merger or an allegedly anticompetitive industry practice, it could tie up huge amounts of staff time and money for many years. If the Commissioners thought there was a higher priority use of those funds, but had no say in whether the case should be filed, they would lose significant power over how the agency operated. It might also force the Commissioners themselves to devote a major portion of their time to that case instead of other activities. This is the kind of discretion that law enforcement agencies, such as the Antitrust Division of the DOJ, have traditionally exercised in filing cases in court, and it would be counter-productive for Congress to have created an agency like the FTC to improve efficiency, but foreclose agency control over its docket through a strict separation of functions law.

Second, agencies often have choices about whether to proceed by rulemaking or adjudication, but if the staff controls the adjudication, the agency, in effect, no longer has that choice. Third, even if the Commissioners agree that adjudication is the correct method for proceeding, and even if they agree with staff that the general subject area has a high priority, they may conclude, for any number of reasons, that one case is not the best one to bring to test a legal theory. Again, a decision of that kind should be made by the agency officials with the expertise and ultimate responsibility for the laws assigned to it, even though they eventually may have to pass on the merits of the case after the record has been developed. Thus, there are substantial advantages, some of which were reasons for the creation of the agency in the first place, and why Congress chose not to have a complete separation of functions between those who bring the case and those who will decide it.

Secretary of Labor, the separate and independent Occupational Safety & Health Review Commission adjudicates the matter. 29 U.S.C. §§ 659(c), 661(a)-(b) (2000).

79. The General Counsel of the NLRB has the authority to commence proceedings before the Board. *Id.* § 153(d).

80. *See* 2 U.S.C. § 438 (2000) (listing powers of the Federal Election Commission, with no provision for administrative adjudications).

Before turning to the specific safeguards that Congress has enacted to deal with this problem, there are some ancillary protections that ameliorate it to some degree. For instance, although the FTC Commissioners must approve the filing of a complaint leading to a formal adjudication, it will be several years before the case comes back to them. Because they will have a number of cases on their docket, their recollection of what the staff told them about that case likely will be hazy. Because Commissioners serve staggered five-year terms, it is quite likely that some, perhaps even a majority, will not still be there when the case returns, and their replacements will have no prejudgment problem at all.[81] Moreover, the agency that decides a formal adjudication must do so on the basis of the record compiled by the ALJ who hears the case and whose findings of fact the agency must give substantial deference upon review.[82]

There are two sets of restrictions that deal with this intermingling problem. First is the creation of a strict separation of functions between the initial adjudicators and the enforcers. Thus, the person who is hearing the evidence and making the initial recommendations on factual and legal findings (an ALJ or anyone working for her) cannot be simultaneously involved in the same or a factually similar case on the enforcement side and vice-versa.[83] Nor can such a person report to anyone who is involved with those other functions, other than members of the agency itself. [84] Note that Congress stopped short of requiring separate staffs for enforcers and adjudicators, and so they can move back and forth, but just not in the same or similar pending cases. There is, of course, nothing that precludes an agency from making the separation more secure, but the APA does not require it, and reasons of efficiency and overall advancement of the agency's goals often counsel against it. Considerations of efficiency have no place in the organization of a judicial system, where there is complete separation of functions. But at the agency level, the important differences

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81. Formal adjudications can be undertaken by agencies headed by a single individual, as well as by agencies with three or more persons. In practice, however, most formal adjudications take place at multi-member agencies. The point in the text regarding staggered terms does not apply to single member agencies but, if there is a change in the single agency head, the prejudgment issue vanishes.

82. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951) (requiring examination of the record as a whole, including the ALJ's findings).

83. 5 U.S.C. § 554(d) (2000). *See generally* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981).

84. 5 U.S.C. § 554(d)(2). The APA allows the agency itself, or any member thereof, to serve as the initial adjudicator, in which case the separation of functions rule is inapplicable. *Id.* § 556(b)(1)-(2). However, the option is rarely, if ever, utilized because agency members have more important work to do than listening to live witnesses in a trial-type proceeding.

between it and a court compelled Congress to create an alternative response to prevent the most serious abuses that might arise from the combination of functions.

The second set of restrictions involves a ban on ex parte communications, a practice universally accepted in court proceedings. Thus, for a DOJ lawyer who works in the executive branch and who has a case before a federal judge who works in the judicial branch of the same government, strict compliance with an ex parte rule is not a problem. What makes application of the principle more complicated at the agency level is that the law enforcers (staff attorneys) and the adjudicators (the ALJ and the agency officials) all work for the same agency. Moreover, the staff attorneys have regular contact with the Commissioners regarding a wide variety of matters, such as whether to start an investigation and whether to file a formal complaint. Applying the strict ex parte rules to agency attorneys would make it almost impossible for them to do their jobs.

Nonetheless, Congress has concluded that given the adversarial nature of formal adjudications and consequences to the party defending against the agency, some ex parte restrictions should apply in that context. Thus, in formal adjudications, the APA forbids ALJs or other presiding officers, with limited exceptions, from "consult[ing] a person or party on a fact in issue, unless on notice and opportunity for all parties to participate."[85] In addition, Congress dealt more specifically with the issue of ex parte communications by adding § 557(d), which applies to all on the record proceedings, including formal rulemakings. Unlike § 554(d), which applies to any person or party, § 557(d) applies only to "an interested person outside the agency."[86] However, it includes not just the ALJ but the agency itself and "any other employee who is or may be reasonably expected to be involved in the decisional process of the proceeding."[87] And it is not, like § 554(d), limited to issues of fact, but appears to apply across the board to any communication by an interested person outside the agency. However, an agency attorney who tried a case is not covered by the rule and thus could discuss the case with the agency head, perhaps even raising new arguments or facts not presented to the ALJ, subject to the not insignificant limitation that the agency decision must be based on the record and defended in court on that basis. In practice, communications on factual matters related to a case are unlikely to occur because of concerns about whether they would be challenged in judicial review. In sum, the ex parte rules apply to all communications of fact by anyone to the ALJ, who

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85. 5 U.S.C. § 554(d)(1). As provided in the introductory phrase in § 554(a), the whole of § 554 applies only to formal adjudications, which excludes formal rulemakings.

86. *Id.* § 557(d).

87. *Id.*

makes the findings of fact that are given substantial deference by the agency; and agency personnel who worked on the investigation or trial of the case or "a factually related case" may not communicate with the agency officials who have ultimate decisional authority.[88]

Similar issues arise when a claim is made that an agency official is biased and should not participate in a formal adjudication. The final sentence in § 556(b) provides the specific means by which a claim of bias can be filed and is decided, but the procedures apply only to the ALJ or other person presiding at the formal hearing. Does this mean that agency officials could, for example, own stock in a company that is a party to the proceeding or, more problematically, one of its competitors? Or suppose that the agency official had firmly and irrevocably committed himself to a position with respect to the principal issue in the case? Case law, admittedly pre-*Vermont Yankee*, required an FTC Commissioner to step aside in such circumstances,[89] with no question that somehow Congress had authorized him to sit in a case "in which his impartiality might reasonably be questioned."[90] Perhaps the line on whether an agency member's views constitute improper pre-judgment should be drawn in a different place for a formal adjudication than for a judicial proceeding. If it is, it is because agencies make policy as well as adjudicate factual and legal disputes and, therefore, it would be unwise, even if theoretically possible, to hold agency officials to the same standard as applies to judges. Although agencies are like courts, they are not courts, and agency officials should not be treated exactly like judges.[91]

The four *Morgan* cases in the Supreme Court[92] illustrate another way in which agencies conducting even formal adjudications are different from courts, and for good reasons. The substantive issue in *Morgan* was the

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88. Given this quite carefully developed ex parte communications regime, including its application only to formal proceedings and the exclusion of formal rulemaking from the prohibition on factual inquiries under § 554(d), it is at least arguable that if a court attempted to impose similar requirements in the context of an informal rulemaking, *Vermont Yankee* would be invoked to prevent that from happening. On the other hand, basic notions of administrative fairness—and perhaps even due process—might lead a court to imply some protections in particularly egregious cases of ex parte communications, especially when, although the proceeding is a rulemaking, the result is more like an adjudication because it is principally a contest between two competitors over some government privilege. On applying this analysis to informal adjudications where Congress has been completely silent on what procedures apply, see discussion *infra* Part IV.

89. Am. Cyanamid Co. v. FTC, 363 F.2d 757, 767-68 (6th Cir. 1966); *see also supra* notes 73, 76 (addressing bias in rulemaking and the impact of *Vermont Yankee*).

90. 28 U.S.C. § 455(a) (2000) (requiring all federal judges, including Supreme Court Justices, to disqualify themselves in cases where their impartiality may reasonably be questioned).

91. Except for the Supreme Court, if one judge does not sit on a case, another can take her place, which is not true for agencies.

92. *See* United States v. Morgan, 313 U.S. 409, 413-14 (1941) (citing prior *Morgan* cases).

validity of an order by the Secretary of Agriculture establishing a fixed, maximum rate allowed to be charged for livestock in Kansas City.[93] The Secretary delegated the task of taking evidence to an Assistant Secretary in the pre-APA equivalent of an on-the-record hearing, but reserved the decisional authority for himself.[94] The administrative law question was whether the Secretary actually had to read the record or briefs, or if he could do nothing more than sign what his staff had presented to him.[95] The Court deemed his signature sufficient.[96] The model approved by the Court is a far cry from the judicial model, in which trial judges hear the witnesses, read the briefs, and review carefully their opinions, even if they do not actually write the drafts. Leaving aside questions of how evidence of what the Secretary did, or could have done in conducting the review, would be gathered without requiring the Secretary to be deposed, the result is a recognition of the fact that agency heads who make final adjudication decisions are acting rather differently from courts because of the significant institutional differences between them.[97]

Morgan was a pre-APA case, but even with the procedures that now apply under §§ 556 and 557, the result would be substantially the same, although now the ALJ (or whoever heard the evidence) would be required to make recommended findings of fact and conclusions of law, to which any party could object, before the case went to the agency. In that system, the ALJ functions like a magistrate judge to whom a district judge had referred a matter for the taking of evidence pursuant to 28 U.S.C. § 636(b).[98] Once the matter came back to the district judge, she would be expected to read the briefs and the relevant portions of the record, perhaps with the help of a law clerk, and reach a judgment on whether to affirm the recommendations or not. Under *Morgan*, however, (and now the APA), the Secretary may rely on staff to do as much or as little of that work as she deems appropriate.

There are several reasons why that difference in expectations is entirely appropriate. First, agencies generally have many more matters to decide than district judges—some adjudications and some rulemakings—and often with records of enormous length. Unlike judges, whose only job is to

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93. *Id.* at 413.
94. *Id.* at 415-16.
95. *Id*. at 416.
96. *Id*. at 416-17.
97. In *Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1143, 1145-46 (2d Cir. 1974), the court assumed that it was impossible for the new Food and Drug Administration (FDA) Commissioner to have given any meaningful review to the massive record in the formal rulemaking there in the thirteen days in which he was in office before he approved the rules being challenged, but held that this impediment was irrelevant.
98. Even there, the analogy is not exact because the district judge would be required to review contested factual findings de novo, 28 U.S.C. § 636(b)(1), whereas the substantial evidence standard would apply to an agency's review of the ALJ's factual findings.

adjudicate, agency heads have a multitude of other responsibilities, including keeping the relevant committees of Congress happy. If the agency head had to do what a trial judge is expected to do in every case, the efficiencies gained in moving adjudications from a court to an agency would be largely lost. Second, federal judges enjoy life tenure, but agency heads work for a few years and leave. If every new agency head had to start from scratch with every case on the docket, almost no cases would be decided. Third, much is made of the expertise of agencies, often as a reason to sustain their decisions. It is not, however, agency heads who usually have the expertise—they may have just arrived on the job when a decision must be made. Rather, it is the staff—generally career people—who have the knowledge of the agency. Thus, it makes sense to give them significant roles in the decisionmaking process, while leaving to the secretary, who is exercising the discretion provided by law, the final say. Finally, although the term adjudication suggests a judicial analogy, a more apt analogy is the manner in which decisions are formally assigned to the president.[99] No one expects the president to read an entire record, or even all of the main written submissions, and no one should expect—or want—agency heads to do so either. Of course, some matters may be so important that a secretary will pay much closer attention to them than normal; however, that is a matter of choice, not a requirement.[100]

Another respect in which agencies are not like courts relates to issues of judicial review of questions of law. Suppose an agency in a formal adjudication decides a legal question, such as whether newsboys are employees or independent contractors under the National Labor Relations Act and suppose further that an identical question was posed to a district judge in a traditional lawsuit. Assuming in both cases that the facts were stipulated, the district court's decision, either on summary judgment or after trial, would be reviewed de novo by the court of appeals on the legal issue presented. However, if the case originated with the NLRB, the court of appeals would follow the two-step analysis articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[101] as modified by *United States v. Mead Corp.*[102] Under that test, if the statute was clear, the inquiry

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99. 13 U.S.C. § 1341 (2000) (stating the duty of the President to report census data to Congress, based on recommendations of the Secretary of Commerce).

100. The same principles apply to agency rulemaking, but there the analogy to the legislative model sustains the lack of requirement of personal involvement: No one assumes that members of Congress write any of the legislation that becomes law, nor does anyone assume that members of Congress even read most of it.

101. 467 U.S. 837, 842-43 (1984).

102. 533 U.S. 218, 230-32 (2001). In its recent decision in *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Court also placed considerable emphasis in deciding the appropriate amount of deference to be accorded on whether Congress delegated to the agency the authority to resolve specific ambiguities in the statute.

would end. If, however, the statute was ambiguous, the agency would be entitled to substantial deference in its interpretation of the law, provided that it fully considered its conclusion and explained the basis for it which, for the NLRB, is likely to have occurred if the proceeding were a formal adjudication.

There is a reason for the significant difference in the deference accorded an agency's view on a question of a law and the views of the district court: Congress delegated to agencies the power to fill in the inevitable uncertainties in the law. Agencies fill in these gaps as part of their responsibility to implement the law, which includes bringing policy considerations and agency expertise to bear in choosing among various alternatives. District courts, on the other hand, have no such mandate on questions of law because they are not policy implementers and have no specialized expertise in the subject areas of cases that come before them. Thus, because agency officials have policymaking roles and relevant expertise that they properly utilize in deciding questions of law during formal adjudications, their rulings on questions of law are given deference, while the rulings of district judges, who neither create policy nor possess the requisite substantive expertise, are not.[103]

In some formal adjudications, there will be conflicting testimony that the ALJ, and eventually the agency, must resolve. If challenged in court, the agency's factual findings are given considerable deference and will be upheld if supported by "substantial evidence."[104] Although other words are used in Rule 52(a) of the Federal Rules of Civil Procedure to guide the courts of appeals in reviewing findings of fact made by a district judge sitting without a jury—they may not be set aside unless "clearly erroneous"—there appears to be little real world difference between the two standards or, for that matter, between them and the "arbitrary, capricious, [or] abuse of discretion" standard specified in § 706(2)(A), which is used when reviewing the factual findings contained in agency rules or informal adjudications.[105] There is one exception to the limited review of findings of fact that has not been used since its creation by the Supreme Court in *Crowell v. Benson*,[106] but neither has it been overruled.

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103. *Chevron* deference also applies to legal questions arising in agency rulemakings (*Chevron* itself was such a case), but there is no appropriate analogy with comparable decisions of district courts because courts do not issue legislative-type rulings in adjudicated cases. Congress does enact statutes, but since those statutes are themselves "the law," the courts do not review their legality, except for claims of unconstitutionality. *Chevron* also may apply to informal agency adjudications, although they rarely have the requisite formality to satisfy *Mead*. Although what I have called semi-formal adjudications are more likely to satisfy *Mead*, even they may not clear the formality hurdle.

104. 5 U.S.C. § 706(2)(E) (2000).

105. *See* Ass'n of Data Processing Orgs. v. Bd. of Governors, 745 F.2d 677, 686 (D.C. Cir. 1984) (discussing the scope of review in judicial proceedings).

106. 285 U.S. 22, 54, 62 (1932).

The Court there required de novo review of certain factual findings by the agency that the Court concluded were "jurisdictional."[107] Although the rationale for choosing those facts, as opposed to others that were arguably as much of the predicate for the agency's power to act, is not clear, the Court was faced with a claim that Congress lacked the power to assign the adjudication to an administrative agency.[108] The conclusion, therefore, that certain facts had to be tried de novo in the district court provided some assurance that the agency would not stray too far from the congressional mandate.

Finally, in another example of the Supreme Court's unwillingness to give deference to an agency's interpretation of its enabling statute in certain situations, the Court in *FDA v. Brown & Williamson Tobacco Co.*[109] declined to accept the agency's determination that it had the authority to regulate cigarettes as either drugs or medical devices. The Court gave a number of reasons for its ruling, but there is at least a strong undercurrent that the controversial decision as to whether and how to regulate tobacco was one that should be made by Congress explicitly, and not by the FDA alone, by interpreting its existing authority.[110] In the analogous area in which courts review whether Congress has exceeded its limited legislative powers under Article I, Section Eight, the Supreme Court has not treated such cases any differently from other constitutional issues involving Congress, generally according them the presumption of correctness even though, almost by definition, it is reviewing whether Congress exceeded its powers, just as it reviewed whether the FDA exceeded its power by issuing the tobacco rules.

IV. INFORMAL AND SEMI-FORMAL ADJUDICATIONS

If a proceeding is not intended to produce a rule, and if the agency is not required to have an on the record hearing, then the proceeding is considered an informal adjudication, as that is all that remains of the administrative universe under the APA. As the catch-all, informal adjudications include a wide range of agency decisions, some on very complex and very important matters, and others on relatively simple issues that have modest consequences. However, unlike formal proceedings or informal rulemakings, there are no specific procedural requirements in the APA that agencies must follow when engaging in informal adjudication.[111] This

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107. *Id.* at 54.
108. *Id.* at 57.
109. 529 U.S. 120, 155 (2000).
110. *Id.* at 131-33.
111. Some protections that apply to all APA proceedings may be found in 5 U.S.C. § 555 (2000), including the right to appear before an agency (within limits), the right to retain copies of data submitted to an agency, the right to inspect a copy of any transcript of

leaves interested persons with only the procedural protections in the applicable substantive statute, plus any found in the agency's regulations. The danger from this kind of procedural void was brilliantly captured by Representative John Dingell, when he was chair of the House Energy and Commerce Committee: "Most people think of the procedure as just being kind of amorphous, and you don't have to worry about it. The procedure is exquisitely important . . . . I'll let you write the substance of a statute, and you let me write the procedure, and I'll screw you every time."[112] As described below, the courts have not been willing to allow agencies full carte blanche, but neither have they imposed substantial procedural requirements. In so doing, the courts have attempted to tailor the procedures to the nature of the proceedings, resulting in an almost case-specific approach within the general category of informal adjudications. Because the "law of informal adjudications" is not based on the text of the APA, but rather on case holdings, it is necessary to explore these cases in greater detail here than was done in the rest of the Article.[113]

This choice between quite formal procedures and almost no procedures sometimes leaves the courts in an awkward position, especially when important personal rights are at stake. The result was that the Supreme Court, in *Wong Yang Sung v. McGrath*,[114] construed the Immigration and Naturalization Act to require an on the record hearing in a deportation case, in large part because of what was at stake and the absence of an intermediate position. In response, Congress provided a set of specific procedures that do not require a full on the record trial, but that do provide more protection for aliens than would exist if the proceeding were only an informal adjudication.[115]

Because the APA is simply the default procedural option, if Congress specifies the procedural rules to be followed under a given statute, the APA no longer sets the maximum or minimum. In providing these additional protections, Congress has been informed by, although not necessarily controlled by, the requirements imposed by the mandates of the Due Process Clause. Surely, an alien who has been in this country for many

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testimony that person gave, and limits on agency subpoena power. However, they are quite different from the requirements of § 553 for informal rulemaking and §§ 554, 556, and 557 for formal adjudications.

112. Craig Oren, *Be Careful What You Wish For: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1141, 1141 (2004) (citing *Regulatory Reform Act: Hearing Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 312 (1983)).

113. For a fuller treatment of the limits imposed on informal adjudications, see Ronald Krotoszynski, *Taming the Tail That Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1057 (2004).

114. 339 U.S. 33, 48-53 (1950).

115. The current rules for hearings in deportation (and inadmissibility) cases are found in 8 U.S.C. § 1229a (2000).

years and is about to be deported would have a due process claim to some kind of procedural protections, perhaps including a hearing, as would a person receiving disability benefits before the government could take them away from her.[116] What those rights would be in the absence of a statute is beyond the scope of this Article, but there can be no doubt that the Due Process Clause operates to constrain agencies in ways that it would not constrain legislatures.[117]

Another very significant example of less-than-formal procedures involves adjudications at the Social Security Administration, mainly in the area of disability claims. Again, Congress specified what procedural rules to follow, attempting to balance the need for formality to protect individual rights, against the costs and delays inherent in an on the record proceeding. Like the Immigration and Naturalization Service (INS) proceedings, there is a hearing at which live witnesses are heard, in contrast to both informal adjudications and informal rulemakings, where there is no right to an oral hearing of any kind.[118] These statutory procedures, which are considerably less protective of individual rights than the procedures that would be followed in court or in a formal adjudication, will be upheld as long as they are consistent with due process.

In contrast to the INS and Social Security cases, which are governed by what I call semi-formal rules of adjudication, there are no procedural rules in the APA for the "everything else" that comprises informal adjudications.[119] In theory, the courts could have stayed out of informal adjudications altogether, providing no judicial review, but the Supreme Court clearly rejected that option in *Citizens to Preserve Overton Park v. Volpe.*[120] At issue there was a decision by the Secretary of Transportation to fund a highway that would run through a park in Memphis, Tennessee, in alleged contravention of a statute requiring the Secretary to choose other routes if feasible and to assure that any damage to the park was minimized to the extent feasible.[121] The Court rejected arguments by plaintiffs requesting de novo court review, review under the substantial evidence

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116. *See* Mathews v. Eldridge, 424 U.S. 319, 323, 348-49 (1976) (holding that an agency's administrative procedures for termination of disability benefits, which did not include a full evidentiary hearing prior to the termination of the benefits, fully complied with due process requirements).

117. *Compare* Londoner v. Denver, 210 U.S. 373 (1908), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

118. *See* 42 U.S.C. § 405(b) (2000) (describing the rules and regulations for hearings and investigations concerning administrative determinations in social security benefits cases).

119. Michael Asimow used the term "Type B" adjudications to cover what I call semi-formal adjudications. Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions To All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1004 (2004).

120. 401 U.S. 402, 410, 422 (1971).

121. *Id.* at 406-07.

standard, and a requirement that the agency make formal findings to support its decision.[122] The Court did, however, require the agency to explain the basis of its decision, in particular how it had satisfied the statute, which the Court found had been enacted for the very purpose of changing agency practice and providing greater protection for parklands.[123] The Court also indicated that, in the absence of a written basis for his decision, deposing the Secretary might be possible as a last resort.[124]

There are several points to note regarding *Overton Park.* First, the Court rejected the no-review option as inconsistent with the presumption of reviewability in the APA.[125] Second, it refused to impose additional procedural requirements directly on the agency, although the practical effect of its ruling—that the agency must explain what it did and why—may be the functional equivalent of requiring findings of some kind in future cases, although perhaps not "formal findings," whatever difference there may be. Third, it made clear that there would be sufficient judicial review to assure that the agency stayed within its congressional mandate, but that the Court would not substitute its judgment for that of the agency. This is consistent with the notion that courts engage in judicial "re-view" and not judicial "re-do;" they serve as a backup to provide some control over agencies, but the principal responsibility belongs to the agency with Congress acting as the ultimate check if it has the votes to pass a statute overruling the agency.

As discussed above, several years after *Overton Park*, the Supreme Court in *Vermont Yankee*[126] set aside a decision of the District of Columbia Circuit imposing additional procedural requirements in an informal rulemaking. While upholding the obligation of the courts to review such decisions, the Court concluded that, in choosing less formal processes, Congress intended to preclude the courts from adding further procedural requirements, such as a hearing.[127]

In *Pension Benefit Guaranty Corp. v. LTV Corp.*, the Court subsequently applied that approach to an informal adjudication decision by the Pension Benefit Guaranty Corporation (PBGC) that restored a previously terminated pension plan to operative status over the claim of the plan sponsor that the PBGC provided inadequate procedures in reaching its decision.[128] Citing *Vermont Yankee* and finding that it trumped *Overton Park*, the Court concluded that a party to an informal adjudication has only

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122. *Id.* at 414.
123. *Id.* at 415-16.
124. *Id*. at 420.
125. 5 U.S.C. § 701 (2000) (detailing the application of the APA).
126. Vermont Yankee v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).
127. *Id*. at 546.
128. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653-56 (1990).

those rights provided by the substantive statute at issue (and presumably any regulations issued under it) and those contained in § 555, although that provision does not mention informal adjudications, nor does it have any procedures that arguably govern them. The Court did leave open the possibility of requiring procedures where, as in *Overton Park*, the administrative record was inadequate to enable the court to engage in meaningful judicial review,[129] and it further left the door open to a due process challenge, which LTV had not raised.[130] The case otherwise seemed to close the door on efforts to have courts require additional procedures in informal adjudications.

Several points should be noted about the decision that raise questions about whether it should be read as broadly as its language suggests. First, LTV's principal procedural objection was that it was not apprised of the basis for PBGC's decision and thus not given an opportunity to adduce evidence to support its position. Yet footnote four in the opinion[131] shows that LTV was given notice of the decision before it was made and that it met twice with PBGC officials before the decision was finally issued, thereby calling into question what function the allegedly missing procedures would have provided. Moreover, the principal issues raised by LTV were legal, and thus it is difficult to understand how the additional procedures would have aided it. And, as the Court noted,[132] PBGC agreed with LTV regarding one of its plans, further suggesting that the agency took into account any facts provided by LTV relevant to the restoration of the remaining plans. Finally, the fact that PGBC is a financial guarantor, not a regulator, may have affected the Court's view of what procedures it should apply, despite the absence of a claim that the PGBC's actions were not subject to the APA.

Despite the sweeping language in *Pension Benefit Guaranty Corp.*, the Supreme Court—and, more likely, the lower courts—will retreat from the result, if not the reasoning, when justice requires it in individual cases. Agencies are required to follow their own regulations, including procedural ones,[133] and courts may be inclined to construe them broadly to avoid

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129. *Id.* at 655.

130. *Id.* at 655-56. As Professor Krotoszynski points out in his article, the breadth of the definition of agency action extends so widely that it would include "a decision to turn on the lights or lower an agency's office building temperature by two degrees . . . ." Krotoszynski, *supra* note 113, at 1069. However, the likelihood of a successful due process challenge in that situation is very small. *Id.* at 1073-74. The main point of his examples is that the scope of informal adjudications is almost limitless and thus that the same procedures are not necessary for every type of decision falling within the category of informal adjudication.

131. *See Pension Benefit Guar. Corp.*, 496 U.S. at 643 n.4 (providing details about the communications between the two parties).

132. *See id.* at 652 n.9.

133. Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); Service v. Dulles, 354 U.S. 363, 388-89 (1957).

serious injustice. That inclination is made more likely because the Due Process Clause also remains available where substantial liberty or property issues are at stake. Thus, in cases (unlike *Pension Benefit Guaranty Corp.*) where an agency relies on secret information, or the agency does not disclose the reasons why it took certain action, it is hard to imagine that the courts will not find some way to assure basic fairness, even when a proceeding falls into the informal adjudication category. At the very least, the opinion makes clear that a remand to the agency for further explanation is a proper tool for the courts,[134] and on remand it may be possible to obtain the protections sought, even if they are not in the preferred procedural form.

Although the breadth of *Pension Benefit Guaranty Corp.* seems excessive, its acceptance of the basic thrust of *Vermont Yankee* seems appropriate in a number of circumstances. Thus, directing an agency to hold a hearing adds an affirmative requirement, as compared to a prohibition such as forbidding the agency from using secret evidence, even though the proceeding is not on the record. Some of these procedural requirements are contained only in the provisions of the APA regarding formal adjudications—such as the prohibitions on ex parte communications, the rules on disqualifications for ALJs, and the rules on separations of functions. If informal adjudications were like formal adjudications and like court adjudications, they too would apply. But when agencies conduct informal adjudications, they undertake a wide variety of tasks, many of which seem quite remote from the kind of decisions that courts make, and hence it should be up to Congress, not the courts, to decide which procedures agencies must use in making certain decisions.[135]

Overton Park provides a good example. In some ways, the decision whether to allow a road to be built through a park and, if so, under what conditions, looks more legislative than judicial—its impact will be in the future, and its discretionary and multi-factored approach is not the kind of activity ordinarily undertaken by judges. Yet, by default and because informal rulemaking does not apply to a process designed to approve (or reject) a specific project, it is an informal adjudication under the APA. Seen in that light, a literal application of the rules on ex parte communications, a neutral decisionmaker, and a strict separation of functions would be out of place, if not unworkable.

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134. *Pension Benefit Guar. Corp.*, 496 U.S. at 654.

135. Nothing prevents agencies from imposing additional procedural requirements on themselves for some categories of cases, or even in specific cases. *See* Paul Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 780-81 (1976).

On the other hand, it would not make sense to apply the legislative analogy of no specific controls because Congress passed a statute designed to limit agency discretion in approving highways that would affect the public's use of parks. Of those requirements, separation of functions is the most problematic since it would, in effect, require the agency to separate the staff that did the information gathering and analysis from the person who has the decisional authority, even though what is at stake is the money to build the highway and the route that it will follow. In many informal adjudication cases, there will be no factual dispute, and yet a separation of functions mandate, taken from the judiciary where there are often factual disputes, would be universally required. As for ex parte communications between the staff and the decisionmaker, whether through memos or in conversations that are not recorded and not available to all interested parties, they are almost certain to take place as they should in a properly functioning agency. But if either a proponent or an opponent of the highway communicated with the secretary, and if that communication contained factual information not available to others interested in the application, that might be a different matter, especially if the secretary relied on it in making his decision. While due process might not preclude that from happening, the courts have insisted on basic notions of fairness, even in the most legislative-like proceedings. Thus, if a court finds such basic unfairness, it can properly rely on its direct authority in the APA to set aside a decision as "arbitrary, capricious, [or] an abuse of discretion . . . ."[136]

The same is true of a neutral decisionmaker. Administrators of regulatory agencies surely have their ideas on how the agency should be run; indeed, that is often why they are chosen. But they are bound by the laws that govern their actions, and if an agency head has "unalterably closed" his mind on a topic, then it would be "arbitrary, capricious, [or] an abuse of discretion" for that official to make that decision and someone else should make the decision instead.[137] As noted previously, rules that are designed to assure fairness in the judicial process do not apply, or do not apply to the same extent and in the same manner, in the informal

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136. 5 U.S.C. § 706(2)(A) (2000). The notion that there should be "one administrative record for the public . . . and another for the Commission" is unthinkable. Home Box Office v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1977). Even though the context in *Home Box Office* was rulemaking, the idea would appear to apply to at least some informal adjudications, and no case has held to the contrary.

137. Ass'n of Nat'l Advertisers v. FTC, 627 F.2d 1151 (D.C. Cir. 1979). Again, the context was informal rulemaking, but the concept should apply to informal adjudications as well.

adjudicative context at the agency level because the nature of the functions being performed are different and the need to strike a different balance is based on the differences between courts and administrative agencies.

Finally, an agency is likely to receive little, if any, deference on judicial review of questions of law arising in informal adjudications. The Supreme Court in *Mead* ruled that deference is generally permissible only when the agency reaches its interpretation in a more or less formal proceeding, in which input from outside the agency is sought—a rarity in informal adjudications. In addition, the basis of *Chevron* and *Mead* is that Congress presumably intended to allow agencies to fill in the gaps in the statutes that they administer.[138] However, in cases like *Overton Park*, where it was clear that the law was passed in order to confine, and not free, the agency's discretion over parks, the rationale is inapplicable and no deference is permitted. Also, when federal agencies make decisions that tread on areas traditionally left to the states, the Supreme Court has insisted that the delegation to the agencies must be clear before deference can come into play.[139]

There is one other set of decisions that, by default, are within the category of informal adjudications, but for which there are no procedural rules and no (or almost no) judicial review. *Heckler v. Chaney*[140] is the prime example of this category. The plaintiffs, death row inmates, alleged that the FDA had approved certain drugs for lethal injections that did not meet the statutory requirements of safety and efficacy because they produced unnecessary pain during the execution process.[141] The inmates sought an order directing the FDA to commence enforcement proceedings recalling the drugs as unlawful under the statute.[142] The FDA refused to commence such proceedings on the ground that the decision was one related to the allocation of its law enforcement resources and, as such, was not subject to judicial review.[143] The Supreme Court agreed, finding that the statute did not provide judicially manageable standards for deciding whether an agency had made a reasonable resource-allocation decision.[144]

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138. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 106-07 (2005).

139. *See* Gonzales v. Oregon, 546 U.S. 243 (2006) (practice of medicine).

140. 470 U.S. 821 (1985).

141. *Id.* at 823.

142. *Id*.

143. *Id*. at 824.

144. Justice Brennan's concurring opinion left open the possibility that if the agency had refused to proceed for a legally indefensible reason—for example that the statute did not apply—the courts might review that determination and remand to the agency for reconsideration under the correct interpretation of the law. *See id.* at 839 (Brennan, J., concurring). Neither the APA nor any other substantive law required the FDA to account for its actions and inactions, or explain what its priorities are. That kind of reporting requirement would be far less intrusive than the relief sought in *Heckler*, but also would

In reaching the result in *Heckler*, the Court relied on the narrow exception to judicial review contained in § 701(a)(2) for actions "committed to agency discretion." There is, however, another way to look at the case that is consistent with the concept that the APA and judicial review are primarily designed to control the regulatory actions of agencies. Because the agency's decision in *Heckler* was to take no action, it did not fall within the broad category of agency regulatory action that the courts are called on to police. To be sure, under the APA's definitions, the decision not to seek the recall was an informal adjudication, but the action much more closely resembled the kind of executive branch prosecutorial decisions that federal officials made for more than 150 years before the APA was passed when compared to the type of regulatory actions that led to the enactment of the APA. That perspective alone might not lead to the conclusion that there should be no judicial review. However, the fact that the decision was not the kind that the APA sought to control through procedures and judicial review, and because the agency was not functioning like either a legislature or a court, provide alternative support for the result in *Heckler*, even if it is not the reasoning used by the Court to reach that conclusion. Stated another way, the Court's refusal to provide for judicial review was not inconsistent with the purposes of the APA's provisions for judicial review and their limited exceptions.[145]

CONCLUSION

There are two approaches that can be used in examining the practices regarding administrative agencies and comparing them to courts and legislatures. First, one can look at an agency that is issuing a rule and ask why the additional requirements of § 553 were imposed, instead of allowing the agency to do what a legislature would do in enacting a statute that might closely resemble the agency's rule. The answer would be that the agency process lacks the essential checks and balances found in the legislative arena—the concurrence of two bodies separately elected, plus the president. Thus, Congress has provided alternative checks, generally of a procedural variety, to offset the fact that one person alone will make the decision for the agency. The techniques used to control agencies, as compared to those used to control legislatures and courts, are different because the way that agencies operate produces different sets of problems

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inform the public what agencies are doing and allow for more meaningful congressional oversight.

145. Another way to look at *Heckler* is that it involved inaction rather than action. The problem is that the definition of "agency action" in § 551(13), which triggers the definitions of rule, order, and adjudication in subsections (4), (6), and (7), includes "failure to act," which forecloses that avenue. *See* 5 U.S.C. § 551 (2000).

that require different solutions. But the theory of providing an alternative check on the agency is a constant and, when applied to a particular procedure or other check, explains its existence. In other words, just because a legislature could do something in a particular way, it does not necessarily follow that an agency, carrying out legislative-like functions when issuing rules, should be allowed to do so without additional procedural checks.

Alternatively, one can examine the question from the congressional perspective. Thus, because agencies function differently from courts, some of the judicial checks, such as strict on the record proceedings or complete separation of functions, will not be workable in an agency. Therefore, to both provide for similar, albeit not identical, checks at the agency level, it is necessary to adopt additional agency procedures to assure that the essence of a neutral judiciary is protected at the administrative level without losing the advantages of having an entity that makes policy, enforces policy, and decides whether third parties have complied with that policy. Or, stated another way, just because a court could not do something under well-established norms does not mean that an unchecked agency also should be able to do so. The reason why the last sentence in both of the preceding paragraphs is correct is that "Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not."