Comments on Bernard Schwartz' Essay

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MARSHALL BREGER*

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INTRODUCTION

In a recent survey of administrative law issues, Professor Bernard Schwartz noted that “the entire subject [of administrative law] is going through a period of well-nigh unprecedented change.”1 Professor Schwartz further suggests that “[w]e have been in the midst of a virtual administrative law explosion.”2 This belief that the conceptual moorings of contemporary administrative law are shifting is, I believe, accurate. Until the new boundaries are demarcated, it is useful to focus on fundamentals.

Ours is an era characterized by an intense and overt conflict between

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2. Id.
all three branches of government over their respective roles in the "administrative state." Some claim that we live in an era of the "Imperial President," noted by a "steady increase in presidential power over the administrative process." Others, in contrast, argue that we have reached the age of the "Imperial Congress" which uses statutory micromanagement to gain the upper hand. The judiciary too, has entered the fray protecting its turf against "aggrandizement" by the branches, and debating at length the degree to which it should defer to the Executive in matters of statutory interpretation.

In its early years, American administrative law was taught together with constitutional law under the rubric of "public law." It focused primarily on such "big picture" questions as the appropriate structure for democratic governance, implications of separation of powers, and judicial review. With the institutionalization of the New Deal, how-

5. In this view, "[t]oday's Congress is the champion of the entrenched special interests and the executive branch is the advocate for opportunity and innovation." Gray, Special Interests, Regulation, and The Separation of Powers, in THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH 211 (L. Crovitz & J. Rabkin eds. 1989). See THE IMPERIAL CONGRESS (G. Jones & J. Marini eds. 1988) (discussing development of "Imperial Congress").
7. See R.S. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983) (examining how federal courts have become increasingly aggressive in their oversight of administrative action in area of clean air regulation and resulting impact on environmental policy).
8. See infra notes 105-67 and accompanying text (addressing questions of deference).
9. "Public law" is the general field of law concerned with the structure of government and the relationship between citizens and their government. Thus, a standard public law periodical in Great Britain, might include commentary on such subjects as constitutional law, public administration, and administrative law issues. "Private law," in contrast, concerns itself with the resolution of disputes between private persons. See generally PUB. LAW (Stevens & Son, Co., London, England, United Kingdom, 1956-1991) (providing example of public law periodical addressing citizen-government relations).
10. For example, Ernst Freund, a pioneer in the field of administrative law, placed great emphasis on issues of judicial review in his 1928 casebook. E. FREUND, CASES ON ADMINISTRATIVE LAW V (2d ed. 1928). Freund divided his casebook into two sections: "Administrative Power" and "Action and Relief Against Administrative Action." Felix Frankfurter and J. Forrester Davison's influential casebook focused on constitutional and judicial review issues. F. FRANKFURTER & J. DAVISON, CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW (1932). The text of the Frankfurter and Davison casebook is divided into three sections: "Separation of Powers;" "Delegation of Pow-
ever, the emphasis of scholarly inquiry shifted from questions of legitimacy and accountability to the procedures governing agency adjudication and rulemaking. The passage of the Administrative Procedure Act (APA) in 1946 reinforced this changed focus. The study of administrative law became, in large measure, the study of the civil procedure of agency practice.

Recent years have seen a renewed interest in questions of democratic theory and the allocation of power among the branches of government, bringing administrative law scholarship closer to its moorings in political theory and public law “back to the very foundations of our administrative law.” This renewed interest encompasses such topics as the distribution of powers between the branches, judicial deference to agency interpretations, presidential oversight of rulemaking, future directions of the administrative judiciary, the challenge of due process in administrative adjudications, and the rise of alternative dispute resolution in federal agencies. These are all central issues for administrative law in the 1990’s. There are other issues, particularly those surrounding the rulemaking process, which this Article only tangentially addresses. Unlike the past, administrative law today deals with censers;” and “Judicial Control of Administrative Action.”


12. Professor Schwartz believes this change toward the procedural aspects of the administrative law field occurred following the four Morgan cases dealing with agency decisional processes. B. SCHWARTZ, ADMINISTRATIVE LAW 60 (3d ed. 1988). The emphasis on the procedural safeguards found “legislative articulation” in the Administrative Procedure Act (APA) of 1946. Id. at 58-59. Professor Davis shares Professor Schwartz’ view. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.5, at 14-15 (2d ed. 1978).

13. Geoffrey Miller has attempted to provide empirical evidence for the claim that structural issues have become significant litigation issues in recent years. Miller, From Compromise to Confrontation: Separation of Powers in the Reagan Era, 57 GEO. WASH. L. REV. 401, 402-07 (1989).

14. Schwartz, supra note 1, at 543-44.

15. Id. at 543.

16. Id.

17. See id. at 543-54 (giving examples of presidential oversight of rulemaking).

18. See id. at 554-56 (detailing future of administrative judiciary).

19. See Schwartz, supra note 1, at 569-703 (addressing problems of due process in administrative adjudications).

20. See infra notes 249-282 and accompanying text (discussing alternative dispute resolution).

21. For example, non-rule rulemaking where agencies blur the distinction between non-legislative rules such as manuals, guidelines, and policy statements which fall within the APA’s definition of rules. 5 U.S.C. § 551(4) (1988). See R. Anthony, Agency Efforts to Make Nonlegislative Documents Bind the Public (to be published) (paper presented before ABA Regulatory Practice Section, Seattle, Washington, Feb. 9, 1991) (available at The Administrative Law Journal).
tral issues in our political landscape. The enlarged curriculum can only spark the interest of its practitioners and scholars.

I. QUESTIONS OF POWER AND AUTHORITY

A. Separating the Powers

In recent years, the Supreme Court has swung to and fro in its analysis of separation of powers questions. For a time, it seemed as if the Court was accepting a "formalist" or "structuralist" approach relied upon in cases such as *Buckley,* 22 *Chadha,* 23 and *Bowsher.* 24 However, in cases such as *Morrison* 25 and *Mistretta,* 26 the Court appeared to be advancing a competing "functionalist" approach. The Court's recent decision in *Metropolitan Washington Airports Authority,* 27 however, which relied strongly on *Chadha,* indicated a return to the "formalist" approach.

Under the "formalist" view, 28 each branch of our government has been assigned different powers, and it violates the "constitutional road map" if one branch undertakes tasks assigned to any other. Thus, under this model, separation of powers means that the executive branch is exclusively responsible for executive activity, the legislative power is limited to those powers specifically enumerated in the Constitution, and the judiciary retains the "judicial power."

There is substantial support in the case law for the "formalist" approach to separation of powers questions. In *Myers v. United States,* 29 the Supreme Court clearly articulated the right of the President to remove an "officer" of the United States, in that case a postmaster, without the "advice and consent of the Senate." Removal, Chief Justice Taft pointed out, is an exclusively executive function in that without it the President would not be assured loyal subordinates and would be unable to fulfill his constitutional duties. 30

Fifteen years ago, in *Buckley v. Valeo,* 31 a unanimous Supreme Court...
Court struck down the then-existing structure of the Federal Election Commission on grounds that it was inconsistent with separation of powers principles. Under the statute, presidential appointees were subject to confirmation not only by the Senate but by the House of Representatives as well. The Court held that such an approach contravened article II's stipulation that federal officials be confirmed by the Senate alone.

This fidelity to constitutional text was followed in 1983 by the Court's legislative veto decision in *INS v. Chadha*, and by its 1986 decision in *Bowsher v. Synar*, which involved a challenge to the original version of the Gramm-Rudman-Hollings Deficit Control Act. In *Bowsher*, the Court held that the conferral of executive responsibilities, however modest, on the Comptroller General, an officer of Congress, contravened separation of powers principles. Specifically, the statute charged the Comptroller with the power to produce detailed projections of federal revenues and expenditures, and thus determine what budget cuts would be required to meet the yearly deficit reduction target. As in *Chadha*, Chief Justice Burger emphasized the Framers' belief that "structural protections against abuse of power were critical to preserving liberty."

Lurking in the background of this debate has been the related ques-

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32. At the time, the Federal Election Campaign Act of 1971, as amended, provided that two of the members of the Federal Election Commission (Commission) were to be appointed by the President *pro tempore* of the Senate, two by the Speaker of the House, and two by the President of the United States. All six members of the Commission were subject to confirmation by both Houses of Congress. Federal Election Campaign Act of 1971, Title III, Pub. L. No. 92-225, 86 Stat. 3, 12-22 (1972), as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208, 88 Stat. 1463, 1458 (codified at 2 U.S.C. § 437c(a)(1) (1988)).


38. The Court found this to be clearly an executive duty: [A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly by passing new legislation. By placing the responsibility for execution of [this Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.

*Id.* at 733-34 (citation omitted).


tion of the constitutionality of independent agencies. For a time, it appeared that the constitutionality of this "fourth branch of government" was being placed in question, both by the courts and the executive branch. Former Attorney General Edwin Meese posed this issue most directly in a well-publicized speech before the Federal Bar Association. Mr. Meese's position is based upon the unitary theory of the executive branch which is expressed in Hamilton's discussion of executive power, particularly in *The Federalist No. 70*.

The theory is premised on the constitutional text that "[t]he execu-

41. Professor Schwartz notes that "for the first time in half a century, doubt was cast upon the independent regulatory agency, even though its existence is half as old as the Constitution itself." Schwartz, supra note 1, at 544.

42. See Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986) (declaring unconstitutional provision in Balanced Budget and Emergency Deficit Control Act of 1985 which vested executive power in officer removable by legislature). This *per curiam* opinion is generally believed to have been written by then-Judge Antonin Scalia. Indeed, in the *Bowsher* oral argument, the Solicitor General stated that proponents of constitutionality wished to "scare" the Court with the specter that upholding the lower court would endanger the independent agencies. At this point, Justice O'Connor confessed that "they scared me with it." 54 U.S.L.W. 3710 (1986). See also *SEC* v. Blinder Robinson & Co., 855 F.2d 677 (10th Cir. 1988) (upholding SEC civil enforcement power); *FTC* v. American Nat'l Cellular, 810 F.2d 1511 (9th Cir. 1987) (rejecting separation of powers challenge to Federal Trade Commission (FTC) enforcement authority). See also *Ticor Title Ins. Co. v. FTC*, 625 F. Supp. 747, 751 (D.D.C. 1986) (dismissing constitutional challenge to authority of FTC to initiate and prosecute certain complaints noted that "[t]he constitutionality of independent federal agencies has never been fully adjudicated ... the issue has been avoided for years").

One curious case recently placed a shadow over the independent status of these agencies even while affirming their enforcement powers. In *SEC v. Bilzerian*, 750 F. Supp. 14 (D.D.C. 1990), the District Court for the District of Columbia rejected a separation of powers challenge to the vesting of civil enforcement authority in the Securities and Exchange Commission (SEC). Noting that "Congress has no power or control over the enforcement activities of the SEC," the court concluded that "it is clear that the SEC is within the executive branch." *Id.* at 17. For a general discussion of challenges to the constitutionality of independent agencies, see Survey, *Constitutional Challenges to Independent Agency Enforcement Action*, 2 *Admin. L. J.* 423 (1988).

Finally, it is worth remembering that Chief Justice Burger's *draft* opinion in *Bowsher* was far stronger and specifically, so his colleagues believed, imperiled the independence of administrative agencies. Schwartz, *An Administrative Law "Might Have Been"—Chief Justice Burger's Bowsher v. Synar Draft*, 42 *Admin. L. Rev.* 221, 233-49 (1990).


tive Power shall be vested in a President, . . ." that is to say, vested in the President alone. Further, the President must, himself, undertake those enumerated powers explicitly granted by the Constitution, and in general "take Care that the Laws be faithfully executed . . . ." The argument suggests that this duty can be discharged only if the federal agencies, which perform traditionally executive functions, are understood to be agents of the President and responsible to him. Any other structure, the argument runs, would undermine accountability—collapsing the notion that "the buck stops here." Proponents of a unitary executive, view the federal bureaucracy as a pyramid, with the President as the responsible official at the top. The power to remove subordinates who do not follow the President's directives, or in whom he no longer has confidence, is vital to his supervisory ability. Limitations on the removal power, such as statutory requirements that dismissal be for cause, are viewed as derogations from executive power, at least when the government official at issue exercises significant authority.

Opponents of "formalism" advocate an alternative model which allows for permeability between the branches. This "functionalist" approach argues that Congress may, by statute, adjust or alter the tripartite division of federal power so long as it does not undermine a core function or responsibility of one of the branches. For the "functional-

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46. U.S. Const. art. II, § 1 (capitalization in original).
47. For example, the powers to serve as Commander-in-Chief of the Army and Navy, request opinions in writing from the heads of the various departments, grant pardons, make treaties, nominate ambassadors, Supreme Court justices, and other federal officers, and to ensure that the laws are faithfully executed. U.S. Const. art. II, §§ 2-3.
48. U.S. Const. art. II, § 3 (capitalization in original).
49. Meese Address, supra note 44, at 408.
51. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring); Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (recognizing need for quasi-legislative or quasi-judicial agencies, which have
ist," two questions predominate: first, does the act in question prevent a branch from performing a "core" function; and second, will such action "alter the balance of authority" between the branches? Thus, for example, in United States v. Nixon, the Supreme Court adopted a "functionalist" approach when it examined on the one hand the nature of the disputed activity—the general privilege of confidentiality of Presidential communications—and the administration of the criminal justice system on the other, and held that allowing the assertion of executive privilege "to withhold evidence that is demonstrably relevant in a criminal trial would . . . gravely impair the basic function of the courts."

Although not styled as such, the first articulation of the "functionalist" approach was in Humphrey's Executor v. United States, which limited the expansive reach of Myers by holding that the Framers intended to limit the removal power to "purely executive officers." In contrast to Myers, the Humphrey's Executor Court dealt with a strange beast: a Federal Trade Commissioner, which it viewed, as it did all independent agency commissioners, to be in certain respects "quasi-legislative" and in others "quasi-judicial," but in any event, "wholly


55. Id. at 629-32. Note that Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573 (1984), suggests that Humphrey's Executor proposes a "radical" approach to separation of powers, emphasizing the need to place agencies in one or another branch, maximally free from intrusion by the others." Id. at 611. He muses that the Court's formalism here might have been the result "of growing executive totalitarianism in Europe—in which resistance to broad executive authority was only to be expected." Id. at 612 n.154.
disconnected from the executive." Consequently, the Court held that Congress could set limits on the President's removal power vis-à-vis these officials.

Recent court opinions have followed this "functionalist" approach, and in so doing, have seriously challenged the theory of the unitary executive. In *Morrison v. Olson*, the Court sustained the constitutionality of a statute providing for the appointment of an independent counsel to investigate allegations of wrongdoing by certain executive officials, notwithstanding the fact that the counsel was independent of the Department of Justice supervision and that the Attorney General's removal power was limited by statute to a "good cause" standard. In *Morrison*, the Court ruled that the congressional restrictions on the executive power were not "of such a nature that they impede[d] the President's ability to perform his constitutional duty." Placing itself firmly in a "functionalist" posture, the Court held that the "analysis contained in our removal cases is designed not to define rigid categories . . . but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."

The *Morrison* decision raises significant questions about the removal power which is, of course, the President's trump card when it comes to ensuring the faithful execution of the laws. Under a "formalist" analysis, the President has unfettered power to dismiss "officers of the United States" as long as they are in the executive branch. This authority does not reach officials in the judicial or legislative branches, nor under *Humphrey's Executor*, independent agencies.

In adopting this balancing procedure, the *Morrison* Court stepped back from the notions of "quasi-judicial" and "quasi-legislative" utilized in *Humphrey's Executor*. Acknowledging that "[w]e undoubtedly did rely on the terms 'quasi-legislative' and 'quasi-judicial,' " the *Morrison* Court recognized the "difficulty of defining such categories," stating that "our present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type

58. Id. at 696.
59. Id. at 691. Elsewhere in its opinion, the Court held that the statute in question did not "impermissibly interfere with the President's authority under Article II." Id. at 660 (emphasis added).
60. Id. at 689-90.
61. U.S. Const. art. II, § 3 (capitalization in original).
restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.' The Court further noted that, "[w]e cannot say that the imposition of a 'good cause' standard for removal by itself unduly tram-mels on executive authority."

If followed, this holding may strike a long-term blow to traditional notions of Presidential power. *Myers* affirmed that executive accountability requires untrammelled executive removal authority. *Humphrey's Executor* carved out an exception to this principle for independent agency commissioners. If *Morrison* means what it says with respect to removal of an executive branch official, it may emasculate the *Myers* principle entirely.

The practical question, however, is what is meant by "good cause?" If the "good cause" standard is the one for impeachment which requires evidence of high crimes and misdemeanors, then the restriction clearly makes a difference. Even if it means some esoteric act, that too is a serious limitation of Presidential authority. However, some constitutional scholars claim that "good cause" may include a failure to follow a Presidential directive in an area of rulemaking that requires a unified policy approach under the President's direction. Adoption of this broader construction of "good cause" would protect Presidential prerogatives and probably reduce the political, if not the theoretical, underpinnings of further controversy over the reach of the "removal power."

Following *Morrison*, the Court in *Mistretta v. United States*, upheld the constitutionality of the United States Sentencing Commission and its sentencing guidelines, rejecting the argument that the Commission was a judicial body impermissibly exercising executive authority.

64. *Id.*
65. *Id.* at 691.
66. Schwartz, *supra* note 1, at 548. In this regard, I agree completely with Professor Schwartz' suggestion that "*Morrison*’s ultimate effect may be a weakening of the President's position as administrative chief of the government." *Id.*
67. See Miller, *Independent Agencies*, 1986 Sup. CT. REV. 41, 44-45 (advocating that President can remove policy-making officials in agencies and Congress cannot usurp this power under Constitution). According to Miller, Congress may not restrict the President's power to remove officers who have failed to follow a presidential directive to take action within their statutory discretion. *Id.* at 97.
69. *Id.* at 412. The Court concluded that:

[I]n creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of
Speaking for eight members of the Court, Justice Blackmun maintained that separation of powers does not require "a hermetic division between the Branches," but means only that each branch must be free of the control or coercive influence of the others.

Admitting that the Sentencing Commission was a "peculiar institution within the framework of our Government," Justice Blackmun recognized that separation of powers principles are not violated by "mere anomaly or innovation." The Constitution is violated only if Congress places in one branch the powers that the Constitution vests in another branch, or otherwise undermines the independence of one of the three branches.

The Court's 1986 decision in Commodity Futures Trading Commission v. Schor, announced the same day as Bowsher, is further illustrative of the "functionalist" approach. The Court held that the Commodity Future Trading Commission's adjudication of certain state law claims, incident to its resolution of claims under the federal commodities statute, was not an unconstitutional infringement on the article III judicial power. Writing for the majority, Justice O'Connor declined

formulating sentencing guidelines. Nor does our system of checked and balanced authority prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges.

Id.

This approach was foreshadowed in Morrison, which suggested that "[i]t is not difficult to imagine situations in which Congress might desire that an official performing 'quasi-judicial' functions, for example, would be free of executive or political control." Morrison, 487 U.S. at 691 n.30.

70. Mistretta, 488 U.S. at 381. Specifically, the Court tracked James Madison, noting that so long as those who completely control one branch do not completely control another, the "fundamental principles of a free Constitution are [not] subverted." Id. (quoting THE FEDERALIST No. 47, at 325-26 (J. Madison) (J. Cooke ed. 1961)). In support of this position, the Mistretta Court cited Justice Jackson for the proposition that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Mistretta, 488 U.S. at 381 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (concurring opinion)).


72. Mistretta, 488 U.S. at 385. The Court noted that although the Sentencing Commission was a peculiar institution, "petitioner's fears for the fundamental structural protections of the Constitution prove . . . to be 'more smoke than fire.'" Id. at 384.

73. 478 U.S. 833 (1986).

74. Id. at 856-57.
to adopt "formalistic and unbending rules." Instead, she outlined a number of factors the courts should balance in determining the effect that congressional allocation of part of the adjudicative function to administrative agencies will have on the constitutionally assigned role of the federal judiciary. These factors include

the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, . . . the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Criticizing this tilt toward the "functionalist" model, Justice Scalia, in his Mistretta dissent, prophesied, "all manner of 'expert' bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility." This was not idle fantasy. The Whistleblower Protection Act of 1988, vetoed by the President, would have created a Special Counsel subject neither to executive branch supervision, nor removable at will. Last year, legisla-

75. Id. at 851 (citing Thomas v. Union Carbide Agric. Prods., 473 U.S. 568, 587 (1985)).
76. Id.
77. Mistretta v. United States, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting). One of the most intriguing perspectives on Morrison and Mistretta has been Martin Redish's point that in both cases, "the Court indicated a troubling willingness to rationalize and justify unambiguous breaches of the concept of judicial separation of powers that in themselves are far from de minimis." Redish, Separation of Powers, Judicial Authority and the Scope of Article III: The Troubling Cases of Morrison and Mistretta, 39 De Paul L. Rev. 299, 303 (1990). Redish suggests that the real separation of powers issue was not judicial aggrandizement, such as the judicial branch improperly interfering with the executive branch, but rather was "that the judicial branch had been legislatively directed to perform a nonjudicial function." Id. at 310. In Morrison, the "nonjudicial function" was the vesting of authority in a specially created Article III court to terminate the independent counsel's tenure. 28 U.S.C. § 596(b)(2) (1988) (indicating independent counsel functions judicially, but removal of counsel is "administrative" action on part of statutorily created Special Division). Morrison v. Olson, 487 U.S. 654, 682-83 (1988) (stating "[t]he text of the Constitution contains no prohibition against the service of active federal judges on independent commissions such as that established by the Act"). By straying outside of its adjudicative "case or controversy" function, the Mistretta Court arguably poached on the legislative function and contributed to the politicization of the judiciary. Aggrandizement of a branch is no less proper when Congress orchestrates it on behalf of the judiciary than it is in the case of traditional legislative-executive encroachments.
78. President Reagan vetoed the legislation, in part because "[t]he litigation of intra-Executive branch disputes conflicts with the constitutional grant of the Executive Power to the President, which includes the authority to supervise and resolve disputes
tion providing for Cabinet-level status for the Environmental Protection Agency (EPA) was blocked by a dispute over congressional interposition of the Bureau of Environmental Statistics, which was not accountable to other officials in the executive branch.79

Accountability questions have arisen also regarding aspects of the work of the Inspectors General80 and with the False Claims Act Amendments of 1986.81 Indeed, Congress has proposed establishing a


When President Bush signed the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (to be codified in scattered sections of 5 U.S.C. and at 22 U.S.C. § 4139), he underscored that statutory provisions for concurrent transmittal of information by the Special Counsel to the Congress and the Executive would not be interpreted by the White House as limiting the President's "ability to provide for appropriate prior review of transmittals" to Congress. Statement on Signing the Whistleblower Protection Act of 1989, 25 WEEKLY COMP. PRES. DOC. 516 (Apr. 10, 1989).

79. The Bureau of Environmental Statistic's (Bureau) Director could not be fired by the President, and the Bureau's reports could not be reviewed prior to release, as are Environmental Protection Agency's (EPA), by the Office of Management and Budget (OMB). Department of Environmental Protection Act, H.R. 3847, 101st Cong., 2d Sess. (1990) (dealing with Bureau of Environmental Statistics at H1172). See also Weisskopf, Drive to Elevate EPA to Cabinet Is Stalled, Wash. Post, Oct. 12, 1990, at A19 (discussing problems with making EPA department in Cabinet).


special environmental counsel who could bring environmental cases to court independent of the Department of Justice. And for one fleeting moment during Watergate, Senator Ervin and others proposed making the Department of Justice itself, "an independent establishment." No doubt reflecting a concern with the rise of such "expert bodies insulated from the political process," three Justices recently placed a gloss on the "functionalist" approach in an effort to move the Morrison analysis closer to the Court's "structuralist" framework. Public Citizen v. Department of Justice concerned the applicability of the Federal Advisory Committee Act to the American Bar Association Committee which advises the President on judicial appointments. In his concurring opinion, Justice Kennedy noted that the "functionalist" balancing test does not apply when the Constitution explicitly assigns an activity to the exclusive control of the President. He suggested that courts can use "functionalist" balancing only in those situations where the President, as the Nation's Chief Executive, is exercising his general grant of executive power under article II. Under this view, the ability to apply the "functionalist" approach would be significantly limited.

Morrison notwithstanding, the period of executive self-abnegation vis-à-vis the independent regulatory agencies may be passing, if not past. Until recently, the consensus was that Humphrey's Executor precludes any Presidential involvement in the work of the independent regulatory agencies. One need only recall the tempest that erupted in

82. Federal Nuclear Facilities Environmental Restoration and Management Act, S. 2189, H.R. 4193, 100th Cong., 1st Sess. (1988). The special environmental counsel would "not be responsible to, or subject to the supervision or direction of, any officer, employee, or agent of the United States." S. 2189, 100th Cong., 1st Sess., Title 4, § 401(A) (1987). He would have subpoena power, could issue orders or bring civil suit against the head of any department or agency, or against any federal contractor, for violation of any federal environmental laws, and could impose civil money penalties for lack of compliance of up to $25,000 a day. This is the beginning of the attempt to make the entire Department of Justice "an independent establishment." Removing Politics from the Administration of Justice: Hearings on S. 2803, S. 2978 and S. 2615 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. 298 (1974) [hereinafter Hearings].

83. Hearings, supra note 82.
85. Id.
86. Id. at 482-87 (Kennedy, J., concurring).
87. Id. at 482-88 (Kennedy, J., concurring).
the early days of the Reagan Administration when Federal Communications Commission (FCC) Chairman Mark Fowler briefed the President on proposed FCC regulations governing syndication rights for network programs.89 Lately, however, the Security and Exchange Commission (SEC) and the Treasury jointly participated in the Working Group on Financial Markets90 without any suggestion of constitutional impropriety. This is to the good. The Executive and independent agencies should be able to communicate freely without fear of rankling the guardians of congressional turf. Further, present law does not prohibit—and the Constitution’s “take care” clause may actually require—policy coordination between independent agencies and the executive.

In December 1988, the Administrative Conference of the United States (Administrative Conference) approved a recommendation concerning presidential review of agency rulemaking. It endorsed, as a matter of principle, presidential review of independent agency rulemaking to the same extent that such review applies to executive branch agencies.91 The American Bar Association has done so as well.92

Though it has been concluded that “Mistretta and Morrison represent a welcome post-Burger return to a more flexible interpretation of the constitutional doctrine,”93 I am unable to agree that matters are quite so settled, or that Morrison provides “the complete legal answer.”94 Although the “formalist” approach risks upsetting many administrative law applecarts, the “functionalist” view leaves unresolved

92. The American Bar Association (ABA) recommendation, adopted in February 1986, is appended to Strauss & Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 ADMIN. L. REV. 181, app. at 206 (1986). Explicitly adopting the theory of the unitary executive, the recommendation notes that the “constitutional principles that justify presidential involvement in rulemaking activities are applicable to both the executive and the independent agencies. [Executive oversight of rulemaking] should be extended to the independent agencies because of the need for presidential oversight of all administrative rulemaking activities.” Id. See also ABA Commission on Law and the Economy, Federal Regulation: Roads to Reform 83 (1979) (discussing recommendations for rulemaking reform).
94. See Schwartz, supra note 1, at 548 (noting changes in interpretation of separation of powers).
serious challenges to traditional notions of executive power. After sup-
ing, albeit gingerly, at the "functionalist" table, the Court seems, in
Metropolitan Washington Airports Authority,106 to have settled back
into a "formalist" stance.

In Metropolitan Washington Airports Authority, the Court struck
down an arrangement in which Congress' transfer of National and Dul-
les airports to an Airport Authority created under Virginia and District
of Columbia law was conditioned on the appointment, by the Author-
ity's directors, of nine members of Congress96 to a Board of Review
with specified veto powers. These Members of Congress were to be ap-
pointed in their individual capacities to serve as representatives of air-
port users.97

The Court asserted that "for separation of powers purposes" the Re-
view Board was a congressional agent exercising federal authority. The
Court of Appeals had invalidated the Board on the basis that by dele-
gating to it veto power, the Board exercised "quintessentially execu-
tive" powers.98 However, the Supreme Court found it unnecessary to
categorize the type of authority: if the federal authority exercised was
legislative, the Constitution does not allow boards or other entities to
substitute for Congress;99 and if the "power is executive, the Constitu-
tion does not permit an agent of Congress to exercise it."100

Apparently fearing the overweening exercise of congressional au-
thority, Justice Stevens underscored that the "statutory scheme challenged
today provides a blueprint for extensive expansion of the legislative
power beyond its constitutionally confined role."101 His fear was that
the process of conditioning grants to states used in Metropolitan Wash-
ington Airports Authority could enable Congress "to retain control,
outside the ordinary legislative process, of the activities of state grant
recipients charged with executing virtually every aspect of national pol-

95. Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft
96. The Members were drawn from committees having jurisdiction over transporta-
97. Id.
98. Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Wash. Air-
ports Auth., 917 F.2d 48, 56 (D.C. Cir. 1990), reversed, 59 U.S.L.W. 4660 (U.S. June
17, 1991).
99. 59 U.S.L.W. at 4666 (stating that "[i]f the power is legislative, Congress must
exercise it in conformity with the bicameralism and presentment requirements of Art.
I, § 7").
100. Id.
101. Id.
icy.”

No matter how delicately balanced and “innovative” such institutions might be, this kind of legislative ingenuity “permit[s] Congress to evade the ‘carefully crafted’ constraints of the Constitution.” By laying down markers to guide congressional drafters, the Court goes a long way in reasserting the traditional distinctions between the branches. And so the wheel turns.

B. Questions of Deference

One of the most complex problems for students of administrative law is the impact of statutory interpretation on the power relationships between the branches. The battle is, in part, between the courts as “trustee for the ghosts of Congresses past,” in then-Chief Judge Wald’s fabulous phrase, and administrative agencies, whose actions presumably reflect the views of administrations present. A sitting administration will obviously seek to interpret an agency’s mission by its own lights. Those who do not like what those lights reveal, appeal to what Congress “really” meant when it passed a statute—even though what Congress often did was to vest authority in the agency without deciding precisely how it wanted the agency to implement that authority.

There were, in the past fifteen years, increasing signs of deference by the judiciary to executive decisionmaking. In Vermont Yankee, the Supreme Court specifically instructed lower courts to stop, on their own volition, adding due process “bells and whistles” to the APA’s informal rulemaking procedures. Later, in Heckler v. Chaney, the Court held that the judiciary may not interfere when an agency has decided not to act, thus reducing the zone of judicial interference in agency decision-making.

102. Id.
104. Id. at 4664 (quoting INS v. Chadha, 462 U.S. 919, 959 (1983)).
107. Administrative Procedure Act, 5 U.S.C. § 553 (1988). Even State Farm can be read to suggest that if an agency gives reasons for its position and they comply with the statute, there will be no second guessing and the agency will be left alone. Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) (holding agency’s rescission of air bag requirement as arbitrary and capricious when agency failed to provide adequate reason for rescission).
109. Id. at 831. Note, however, that the agency’s decision not to act is only presumptively unreviewable. “[T]he presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement
Chevron U.S.A., Inc., v. Natural Resources Defense Council is the most important example of this new judicial deference to agency decisionmaking. Indeed, Chevron has become a judicial icon. More than one thousand cases have cited this opinion. But, it would be wrong to conclude from the frequency of its citation that the case is uniformly followed. In fact, in the past few years it has been inconsistently applied, even by the Supreme Court. At times, the only certainty is the difficulty of discerning a pattern in the granting, or not granting, of Chevron deference by the courts.

Under Chevron, when a court reviews an administrative agency's interpretation of a statute, it must look initially to the statute to determine if Congress has spoken directly to the precise question at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." However—and this is the famous "Chevron Step 2"—"[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Such, regulatory flexibility is the raison d'être of the administrative process. An agency typically is charged with promulgating regulations that implement open-ended statutes. Congress, one might say, paints with a broad stroke and then asks the agency to fill in the gaps. If that is true, then an agency must interpret its statutory charge in light of the sitting administration's policy preferences. Only when an agency opts for a reading of its congressional mandate that is not "permissible" should the court rein it in. If, on the other hand, executive discretion is exercised through a permissible interpretation of an agency's powers.

Id. at 832-33.
112. Chevron, 467 U.S. at 842-43. In Continental Training Servs., Inc. v. Cavazos, 893 F.2d 877 (7th Cir. 1990), despite clear statutory language requiring a hearing on the record prior to "the limitation, suspension, or termination of the eligibility for any program," id. at 881, funded under the Higher Education Act, the Department of Education interpreted the statute to require hearings only for "determinations other than eligibility." Id. at 884 (emphasis in original). The Seventh Circuit stated that: There is probably no word or phrase around which parties could not spin conflicting meanings, given the opportunity and incentive. However, even given this limitation to 'plain language' arguments generally, this case presents as clear an example of an administrative interpretation that contravenes plain statutory language as we are likely to see.

Id.
113. Chevron, 467 U.S. at 843 (emphasis added).
mandate, courts should "butt out."

In the two years following Chevron, the government won all but one Chevron case. A 1988 study for the Administrative Conference concluded that "Chevron significantly altered the proportion of agency cases affirmed by the appellate courts over a period of time during which judicial memberships and preferences apparently were stable." There is little doubt that during these two years the lower courts took the Chevron doctrine to heart.

Cases subsequent to the courts' honeymoon with Chevron indicate that the Supreme Court rejected an overly simplistic adherence to Chevron deference. After all, there is a limit to judicial abnegation; defer as much as you will, but at some point the courts are in the business of interpreting statutes. Ultimately under our constitutional system, the courts have the final say on the meaning of laws.

In INS v. Cardoza-Fonseca, the Court stated that where a "pure question of statutory construction" is at issue, courts, "[e]mploying traditional tools of statutory construction," are the final authority.


Of course, the pre-Chevron approach to questions of deference was certainly not uniform. Professor Robert Anthony has observed that judicial attitudes before Chevron "range from a near-abject acceptance, to a skeptical consideration of agency views, to an ignoring of them altogether." Anthony, Which Agency Interpretations Should Bind Citizens and the Courts, 7 YALE J. ON REG. 1, 6 (1990) (footnotes omitted). For a useful analysis of pre-Chevron deference, see Jordan, Deference Revisited: Politics as a Determinant of Deference Doctrine and the End of the Apparent Chevron Consensus, 68 NEB. L. REV. 454, 458-73 (1989).


116. Judge Breyer has pointed out that:
Carrying out the ordinary judicial appellate task involves looking to both facts and existing law; looking to both equity in the particular case and the need for uniform, effective and fair rules applicable to similar cases; and looking to the development of a fair rule of decision for the individual case that does not tangle the web of existing interpretations, including interpretations of rules, standards, statutory meanings and interpretive practices. Added to this set of factors are the need for reasonably expeditious decisions so that agencies can act, the need to resolve individual challenges fairly, and the vast range of different litigation contexts in which questions of statutory interpretation can arise.

These factors will tend to force a less univocal, less far-reaching interpretation of Chevron and the other "show deference on questions of law" cases. Inevitably, one suspects, we will find the courts actually following more varied approaches, sometimes deferring to agency interpretations, sometimes not, depending upon the statute, the question, the context, and what "makes sense" in the particular litigation, in light of the basic statute and its purposes.


118. Id. at 446 (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Coun-
However, in the "process of case-by-case adjudication," courts must respect the interpretations made by the agencies "[i]n that process of filling 'any gap left, implicitly or explicitly, by Congress.'" While concurring in the judgment, Justice Scalia called this approach an "evisceration" of Chevron. He complained that

the Court . . . implies that courts may substitute their interpretation of a statute for that of an agency whenever . . . they are able to reach a conclusion as to the proper interpretation of the statute. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue.

Shortly thereafter, a unanimous Court, in NLRB v. United Food & Commercial Workers Union, applied the Chevron distinction between "a pure question of statutory construction," and situations in which the statute "is silent or ambiguous." In United Food, the Court upheld the National Labor Relations Board (NLRB) regulations that precluded formal NLRB approval, and hence, judicial review, of the NLRB General Counsel's decision to reach an informal prehearing settlement of an unfair labor complaint. Justice Brennan, writing for the Court, pointed primarily to Cardoza-Fonseca, and relied on "the words, structure, and history" of the Labor-Management Relations Act Amendments, stating that when a statute is silent, the "task under Cardoza-Fonseca and Chevron is not judicially to categorize each agency determination, but rather to decide whether the agency's regulatory placement is permissible." In a sardonic concurring opinion, Justice Scalia, joined by Chief Justice Rehnquist and Justices White and O'Connor, characterized the Court's opinion as demonstrating "the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in [Chevron]." Scalia criticized "[s]ome courts" for following the "dicta" of Cardoza-Fonseca, and asserted that if the "dicta" of

cit. 467 U.S. 421, 843 n.9 (1984)).
119. Id. at 448.
120. Id. at 448 (citing Chevron, 467 U.S. at 843).
121. Id. at 454 (concurring opinion).
124. Cardoza-Fonseca, 480 U.S. at 446. See Chevron, 467 U.S. at 843 n.9 (stating that "the judiciary is the final authority on issues of statutory construction. . .").
125. Chevron, 467 U.S. at 843.
127. Id. at 125.
128. Id. at 133.
129. Id.
that case, rather than its “expressed adherence to Chevron” were followed, the question at issue would have been “a pure question of statutory construction’ rather than the application of a ‘standard to a particular set of facts,’ as to which ‘the courts must respect the interpretation of the agency.’”

In light of these cases, it is not surprising that lower court decisions no longer consistently defer to agency statutory interpretations. In Costello v. Agency for International Development, for example, the District of Columbia Circuit refused to accept the Foreign Service Grievance Board’s interpretation of the statutory term “grievance,” relying expressly on Cardoza-Fonseca for its observation that the case presented “a pure question of statutory construction.”

In contrast, in Chemical Waste Management, Inc. v. EPA, the District of Columbia Circuit declined to repeat the “basic legal error” of adopting a “static judicial definition” that had led to reversal in Chevron. Instead, it reversed its own precedent regarding the construction of a particular statutory term, because subsequent to the first decision the agency had changed its position on the statute’s interpretation. The court observed that, since Chevron, it is “now clearly the prerogative of the agency to bring its own expertise to bear upon the resolution of ambiguities in the statute that Congress has charged it to administer.” This is true even when an agency alters its interpretation of a statute based on the nature of the issues raised.

130. Id. at 134 (citing Cardoza-Fonseca, 480 U.S. at 446, 448) (citations omitted).
131. District of Columbia Circuit Chief Judge Wald has observed: [O]ur circuit initially took a fairly rigid approach to [Chevron], deferring to agencies in a wide array of situations. This highly deferential approach peaked in the case of National Fuel Gas Supply Corp. v. FERC where the court held that Chevron deference applied not only to agency statutory constructions, but even to an agency’s interpretation of private contracts involving ‘‘pure’ questions of law.”

Today, however, our court seems to be inching back towards a more balanced stance, allowing greater space for judicial legal interpretations and moving away from complete deference to the agency. In part we are emboldened by the Supreme Court’s decision . . . in INS v. Cardoza-Fonseca, which held that the court should decide for itself the ‘pure question of statutory construction . . .’


132. 843 F.2d 540 (D.C. Cir. 1988).
133. Id. at 542.
134. 873 F.2d 1477 (D.C. Cir. 1989).
135. Id. at 1482.
136. Id. at 1481. But see Maislin Indus., Inc. v. Primary Steel, Inc., ___ U.S. ___, 110 S. Ct. 2759 (1990) (holding that no deference is due where agency changes interpretation of law where text is unchanged, even if it argued that overall regulatory scheme has been altered).
Other recent cases suggest that the Supreme Court has not settled on one view of *Chevron*. In *Dole v. United Steelworkers of America*\(^{137}\) the Court applied a "weak" *Chevron* approach in an opinion by Justice Brennan in which Justice Scalia joined,\(^{138}\) over a strong dissent by Justice White, who would have used the "strong" approach and deferred to the agency's "longstanding and consistently applied interpretation."\(^{139}\) On the same day, however, the Court also handed down *Sullivan v. Everhart*,\(^{140}\) in which Justice Scalia, writing for the Court, applied a "strong" *Chevron* analysis and upheld an agency interpretation\(^{141}\) on the ground that the statutory language "reasonably bears the Secretary's interpretation."\(^{142}\) Justice Stevens, in dissent with Justice Brennan, characterized the opinion as allowing the Secretary "kingly powers to rewrite history,"\(^{143}\) and would not have permitted the acceptance of agency construction of statutes until the court employed "traditional tools of statutory construction."\(^{144}\)

It is, I think, a mistake—and it certainly is premature—to view the development of "strong" and "weak" interpretations of *Chevron* as signifying the eventual demise of *Chevron* deference. Rather, this development should be viewed as a refinement of the doctrine necessary to accommodate conflicting pressures and functions of reviewing courts, and the nature of the cases before them.\(^{145}\) It also reflects the fact that "verbal formulas [and] general principles only take us so far."\(^{146}\)

Occasionally, the structure of agency rulemaking and adjudication processes can make a straightforward application of *Chevron* exceedingly difficult. I refer to the so-called "split-function" or "split-enforcement" model, where adjudication of enforcement functions under a regulatory statute are lodged in an administrative agency that is wholly separate from the agency that writes regulations and prosecutes violations.

The "split-function" model is of relatively recent origin. One example is the Occupational Safety and Health Administration (OSHA), a

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138. *Id.* at 934, 937-38.
139. *Id.* at 939.
141. *Id.* at 964-66.
142. *Id.* at 966.
143. *Id.* at 968 (maintaining such powers under *Chevron* deference).
144. *Id.* at 971 (quoting *Chevron* U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 n.9 (1984)).
division of the Department of Labor (DOL), which is responsible for promulgating and enforcing health and safety standards, while the independent three-member Occupational Safety and Health Review Commission (OSHRC) adjudicates contested OSHA citations. Similarly, the Mine Safety and Health Administration, also in the DOL, promulgates safety and health standards for the mining industry, while the five-member Federal Mine Safety and Health Review Commission adjudicates cases brought to enforce these standards. Again, the Federal Aviation Administration (FAA) has the power to suspend or revoke airmen certificates, while the certificate holder may appeal the FAA’s order to the National Transportation Safety Board (NTSB). Appeals are assigned to an administrative law judge who conducts a de novo review.

Where enforcement is split, the issue becomes to whose interpretation does a reviewing court owe Chevron deference? In *Martin v. Occupational Safety & Health Review Commission*, the Court recently resolved a split in the circuits on the question of whether to defer to an OSHA or OSHRC interpretation in favor of OSHA. The Court

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151. The split between the circuits can be traced to *Donovan v. A. Amorello & Sons*, 761 F.2d 61 (1st Cir. 1985), which found that the Secretary’s interpretation of the regulation was reasonable and, after reviewing the statutory functions of Occupational Safety and Health Administration (OSHA) and Occupational Safety and Health Review Commission (OSHRC), held that OSHA’s interpretation should control. *Id.* at 66. Judge Breyer was influenced not only by the fact that Congress gave OSHA the broad policy-setting function, in contrast to OSHRC’s fact-based adjudicative function, but also because OSHA employees had chosen the language of the regulation and, therefore, were “more likely to have an institutional memory of the regulation’s purposes and meaning.” *Id.* at 66.

unanimously held, based on the legislative history of the Occupational Safety and Health (OSH) Act, that Congress "did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them." The Court explicitly refrained from taking a position "on the division of enforcement and interpretative powers within other regulatory schemes that conform to the split enforcement structure." Further, the Court saw no obvious barriers to Congress dividing those powers as it sees fit. It thus appears that the issue of "who gets the deference" is itself a matter of statutory interpretation.

The matter was further elaborated in Pauley v. Bethenergy Mines, Inc. Faced with having to choose between two agencies that had administered the Black Lung benefits program, the Court deferred to the DOL's view that its interim regulations under the program did not violate a statutory requirement that they "not be more restrictive" than the Department of Health, Education, and Welfare's (HEW) older interim regulations. Rejecting Justice Scalia's view that the DOL was engaged in a "cross-border attack," and that only the agency that drafted the regulations was entitled to deference in inter-

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It should be noted that the Administrative Conference of the United States (Administrative Conference) considered this issue in 1986 and concluded that, in general, under the split-enforcement function model, Congress should require that the adjudicatory agency accept the rulemaking agency's interpretation of a rule unless that interpretation is "arbitrary, capricious, or otherwise not in accordance with the law." The Split-Enforcement Model for Agency Adjudication, ACUS Recommendation 86-4, 1 C.F.R. § 305.86-4 (1991).

152. Martin, 59 U.S.L.W. at 4201.
153. Id.
157. Specifically at issue, the DOL interim regulations added three methods of invoking the presumptions of eligibility for claimants under the program which were not included in the HEW interim regulations, 20 C.F.R. §§ 727.203(a)(3), (4), (5) (1991), and two additional methods for rebutting these presumptions, id. at §§ 727.203(b)(1), (2). Pauley, 59 U.S.L.W. at 4780.
interpreting them, the majority found that Congress declined to require the DOL to adopt the old HEW regulations but refused to give the DOL a free hand in writing new regulations. "[T]he Secretary's authority to promulgate interim regulations 'not . . . more restrictive than' the HEW regulations necessarily entails the authority to interpret HEW's regulations and the discretion to promulgate interim regulations based on a reasonable interpretation thereof."\(^\text{189}\) Possibly implicit in the Court's decision favoring the newer regulations, in this instance those of the DOL, is its preference to give deference to current political judgements as an appropriate means of effectuating the legislative will.

In cautioning against a rigid application of *Chevron* principles, Professor Schwartz suggests that *Chevron* blurs the distinction between law and fact upon which the scope of review had been grounded. He believes that *Chevron* errs by drastically limiting review, not only of agency findings of fact, but also of agency construction of statutory law.\(^\text{160}\) Indeed, he argues that *Chevron*, and an earlier case, *Gray v. Powell*\(^\text{161}\) which Schwartz designated as *Chevron*'s progenitor,\(^\text{162}\) "is inconsistent with the very basis of the law of judicial review."\(^\text{163}\) Professor Schwartz is not alone in viewing *Chevron* as a power shift to the Executive. Professors Shapiro and Glicksman similarly suggest that:

If Congress becomes fully aware of the Court's shift to executive implementation review, it may conclude that the only way to limit agency discretion is to abandon the discretionary model of delegated power, since the courts will no longer actively ensure that agencies adhere to congressional intent.\(^\text{164}\)

These fears, however, are not justified by recent application of the doctrine. To some small degree, of course, *Chevron* could be mitigated if Congress were to delegate its statutory authority more precisely. The need for more precise delegation, however, is a wish often made, but rarely fulfilled. At the same time, however, agencies can contribute to reducing *Chevron* uncertainty by claiming *Chevron* deference only for agency positions developed by using "procedures authorized by Con-

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159. *Id.* at 4783.
160. Regarding construction of statutes, "[u]nder the traditional theory of Anglo-American judicial review, [these] are matters more legal than factual in nature and hence are open for determination by the courts upon review." Schwartz, *supra* note 1, at 567.
161. 314 U.S. 402 (1941).
gress for, and otherwise appropriate to, the development of definitive agency statutory interpretations.”

Agency adherence to such procedures will ensure that a position is sufficiently definitive to deserve *Chevron* deference without judicial reinforcement. Such agency discipline, however, may be too much to expect.

Moreover, there are good reasons why *Chevron* should have a lasting effect on judicial review of agency statutory interpretations. Indeed, the root of *Chevron* deference may lie in the Supreme Court’s recognition that its own “practical inability, in most cases, to give its own precise renditions of statutory meaning virtually assures that circuit readings will be diverse.” Thus, *Chevron* may reflect the Court’s recognition that it is preferable to allow a single agency decisionmaker an acceptable range of discretion, rather than trying to squeeze uniformity from the decisions of a multitude of federal appeals court judges. And lastly, of course, *Chevron* rejects the intrusive “hard look” approach to judicial review so prevalent in the 1970’s.

**C. Presidential Oversight of Rulemaking**

If some observers are suspicious that *Chevron* marks a decrease in congressional control over the administrative process, others have raised concerns that increased Presidential oversight of the rulemaking process reduces the range of agency autonomy. Here, the critics contend that with the imposition of a White House rulemaking agenda the agencies themselves have lost control over the regulatory process. As the administrative state has become more complex, we have experienced a veritable regulatory explosion. Centralized coordination of the regulatory process is considered by many to be inevitable given “[t]he President’s statutory responsibilities and political accountability for making balancing choices among competing national goals.”

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166. Definitive statements can, of course, be presented in informal formats. See Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568-69 (1980) (holding Truth in Lending Act did not mandate general rule of disclosure for acceleration clause, and therefore, court must defer to Federal Reserve Board staff’s interpretation of Act).


truth, this seeming swing of the pendulum toward Presidential oversight is simply the continuation of relatively steady movement in this direction over the past two decades.

In 1971, President Nixon, in an effort to gain some control over the administrative state instituted a "Quality of Life" review program, under which all "significant" draft, proposed, and final rules in the areas of environmental quality, consumer protection, and aspects of public health and safety first were submitted to the Office of Management and Budget (OMB). President Ford strengthened OMB oversight with an Executive order requiring agencies to submit inflation impact statements for each proposed major rule prior to publication. In 1978, President Carter significantly expanded this oversight effort by requiring detailed regulatory analyses of proposed major agency rules, review of selected major rules by the newly created Regulatory Analysis Review Group and Regulatory Council, and semi-annual publication of a calendar of federal regulations then under development.

Almost immediately after taking office, President Reagan issued Executive Order 12,291 which required executive branch agencies, when proposing certain "major rules," to observe unless precluded by law, specified cost/benefit formulae in accompanying Regulatory Impact Analyses. Moreover, it required submission to OMB of all proposed and final rules, and any accompanying impact analyses, sixty days prior to their publication. Under the terms of the Executive order, OMB may, barring statutory or judicial deadlines, withhold publication of the proposed or final rule. A subsequent Executive order required agencies to submit an annual "draft regulatory program" for OMB approval, to "ensure that each major step in the process of rule development is consistent with Administration policy."

In 1980, the Paperwork Reduction Act established the Office of

(1991) (asserting that Presidential review should apply generally to federal rulemaking and describing process whereby review would occur subject to certain procedural limitations).

169. See J. QUARLES, CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY 117-42 (1976) (stating that in practice, regulatory scheme of EPA was principal recipient of attention under this program).


Information and Regulatory Affairs (OIRA) within OMB, whose responsibility was to track and review agency activities. OIRA quickly became the focal point for White House oversight of the regulatory process. OIRA has been praised as the solution to burdensome, overlapping, and uncoordinated regulation. It has also been condemned as a "black hole" for regulatory proposals, in an attempt by the Executive to impose ideological and political perspectives on the regulatory process to the point of subverting legislative intent and agency responsibility and as an attempt to kill legitimate regulations before they get a public airing.

A related complaint is that OIRA uses delay as a weapon in the policy debate.

In recent reauthorization hearings, OIRA assured Congress that whether or not these practices occurred, they are not in current use. Present OIRA procedures require it to review regulations within a statutory period and require a docket system with files open to public scrutiny after the rule in question is published. Once fear of OIRA

U.S.C. §§ 3501-3520 (1988)). The Office of Information and Regulatory Affairs (OIRA) is overseen in addition to the Office of Management and Budget's (OMB) director, by the Presidential Task Force on Regulatory Relief, established by Exec. Order No. 12,291, supra, note 172. That Task Force has been succeeded by the Council on Competitiveness, established by President Bush on March 31, 1989. See THE VICE PRESIDENT'S OFFICE, OFFICE OF THE PRESS SECRETARY, FACT SHEET ON THE COUNCIL ON COMPETITIVENESS (April 12, 1989) (explaining workings of Council on Competitiveness). There has been some concern that the Council is, in fact, truncating the OMB review process as it is not subject to any of the disclosure of the OIRA process. See Victor Quayle's Quiet Coup, NAT'L J. 1676 (July 6, 1991) (noting Vice-President Quayle's role in Council on Competitiveness).


OIRA Hearing, supra note 176, at 15-59.

Besides the Paperwork Reduction Act, supra note 174, OIRA has general regulatory authority under Executive Orders 12,291 and 12,498. Thus, the decision whether to reauthorize OIRA does not materially affect White House control over agency rulemaking.

See Paperwork Reduction Act, supra note 174 (enumerating OIRA purpose and procedures).

Additionally, the Hon. S. Jay Plager, Administrator of OIRA, 1988-1989, specifically addressed the question of external influence on OIRA's review:

First of all, as soon as a regulation comes over to us for official review, my entire
as a "black hole" is dispelled, the coordination issue becomes less controversial.\textsuperscript{181}

While some worries remain unalleviated,\textsuperscript{182} the basic premises underlying OIRA's creation seem to have been accepted, namely that the administrative state and its bureaucratic offspring are growing ever larger and more sophisticated, and that some coordinating mechanism is consequently necessary to ensure regulatory accountability. Coordination and oversight of the regulatory process will likely be with us for the foreseeable future, as will the enhanced role the White House plays in this process.

\section*{II. The Structures of Adjudication}

\subsection*{A. Courts and Agencies}

As both judges and lawyers continually note, we face an imminent crisis in our civil justice system, caused in large part by rapidly increasing costs and caseloads. Fundamental restructuring is necessary. Such efforts must include a review of the role of the administrative judiciary—which already adjudicates many times the caseload of the federal courts.\textsuperscript{183} It is no virtue to move cases from the federal courts to the administrative law system, blithely assuming that the problem of case overload has been solved.\textsuperscript{184} Unless the administrative agency's adjudi-
catory scheme is in fact less costly and complex than article III adjudication, that solution only hides litigation overload, it does not resolve it.

Administrative agency adjudications are functionally judicial in character and part of the same adjudicatory continuum as article I and even article III courts. All provide parties with a forum for dispute resolution, though they range widely in jurisdiction, formality, and reviewability. This functional similarity has caused considerable debate on the proper location or "venue" for administrative adjudication. The Administrative Conference, for example, has urged for years that authority to enforce civil penalties be placed in the agency rather than federal district court. Last year, following the Administrative Conference's recommendation, Congress gave the SEC authority to impose civil penalties administratively, rather than through de novo district court enforcement proceedings.

Another aspect of the "location" dispute is illustrated by the debate over the proper enforcement structure for those new provisions of the Fair Housing Amendments Act of 1988 which make housing discrimination punishable by a civil penalty. One group, led by then Assistant Attorney General for Civil Rights, W. Bradford Reynolds, argued that complainants should first try conciliation. Only if conciliation efforts failed, should the parties be able to seek redress in federal district court. Civil rights attorneys, on the other hand, preferred adjudication before an administrative law judge (ALJ), whose decisions could be reviewed in a federal court of appeals. The resulting compromise

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189. See Statement of Jack Greenberg of NAACP Legal Defense and Educational Fund, Inc. reprinted in Hearings on S. 558 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, H.R. REP. No. 711, 100th Cong., 2d Sess. 77
reached requires enforcement proceedings before a Department of Housing and Urban Development ALJ, but provides for a “removal” right to district court, exercisable by either party. This resolution indicates but one of many venue-possibilities available along the adjudicatory continuum.

Sometimes “location” disputes concern which agency is the most appropriate adjudicative forum, as in the current debate over whether the FAA or the NTSB should adjudicate civil penalty enforcement cases for aviation safety violations. Sometimes, the location dispute probes the extent of administrative agency delegation. Until struck down in *Coit Independent Joint Venture v. Federal Savings and Loan Insurance Corp.*, the now defunct Federal Home Loan Bank Board asserted its ability to hear and resolve claims against its component unit, the Federal Savings and Loan Insurance Corporation (FSLIC), acting in its capacity as receiver of a failed thrift. The Court held that the agency could not assert such jurisdictional authority at the expense of claimants’ rights to litigate the issue in federal or state court. However, the Court noted that if Congress had specifically authorized the agency to resolve the claims, such delegation would be valid.

The perceived need for additional procedural safeguards beyond those found in agency adjudication has already led to additions to the article I court system—legislatively created courts which, like agencies, perform specialized judicial functions. The newest article I court is

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192. See generally Fallon, *Enforcing Aviation Safety Regulations: A Case for the Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L.J. 389 (1991) (addressing civil penalty enforcement adjudication). As a further example, in its tentative recommendations, the Federal Courts Study Committee made a similar proposal for Equal Employment Opportunity Commission (EEOC) Title VII employment discrimination cases. Instead of moving automatically to litigation in district court, the Committee proposed that the EEOC be authorized to track the procedure of the National Labor Relations Board (NLRB) and adjudicate wrongful discharge cases, rendering decisions that would be reviewable by circuit courts under traditional administrative law principles. *Federal Courts Study Committee, Tentative Recommendations For Public Comment* 49-50 (Dec. 22, 1989). In its final report, the Committee revised its recommendations to provide instead for voluntary arbitration of these cases by the EEOC. *Report of the Federal Courts Study Committee* 60-61 (Apr. 2, 1990).
194. The concept of article I courts is fully discussed in Dreyfuss, *Specialized Ad-
the United States Court of Veterans Appeals, providing judicial review of Board of Veterans Appeals decisions regarding benefit claims.

Recent years have seen a questioning of the constitutional underpinning of article I "legislative" courts. Traditional doctrine held that while some "core" judicial functions belong to article III courts, other activities in which courts engage might be hived off to non-article III tribunals. The traditional "bright line" test for such delegations is found in Murray's Lessee, where the Court distinguished between "private rights," involving liability of one private individual to another historically sounding in common law, equity, or admiralty, and "public rights" which are "susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the [article III] courts of the United States, as it may deem proper." The distinction gave Congress more flexibility in determining the sort of adjudicatory system it wished to see handle a given type of matter.

Invoking the Murray's Lessee distinction in Atlas Roofing Co. v. Occupational Safety & Health Review Commission, the Supreme Court upheld the assignment of imposing civil money penalties to an administrative agency against a challenge that the court violated the seventh amendment right to a jury trial. The Court noted that "when Congress creates new statutory 'public rights' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible without violating the Seventh Amendment's injunction that a jury trial be 'preserved' in 'suits at common law.'" This reading of the "public rights" concept established a significant opening for legislatively-created courts. The notion was further expanded in...
Thomas v. Union Carbide Agriculture Products Co., which found that "public rights" can be expected to include cases in which the government is not a party when Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I . . . create[s] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.

These decisions provided Congress with substantial flexibility in assigning adjudication procedures to agencies, as well as article I and article III courts. This flexibility would allow Congress to supplant a common law cause of action with a statutory cause of action which would be heard in a non-article III tribunal. Indeed, in Commodity Futures Trading Commission v. Schor, the Court held that where a claim can be adjudicated in a non-article III tribunal, common law counterclaims based on the very same transaction can be directed to the non-article III tribunal as well.

Until recently, little thought was given to the definition of a "public" right. In Granfinanciera, S.A. v. Nordberg, the Supreme Court decided that a person sued by a bankruptcy trustee for recovery of an allegedly fraudulent monetary transfer is entitled to a jury trial under the seventh amendment, notwithstanding the bankruptcy statutes' assignment of such actions to adjudication by non-article III bankruptcy judges. Basing its analysis on scholarly interpretations of eighteenth century equity jurisprudence, the Court determined that a "private right" was implicated in such an action, thus triggering a seventh amendment jury trial right. While Congress has some room to "devise novel causes of action involving public rights," the Court held that "it lacks the power to strip parties contesting matters of private right of..."

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204. Id. at 593-94.  
The Court noted that the factors to be examined in article III challenges to such an arrangement are:  

[T]he extent to which the "essential attributes of judicial power" are reserved to Article III courts, and conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.  

Id. at 851.  
207. Id. at 35.  
208. Id. at 43-47.
their constitutional right to a trial by jury." In addition, the holding in *Granfinanciera* raised significant questions as to the meaning of non-article III adjudications, be they by ALJs or article I courts.

Unlike *Thomas*, which dealt with article III challenges, *Granfinanciera* encompassed a seventh amendment right, leaving open the question of whether the seventh amendment or article III allows jury trials in actions to be held before non-article III bankruptcy judges. That "open" issue was reached in *In re Ben Cooper, Inc.*, where the Second Circuit ordered the bankruptcy court to conduct a jury trial of a Chapter 11 contract dispute. If sustained on remand, such a result would certainly muddy the distinction between article III and non-article III courts.

*Granfinanciera* also leaves unresolved the question, advanced in earlier cases such as *Crowell v. Benson*, as to whether the use of non-article III triers of fact requires an opportunity for article III appellate review. This question affects the entire structure of the administrative judiciary. Can we, for example, reassign, by legislative fiat, environmental crimes or entitlement disputes away from article III courts in

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209. Id. at 50-52.


211. Id. at 36. Jury trials have been upheld in article I courts. See Collins v. Foreman, 729 F.2d 708 (2d Cir. 1984) (upholding constitutionality of act allowing magistrates to conduct jury or nonjury trials).


213. As Justice Scalia points out in his concurrence in *Granfinanciera*, "[t]he notion that the power to adjudicate a legal controversy between two private parties may be assigned to a non-Article III, yet federal, tribunal is entirely inconsistent with the origins of the public rights doctrine." *Granfinanciera*, 492 U.S. at 66 (Scalia, J., concurring). This reasoning would also undermine the rationale in *Schor*.


order to keep caseload down? Is there any limit to the sanctions and economic penalties one could suffer in less formal non-article III contexts? Where Congress has given new adjudicative responsibilities to either legislative courts or administrative agencies, some kind of article III "bite" would be prudent, even if not constitutionally required, at least with respect to questions of law.

B. ALJs and Judges

Any discussion of the proper venue for resolving administrative law disputes must also consider the changed role of ALJs since the enactment of the APA\textsuperscript{216} in 1946. At that time, the majority of ALJs were employed by economic regulatory agencies, serving as "initial decider[s] of regulatory policy issues."\textsuperscript{217} Today, however, the bulk of the ALJs' caseload can be fairly categorized as benefit or enforcement cases that involve fact determination, not policy articulation.\textsuperscript{218}

The numbers have changed as well. In 1947, there were approximately two hundred ALJs (albeit by another name).\textsuperscript{219} By 1991, there were more than five times that number.\textsuperscript{220} This does not mean that the numbers will continue to significantly increase—and on this point I must differ from Professor Schwartz, who envisions a federal administrative judiciary of several thousand in the next century.\textsuperscript{221} Indeed, the total number of federal ALJs\textsuperscript{222} has not increased since 1984, when

\begin{footnotesize}
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\item[217.] See Federal Agency Adjudication, supra note 183, at 383, 385 (noting at that time, 64% of all ALJs were concentrated in economic regulatory agencies, serving as "initial decider[s] of regulatory policy issues;" today, suggests author, ALJ role has shifted primarily to that of "dispenser of disability benefits of arbiter of civil money penalties—cases where factfinding, demeanor evidence, fairness and speed are hallmarks, and policy issues absent or submerged").
\item[218.] See Lubbers, A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level, 65 JUDICATURE 266, 268-72 (1981) [hereinafter Unified Corps of ALJs] (citing statistics of reduced role of regulatory adjudication); Levant, A Unified Corps of Administrative Law Judges—The Transition from a Concept to an Eventual Reality, 6 W. NEW ENG. L. REV. 705, 709 (1984) (asserting that majority of ALJ proceedings have shifted from regulatory to enforcement actions).
\item[219.] The APA originally used the term "examiner." This was changed to "hearing examiner" in 1966. It was then changed to "administrative law judge" in 1972, and the APA was so amended in 1978. Lubbers, Federal Administrative Law Judges: A Focus on Our Invisible Judiciary, 33 ADMIN. L. REV. 109, 110 n.8 (1981).
\item[220.] Data provided by the Office of Administrative Law Judges, Office of Personnel Management establishes the number of ALJs at 1,090 as of March 25, 1991 (available at the Administrative Conference).
\item[221.] Schwartz, supra note 1, at 569. He further predicts that "[t]he justice now dispensed by administrative agencies may become truly judicialized and administered by judges possessing solely judicial authority." Id. at 570.
\item[222.] In June 1984, there were 1,121 ALJs, Lubbers, supra note 171, at 384, compared to 1,100 ALJs in August 1990, supra note 220. It should be noted that, in addi-
\end{enumerate}
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Professor Schwartz published the second edition of his administrative law text. 223

Even as the numbers remain steady, the status of ALJs continues to grow. In 1972, their title was upgraded from "hearing examiner." 224 Last year, they received a new pay formula, pegging their salary to a stated percentage of the Senior Executive Service pay scale. 225 ALJs possess considerable independence under the protections provided by the APA. 226 Only a handful of ALJs have been removed under APA guidelines. 227 Unlike federal trial judges, however, ALJ opinions can be reviewed essentially de novo by the agency head. 228 Indeed, the policy
tion to the numerous ALJs, there were also approximately 550 non-ALJ administrative judges in 1986. Robie & Morse, The Federal Executive Branch Adjudicator: Alive (and) Well Outside the Administrative Procedure Act?, 33 FED. BAR NEWS & J. 133, 134-35 (1986).

223. B. SCHWARTZ, ADMINISTRATIVE LAW (2d ed. 1984). Schwartz' article seeks to cover developments since the 1984 publication. Schwartz, supra note 1, at 543.

224. See supra note 219 (noting progressive change in title of ALJs). This change suggested a more formalized position. The legislative history indicates that one of the catalysts for this change was the necessity to "eliminate confusion on the part of the public about the role played by those officers." S. REP. No. 697, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 496, 499.


226. See 5 U.S.C. § 554(d)(2) (1988) (stating ALJ may not be responsible to, or be subject to supervision by, anyone performing investigative or prosecutorial functions for agency); 5 U.S.C. § 5372 (1988) (stating ALJs receive their pay as prescribed by Office of Personnel Management, independent of agency ratings or recommendations); 5 U.S.C. § 7521 (1988) (stating disciplinary action may be taken against ALJ only for good cause established and determined by Merit Systems Protection Board (MSPB) on record after opportunity for hearing before MSPB).

In Association of Admin. Law Judges, Inc. v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984), ALJs challenged the Secretary of the Department of Health and Human Services' (HHS) program of performance appraisal of judges pursuant to the Bellmon Amendment, Pub. L. No. 96-265, 94 Stat. 441, 456 (codified at 42 U.S.C. § 421 (1988)), alleging that the procedures under that program compromised their decisional independence under the APA. Id. at 1133. In Heckler, the District of Columbia Circuit found that many of the claims were well-founded, but held that the ALJs were not entitled to relief in the absence of a specific showing that the program resulted in the improper denial of benefits. Id. at 1143.

In Nash v. Bowen, 869 F.2d 675 (2d Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 59 (1990), the Second Circuit held that the Secretary did not improperly impair decisional independence under the APA. Nash, 869 F.2d at 680-81. Among the issues in question were the Secretary's imposition on the Social Security Administration's (SSA) ALJs of monthly production quotas and an attempt to control the number of ALJ decisions reversing state-level determinations declining to award benefits. Id. at 678.


228. In reviewing an ALJ's decision, the agency retains "all the necessary powers which it would have in making the initial decision." Administrative Procedure Act, 5
under which the ALJ's decision was based can be changed by the agency through rulemaking, even in the middle of an appeal.\textsuperscript{229}

In the 101st Congress, Senators Heflin, Pryor, and others sponsored legislation that would establish a corps of ALJs which would be institutionally separate from the agencies over whose adjudications they preside.\textsuperscript{230} The corps concept, however, has not received universal support. Some ALJs have opposed the concept as destructive of specialized administrative expertise. Others, arguing that ALJs have suffered inroads into their decisional independence, have called for an overhaul of their agency alone.\textsuperscript{231} Still others have complained that the Heflin bill does not pertain to those "cases heard by the hundreds of full-time presiding officers or by the uncounted number of part-time hearing officers who function under special statutory systems. . . . [T]he bill may be neglecting the very people who are in greatest need of protection."\textsuperscript{232}

Less comprehensive legislation also has been introduced. Senator Pryor has proposed that all Social Security Administration (SSA) adjudicatory functions be placed under the operational control of a Chief ALJ,\textsuperscript{233} to be appointed by the Secretary of the Department of Health

\textsuperscript{229} See Association of Admin. Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984) (challenging agencies' ability to conduct performance appraisals which interfered with ALJ's independence). It is only when the agency accepts the ALJ's decision, or if that decision is not appealed, that it becomes the final decision of the agency. Id. at 1141. See also Scalia, The ALJ Fiasco—A Reprise 47 U. Chi. L. Rev. 57, 61-62 (1980) (stating that "even if Congress chooses to call them judges . . . [t]hey are entirely subject to the agency on matters of law . . . ").


and Human Services. Cautious thinkers have advocated the establishment of an experimental mini-ALJ corps. The Federal Institutions Reform, Recovery, and Enforcement Act of 1989 has, in effect, mandated such a mini-corps, requiring the appropriate federal banking agencies and the National Credit Union Administration to establish an ALJ pool. This legislation, however, had less to do with ALJ independence than with concern for efficiency and decisional quality.

III. QUESTIONS OF PROCESS

A. Bureaucratic Justice

The challenge of due process in the administrative state has been central to the study of American administrative law. Goldberg v. Kelly directly addressed this issue articulating a constitutional requirement of "some kind of hearing" before a welfare "entitlement" could be revoked. As Professor Schwartz correctly notes, Goldberg was a turning point in the history of administrative procedure, and since that decision, "the Goldberg entitlement approach to procedural due process analyses has been applied to virtually all the cases that had previously been held to involve only privileges." While courts have debated what kind of hearing due process requires—pre- or post-termination, and with what procedural ingredients—the existence of a hearing requirement remains a constitutional lodestar in modern administrative law.

"Between the idea and reality," T.S. Eliot teaches, "falls the shadow." In today's administrative state, the brute pressure of caseload is the shadow hampering implementation of the "some kind of hearing" principle. In mass entitlement programs, at least, hearings are often rote; judges spend little time in making decisions. For one example, the Social Security Appeals Council, which reviews disability

234. Id. § 712(A)(2), 135 Cong. Rec. at S10,321. The Chief ALJ would report directly to the Secretary. Id. § 712(5), 135 Cong. Rec. at S10,322.
235. Unified Corps of ALJs, supra note 218, at 275-76 (proposing experimental creation of such corps to serve most of small-volume agencies).
237. Id. § 916.
239. Schwartz, supra note 1, at 554.
cases, spends, on average, no more than fifteen minutes on each case. It is unlikely that this short decisional framework will provide the "process" that litigants consider "due."

Recent studies of mass entitlement programs have urged acceptance of the notion of "bureaucratic justice," arguing that caseload pressures make it necessary to reconceptualize the meaning of due process. Jerry Mashaw's study of the SSA's disability adjudication program lays out the tremendous problems faced in mass justice adjudication. The paradigm of "bureaucratic rationality," he suggests, is a way to conceive of an administrative law system that focuses on consistent, accurate, and efficient implementation of agency policy. It represents an effort to secure, in a cost-effective way, information sufficient to make accurate decisions while minimizing system error. This is a far less noble enterprise than individualized advocacy in an adversary system context. Yet, it may in the end produce fairer results for more persons involved in the mass justice system. Indeed, Judge Harold Leventhal has observed that formal hearings are neither necessary, nor an essential feature of fair procedure. He invited attention as to whether, and to what extent, procedural requirements developed for a formal adjudicatory model should be required in what he described as "low visibility discretionary decisionmaking." Adherents to such an approach would rely more on expert agency testers, determiners, weighers, and ponderers to make the best determination possible, and only then allow the aggrieved person the right to challenge the legal, and perhaps to a limited extent, the factual basis for that determination in an adjudicative procedure. Thus, they would have no quarrel with the employment of doctors at Social Security district offices, human rights specialists at asylum centers, or fraud-spotters at alien legalization centers as


243. Mashaw calls this the paradigm of "moral judgment." He also develops a third model, the paradigm of "professional treatment," in which decisionmaking authority is surrendered to the essentially unreviewed judgment of service-oriented professionals—the standard doctor-patient relationship in America. Id. at 23-40.

244. Leventhal, Nature and Scope of Judicial Review, reprinted in C. Christensen & R. Middlekauf, Federal Administrative Law: Practice and Procedure 293, 298 (1977) (stating "decisions in adjudicatory model hearings are not necessarily applicable for other models of agency [decisionmaking]").


246. See Asylum Adjudication Procedures, ACUS Recommendation 89-4, 1
long as their determinations were subject to challenge in a tribunal, either an agency or court, for legal, or to a limited extent factual, infirmities only. This question as to whether the adjudication model of decisionmaking is preferable to reliance on technical experts remains a continuing concern in administrative law.

**B. Informal Procedures and Complementary Adjudicatory Processes**

Professor Schwartz suggests that the administrative process will become increasingly formalistic over time.446 It is both questionable whether his predicted "judicialization" of the administrative process is correct, and whether such a trend is necessarily a positive development. While there is no doubt that the adversary system encourages formalization, there is a growing trend in administrative law toward more informal procedures.

The administrative process, it must be remembered, was intended as a less formal alternative to the judicial resolution of disputes. The early history of the Interstate Commerce Commission (ICC) shows that the nineteenth century ICC often resolved complaints simply by writing informal letters to the railroads asking them to justify particular rates or practices.449 One hundred years ago, then, the ICC was using an early form of alternative dispute resolution.

The effort to replace formal hearings with less costly, less time-consuming alternatives has developed slowly. In the early 1970's, the Supreme Court held that formal APA hearing requirements need apply only if the agency's enabling statute, in addition to providing for a hearing, also expressly prescribes that such a hearing be "on the rec-


249. *See A. Jones, The Constitutional Conservatism Of Thomas McIntyre Cooley: A Study In The History Of Ideas 312 (1987) (stating that, "[w]hile the Commission adopted simple and efficient rules of practice, ... it did not overemphasize its judicial character. It sought to settle most complaints by agreement among parties. . . ."); H. Newcomb, The Work Of The Interstate Commerce Commission 18 (reprint ed. 1981) (noting that many complaints to Interstate Commerce Commission (ICC) during 1898-1900 were settled by "informal action"); Auerbach, The Expansion of ICC Administrative Law Activities, 16 Transp. Rev. 92, 94 (1987) (commenting "[b]y 1901, the great majority of complaints before the ICC were disposed of by conferences with shippers and carriers or by correspondence. The concept of paper proceedings as an administrative substitute for even the informal hearing had become a reality in less than a decade").
Following this view, the District of Columbia Circuit endorsed a system of “paper hearings” established by the FCC for comparative licensing cases involving cellular radio communication. Likewise, the Seventh Circuit approved the Nuclear Regulatory Commission’s (NRC) conclusion that formal hearings are not required for amendments to source material licenses. Recently, the District of Columbia Circuit upheld EPA regulations implementing the Hazardous and Solid Waste Amendments of 1984 that provide for the use of non-APA procedures, including reliance on EPA regional lawyers instead of administrative law judges as initial decisionmakers, in cases involving interim corrective measures. On a few occasions in environmental statutes, Congress has expressly provided for agency imposition of civil penalties without formal APA procedures.

A wide range of procedural techniques to complement conventional administrative or court litigation has developed under the rubric of alternative dispute resolution (ADR). Indeed, some use of ADR has already been institutionalized in selected federal district courts.

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250. See United States v. Florida East Coast Ry., 410 U.S. 224 (1973) (noting ICC’s establishment of per diem rates for freight car use did not trigger formal rulemaking under APA since record provided substantial basis on which reasonable rules were promulgated); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972) (holding ICC’s “car-service rules” were reasonable in light of substantial record support of national freight car shortage which could be alleviated by mandatory observance of rules).

251. See Cellular Mobile Sys. v. FCC, 782 F.2d 214 (D.C. Cir. 1986) (noting sur-rebuttal and cross-examination are authorized only when ALJ finds that this type of testimony is needed to complete record); Cellular Mobile Sys. v. FCC, 782 F.2d 182 (D.C. Cir. 1985) (stating APA expressly authorizes “paper hearings” in licensing cases when party will not be prejudiced by that proceeding).


253. Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989). In Chemical Waste Management, plaintiffs sought review of regulations promulgated by the Environmental Protection Agency (EPA) under the Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act, arguing that the informal procedures established by the regulations violated due process. The District of Columbia Circuit ruled that the Act did not require the EPA to hold formal hearings and that the informal hearing process which the agency initiated did not violate plaintiff’s due process rights. Id. at 1485.


tionally, in recent years, a number of federal agencies have begun to employ one or another ADR methodology. Agencies such as the National Aeronautics and Space Administration (NASA),\textsuperscript{256} the EPA,\textsuperscript{257} the Army Corps of Engineers,\textsuperscript{258} the Department of Energy,\textsuperscript{259} and the Department of the Navy\textsuperscript{260} have used mini-trials to resolve complex contract claims. The Department of Justice has issued guidelines on the use of mini-trials for resolving commercial disputes,\textsuperscript{261} as has the United States Claims Court.\textsuperscript{262}

A few agency Boards of Contract Appeals have begun to adopt policies favoring use of ADR techniques such as settlement judges, non-presiding judges who serve as neutral evaluators. One example is the Federal Energy Regulatory Commission which has used settlement judges to settle cases otherwise destined for trial.\textsuperscript{263} The Merit Systems Protection Board created a voluntary expedited appeal process and encouraged mediation of employee grievances.\textsuperscript{264} In addition, a number of agencies have utilized a form of ADR known as negotiated rulemaking.

The recent passage of the Administrative Dispute Resolution Act (Act),\textsuperscript{265} signified legislative support for agency use of ADR. The new

\textsuperscript{256} Johnson, Masri & Oliver, Minitrial Successfully Resolves NASA-TRW Dispute, Legal Times, Sept. 6, 1982, at 13, col. 1.


\textsuperscript{260} United States Department of the Navy, Alternative Dispute Resolution Program, Memorandum From the Secretary and Procedures (Dec. 1986), reprinted in ACUS Sourcebook, supra note 257, at 847.

\textsuperscript{261} United States Department of Justice, Civil Div., Commercial Litig. Branch, Memorandum on Alternative Dispute Resolution—Mini-trials (1986), reprinted in ACUS Sourcebook, supra note 257, at 827.

\textsuperscript{262} United States Claims Court, General Order No. 13: Notice to Counsel on Alternative Dispute Resolution Techniques (Apr. 15, 1987), reprinted in ACUS Sourcebook, supra note 257, at 731.


\textsuperscript{264} See Adams & Figueroa, Expediting Settlement of Employee Grievances in the Federal Sector: An Evaluation of the MSPB’s Appeals Arbitration Procedure, 1985 ACUS 1, 15 (detailing ADR measures used at Merit Systems Protection Board).

law amends section 556 of the APA to encourage the use of ADR by agencies.\textsuperscript{866} It specifically authorizes use of consensual arbitration by government agencies in specified circumstances. The most controversial provision of the ADR legislation proved to be its consensual arbitration provision.\textsuperscript{867} During hearings regarding the legislation, the Department of Justice raised constitutional concerns about agency use of arbitration, suggesting that binding arbitration constitutes an impermissible delegation of policymaking authority from government officials to private sector decisionmakers, in violation of article II.\textsuperscript{868} Given its concern over the protection of executive prerogatives, the Department of Justice's position is understandable. Nonetheless, although the clauses from the Constitution and even some of the cases cited by the government can be construed broadly to require that all government decisional activity remain in the hands of federal employees, they need not be read so sweepingly. Rather, only critical decisions must be made by...
government agencies. The critical decision for arbitration is whether or not to have the dispute arbitrated in the first place. Since the Act puts this initial decision firmly in the hands of officers of the United States, control over the arbitration process is properly vested in the executive branch. Indeed, since the executive branch has the right to settle rather than litigate a case, it would seem that it ought to have what appears to be the lesser, included right to agree to a procedure for resolving a case. In fact, a variety of federal statutes already provide specifically for agreements for resolving disputes with the government, including those implicating future government financial liability, by use of private arbitrators.

Another argument against the use of arbitration in disputes involving the Federal Government is that arbitration contravenes article III by transferring judicial power to private hands. However, there is nothing magical about using the courts to decide disputes. Administrative agencies, after all, now routinely decide a wide range of cases that were, at one time or another, the province of the courts. In 1985 the Supreme Court expressly upheld in Thomas v. Union Carbide Agricultural Products Co., a requirement of binding arbitration for certain disputes under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Under FIFRA, the arbitrator's decision is subject to judicial review only on the issues of fraud, misrepresentation, or misconduct—a standard of review somewhat similar to that contained in the Federal Arbitration Act. In rejecting the article III concerns, Justice O'Connor observed that "[t]o hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights cre-

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Given the position of the Department of Justice, the recently-enacted ADR legislation appeared stalled in the legislative process. To move the legislation forward, a compromise was fashioned by providing a thirty-day waiting period before an arbitral award becomes final, and authorizing an agency head to vacate any award within this waiting period. Should such an award be vacated, the United States may be liable for attorneys fees. The government underscored that it expected that this "opt-out" provision rarely would be used. Should this indeed be the case, arbitration may yet become a valuable ADR device for government agencies.

Despite Professor Schwartz' suggestion that the administrative process will become increasingly formalistic over time, it is important to remember that formality can also raise problems that may be as serious as those which it is designed to ensure against. Formality typically raises the cost of participation in the administrative process and formal procedures are frequently time-consuming. Even simple requirements such as duplicating and filing multiple copies of written documents, using expedited mail service, or paying for a transcript, will raise the participation costs—in some cases, beyond the reach of some individuals or groups.

275. Thomas, 473 U.S. at 594. Although not discussed in the opinion, the constitutional propriety of using private arbitrators in the judicial branch was fully briefed by the parties.

Yet an additional claim by critics is that arbitration can violate the requirements of due process. There is no reason to believe that arbitration cannot be conducted in full compliance with due process standards. Indeed, in Schweiker v. McClure, 456 U.S. 188 (1982), the Supreme Court upheld the use of private decisionmakers for part of the Medicare program against an express due process challenge. Apart from the potential due process problems presented in the case, the Court showed no concern over the conferral of governmental authority on private parties—even though that was one of the bases on which the lower court struck down the scheme. McClure v. Harris, 503 F. Supp. 409, 414, 415-17 (N.D. Cal. 1980), rev’d sub nom., Schweiker v. McClure, 456 U.S. 188 (1982).


279. Schwartz, supra note 1, at 569-70.
The British administrative law tradition, in contrast, emphasizes informality. Lay judges constitute the majority of the many tribunals which resolve administrative disputes. The procedures followed are relatively informal, and the assistance of a lawyer is often unnecessary. Review of tribunal decisions is available but is limited to questions of law, not fact, except in one respect—if "natural justice" has been violated, to quote the quaint British phrase for what we call "due process of law." It is wrong to assume, moreover, that formal procedures are always better procedures.

CONCLUSION

The new century will require considerable revision in our understanding of the administrative process. The explosive growth in rulemaking will challenge us to maintain notions of democratic accountability in an increasingly bureaucratic political order. This will require close attention to issues of separation of powers and coordination of agency activity by those who are politically accountable.

The caseload pressures of administrative adjudications will require careful assessment of the role of the administrative judiciary. Do we want administrative hearings to be junior courts, as they are tending towards today, or a different kind of adjudication process that maintains fairness without procedural barnacles? Similarly, is the case for administrative bureaucracy based on expertise as has traditionally been asserted? Or is it based on bureaucratic necessity—a bureaucratization de monde—which will inevitably affect all industrialized nations?

The need for rethinking is clear. This is especially true with respect to the constant tensions between formality and informality and between the branches of government that pervade administrative law. The hearing and rulemaking provisions of the APA—its very core—have been amended only slightly in the last forty-five years. The last thorough congressional review of the administrative process took place in the 1970's and failed to yield legislation. The last thorough executive branch review, the Ash Council, was a Carter Administration achievement. Theoretical work in the field, while especially rich, has only

282. Id. at 211-12, 225-51.
284. The President's Advisory Council on Executive Organization, A
begun to consider the larger administrative law terrain. When Max Weber began to describe the bureaucratic model, he had in mind a process that affected society as well as the state. Ours must attempt to do so. It is in the tension between bureaucracy, democracy, and efficiency that the administrative law of the twenty-first century is to be found.

NEW REGULATORY FRAMEWORK: REPORT ON SELECTED REGULATORY AGENCIES (1971).

