Administrative Law

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This article is limited to reviewing a substantial number of Seventh Circuit administrative law decisions spanning the Fall of 1973 to the Fall of 1974. The opinions reported encompass the following areas: environmental law, food and drug law, immigration law, social security benefits, housing and urban development, commerce, labor, and transportation. Particular emphasis is given to the manner in which administrative action is judicially reviewed. The topic “Administrative Law” has been interpreted to primarily, although not exclusively, in-
clude reported Seventh Circuit decisions reviewing final administrative agency action.

**Environmental Law**

In this area the Seventh Circuit had occasion to review the sufficiency of an agency's determination that an environmental impact statement was unnecessary. The court also reviewed an Army Corps of Engineers decision to proceed despite adverse environmental consequences.

Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA)\(^2\) provides in pertinent part that:

> All agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action.\(^3\)

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   The Congress authorizes and directs that, to the fullest extent possible:

   (2) all agencies of the Federal Government shall—

   (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have a [sic] impact on man's environment;

   (B) identify and develop methods and procedures in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

   (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

   (i) the environmental impact of the proposed action.

   (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

   (iii) alternatives to the proposed action.

   (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

   (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

   Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

   (D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
In *First National Bank of Chicago v. Richardson*, the General Services Administration (GSA) had partially completed construction of a Federal parking garage and detention center (the Chicago Annex) on the south fringe of the Chicago Loop when plaintiffs brought suit to enjoin construction pending preparation of a detailed environmental impact statement (EIS). The district court denied preliminary and permanent injunctive relief.

The issue on appeal was whether construction of the partially completed Chicago Annex should be enjoined pending the preparation of an EIS, or whether GSA had satisfied NEPA requirements by issuing a detailed environmental “Assessment” intended to show that this “major Federal action” was not one significantly affecting the quality of the human environment. The Seventh Circuit followed the Second Circuit’s analysis in two factually similar cases, *Hanly I* and *Hanly II*.

The *Hanly* cases dealt with the construction of a Federal office building with an adjoining detention center. The *Hanly I* court noted that since not all agency action required the preparation of an EIS:

> [T]he responsible federal agency has the authority to make its own threshold determination as to . . . [whether the federal action is major and also has a significant effect on the environment] in deciding whether an impact statement is necessary.

In *Hanly I*, GSA attempted to meet NEPA requirements on the basis of a four page memorandum, but the Second Circuit reversed the district court’s denial of preliminary injunctive relief, holding that, as to the detention center:

4. 484 F.2d 1369 (7th Cir. 1973).
5. The Chicago Annex detention center is being built on a square block bounded by Van Buren, Clark, Congress Parkway and Federal Streets, on the south fringe of the downtown Chicago business district or “Loop” in a blighted area of deteriorating buildings including “flophouses,” adult book stores, arcades, liquor stores and taverns, interspersed with several new non-residential office and business buildings such as the Illinois Bell Telephone Building, the Western Union Building, the Federal Reserve Bank and many others. The Annex is in close proximity to the five major downtown Chicago federal buildings. It is five blocks from the Chicago Civic Center and state courthouses and six blocks from the City Hall and County Buildings.
6. Plaintiffs were various banks, organizations, and individuals using the area to be affected by the construction of the Chicago Annex.
9. 460 F.2d at 641.
10. GSA had attempted to justify the detention center on the basis of the same abrupt memorandum which had satisfactorily terminated environmental attacks on the office building.
[I]n the context of an Act designed to require federal agencies to affirmatively develop a reviewable environmental record, this perfunctory and conclusory language simply does not suffice, even for purposes of a threshold section 102(2)(C) determination.\textsuperscript{11}

The \textit{Hanly I} court determined that GSA must at least consider those factors peculiar to detention centers which have an impact on the urban environment.

In \textit{First National Bank}, GSA attempted to use a similar four page memorandum to satisfy its threshold determination that the Chicago Annex would not significantly affect the quality of the human environment. As the Second Circuit did in \textit{Hanly I}, the Seventh Circuit remanded to the district court with directions to enter an injunction effective within thirty days unless in the interim GSA adequately supplemented its threshold environmental impact assessment. If this supplemental assessment was not adequate, an injunction was to be entered and continued in force until an EIS was made in full compliance with section 102(2)(C) of NEPA.

Upon remand in \textit{First National Bank} GSA invited and received environmental objections to the Chicago Annex and thereafter filed a 142-page supplemental assessment supported by a large number of exhibits. The district court found that the 142-page assessment considered all relevant factors and clearly supported GSA's determination that an EIS was unnecessary. The district court denied plaintiffs' prayers for preliminary and permanent injunctions and plaintiffs appealed.

The Seventh Circuit again looked to the Second Circuit for guidance. After remand in \textit{Hanly I}, GSA filed a 25-page supplemental assessment which supported its original threshold determination that an EIS was unnecessary. The New York district then denied plaintiffs' renewed application for a preliminary injunction and the \textit{Hanly II} appeal followed. Since NEPA is silent as to judicial review, the Second Circuit relied on the Administrative Procedure Act (APA)\textsuperscript{12} for reviewing GSA's supplemental assessment and held:

Although a court reviewing administrative action must determine de novo all questions of law, must determine whether factual findings are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or 'without observance of procedure required by law . . . and must accept the administrative agency's decisions as to mixed questions of law and fact if they have 'war-

\textsuperscript{11} 460 F.2d at 647.
rant in the record' and a 'reasonable basis in law'. . . the arbitrary
and capricious standard should apply to NEPA exemption deter-
minations since 'significantly' as used in Section 102(2)(C) can be
isolated as a question of law.13

The Hanly II court then formulated a two part test to determine en-
vironmental "significance":

(1) the extent to which the action will cause adverse environ-
mental effects in excess of those created by existing uses in the
areas affected by it, and (2) the absolute quantitative adverse en-
vironmental effects of the action itself, including the cumulative
harm that results from its contribution to existing adverse condi-
tions or uses in the affected area.14

The Seventh Circuit applied the Hanly II test to GSA's 142-page as-
sessment and concluded that GSA had affirmatively developed a re-
viewable environmental record15 which supported GSA's threshold
determination that the Chicago Annex would not significantly affect
the quality of the human environment. The Court found that GSA's
threshold determination passed muster under the "arbitrary and capri-
cious test," and affirmed the judgments of the district court denying the
preliminary and permanent injunctions.

A possible problem raised by First National Bank is that given
the fact that the agency makes the threshold determination of "signifi-
cance," query under what circumstances will the court require the EIS
mandated by section 102(2)(C) of NEPA. In Hanly II, the Second
Circuit repeatedly referred to the 25-page supplemental assessment as
satisfying GSA's responsibility for developing a reviewable record in
that the assessment closely paralleled in form an EIS.16 The Seventh
Circuit did likewise and deemed its 142-page Assessment to be even
"more penetrating and critical"17 than the 25-page assessment in Han-
ly II.

The real issue is, then, what is the proper standard for judicial
review of an agency's threshold determination not to file an EIS under
NEPA? The Seventh Circuit articulates the "arbitrary and capricious"
standard much like the Second Circuit, as opposed to the "reasonableness" test18 employed by the Fifth19 and Tenth20 Circuits. Examina-

13. 471 F.2d at 828-29.
14. Id. at 830-31.
15. The Court determined that GSA's 142-page supplemental assessment was "ob-
viously not a 'rewrite' of the original 4-page draft." 484 F.2d at 1381 n.19.
16. 471 F.2d at 832.
17. 484 F.2d at 1381 n.19.
18. Under the "reasonableness" test, the court must determine whether the plaintiff
has alleged facts which, if true, show that the recommended project would materially
tion of the court's opinion reveals that GSA's assessment was subject to thorough scrutiny by both the district court and the Seventh Circuit. One gets the distinct impression that the court concluded that GSA's threshold determination was not unreasonable. Accordingly, at this point it is not clear whether there is any practical difference in approach by the circuits in reviewing such determinations. If anything, First National Bank clearly illustrates the court's insistence on a thorough administrative record and complete lack of tolerance for pro forma compliance.

In Sierra Club v. Froehlke, the Seventh Circuit was asked to decide whether a final section 102(2)(C) environmental impact statement complied with the mandates of NEPA. The EIS was prepared by the Army Corps of Engineers prior to commencing construction of a dam creating a reservoir which would inundate twelve miles of picturesque bluffs and sandstone ledges containing rare floral plants.

Plaintiffs filed suit in the district court alleging, in effect, that the Corps' EIS was inadequate in violation of section 102 of NEPA, and that continuation of the project should be enjoined under the APA. The district court found that the EIS "provided adequate notice to all concerned persons, agencies, and organizations, of the probable environmental consequences of the proposed project," and denied plaintiffs' motion for a preliminary injunction. Summary judgment was entered for the Corps and plaintiffs appealed. The Seventh Circuit affirmed.

degrade any aspect of environmental quality. The court should proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects which would significantly degrade our environmental quality. This inquiry must not necessarily be limited to consideration of the administrative record, but supplemental affidavits, depositions and other proof concerning the environmental impact of the project may be considered if an inadequate evidentiary development before the agency can be shown. If the court concludes that no environmental factor would be significantly degraded by the project, GSA's determination not to file the impact statement should be upheld. On the other hand, if the court finds that the project may cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all), the court should require the filing of an impact statement.

21. 486 F.2d 946 (7th Cir. 1973).
23. 5 U.S.C. § 702 (1970), which provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.
Plaintiffs' arguments on appeal were twofold. First, plaintiffs alleged that the Corps did not properly weigh or consider various factors in preparing the EIS. The Corps countered that plaintiffs' real concern was that the Corps' decision-makers did not accord some factors the weight plaintiffs would assign them, and argued that it "is obviously not required to give the same weight to plaintiffs' concern as plaintiffs do, . . . and that some bias is even to be expected." The Seventh Circuit agreed with the Corps. They recognized, however, that the EIS must provide "a record upon which a decision-maker could arrive at an informed decision," and determined that the test for compliance with section 102 of NEPA was good faith objectivity: "Federal agencies are required to demonstrate objectivity in the treatment and consideration of the environmental consequences of a particular project." Since this test was more exacting than the "notice of problems" test employed by the district court, the court re-examined the district court's finding of compliance in light of the "objectivity" standard and found that

[i]f this were the only finding made by the district court, we might be inclined to agree with plaintiffs' argument. However, the court also found that plaintiffs had not shown a sufficient probability of success on the merits as to their contention that the statement in its present form does not constitute 'full disclosure' of the environmental consequences of the project' as required by NEPA.

The court also concluded that plaintiffs have failed to show a sufficient chance of success on the merits of a contention that the present statement is not a record upon which a decision-maker could make an informed decision.

The Seventh Circuit interpreted the district court's opinion as finding that the Corps objectively and comprehensively considered the environmental consequences of the proposed project.

Plaintiffs' second argument was that district courts have an obligation to review an agency's decision to proceed with a project where an admitted adverse environmental impact is revealed in the EIS. Several circuits had recently held that such an obligation existed.

24. 486 F.2d at 950. See also Environmental Defense Fund v. Corps of Eng., U.S. Army, 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973), where the Eighth Circuit Court of Appeals stated: "NEPA assumes as inevitable an institutional bias within an agency proposing a project and erects the procedural requirements of § 102 to insure that 'there is no way [the decision-maker] can fail to note the facts and understand the very serious arguments advanced by plaintiffs if he carefully reviews the entire environmental impact statement.'"

25. 486 F.2d at 950.

26. Id.

27. 486 F.2d at 951.

28. The Fourth Circuit has expressly adopted the holding of the Eighth Circuit.
For the Seventh Circuit this was a point of first impression, so the court looked to the other circuits for guidance. The court adopted the reasoning of the Eighth Circuit Court of Appeals:

Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits.

NEPA is silent as to judicial review, and no special reasons appear for not reviewing the decision of the agency. To the contrary, the prospect of substantive review should improve the quality of agency decisions and should make it more likely that the broad purposes of NEPA will be realized.]

As to the specific standard of review to be applied, the court likewise adopted the test set out by the Eighth Circuit:

The reviewing court must first determine whether the agency acted within the scope of its authority, and next whether the decision reached was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In making the latter determination, the court must decide if the agency failed to consider all relevant factors in reaching its decision, or if the decision itself represented a clear error in judgment.

Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine, according to the standards set forth in §§101 (b) and 102(1) of the Act, whether the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.

It is worthy of note that both First National Bank and Sierra Club arise in the context of substantially completed construction projects. Both cases clearly were major actions. Certainly, in Sierra Club it would have been difficult for the court to have concluded that the Corps' decision to proceed was a clear error of judgment, if for no other reason than the difficulty of fashioning judicial relief. Query the result if the court had been presented with a project not yet under construction.


30. Id. at 300.
In this area the court treated problems of safe DDT levels in food destined for human consumption, condemnation of drugs for violation of "current good manufacturing practices," and a claim of excessive sanctions imposed for failure to keep required records. A common thread weaving through the decisions is an apparent judicial deference to agency expertise and policy. Accordingly, it appears that the Seventh Circuit is wary of denying enforcement of agency orders in this highly technical area.

In two cases during the past year the Seventh Circuit grappled with the problem of DDT levels in fish caught in Lake Michigan. In *United States v. Goodman*, defendants distributed in interstate commerce fish known as raw chubs, in which the total amount of DDT and its derivatives exceeded the FDA's interim limit of five parts per million (ppm). The FDA sought to have defendants permanently enjoined under section 302(a) of the Food, Drug, and Cosmetic Act (FDCA) from further distribution in excess of the interim guideline as violative of sections 301(a) and 402(a)(2)(B).

At trial the parties stipulated that DDT and its derivatives were pesticide chemicals under section 408(a) and that there was neither

31. 486 F.2d 847 (7th Cir. 1973).
32. Pursuant to Reorganization Plan No. 3 of 1970, effective December 2, 1970, EPA was established and there was transferred to it . . . the functions vested in the Secretary of HEW of establishing tolerances for pesticide chemicals under FDCA, together, with authority 'to monitor compliance with the tolerances and the effectiveness of surveillance and enforcement.' However, the Secretary of HEW continues to administer FDCA except for EPA's establishing of tolerances for pesticide chemicals, and inasmuch as EPA only "monitor(s) compliance," the Secretary of HEW continues to enforce compliance. The FDA has acted as the delegate of the Secretary of HEW in enforcing the pesticide tolerances promulgated by EPA. *Id.* at 848-49.
33. 21 U.S.C. §§ 331 et seq., § 302(a) (1970), § 302(a) of the FDCA, provides in pertinent part:
   (a) Jurisdiction of courts. The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, . . . to restrain violations of section 301 [21 U.S.C. § 331], except paragraphs (h), (i), and (j).
34. § 301(a) of the FDCA, 21 U.S.C. § 331 (1970), provides in pertinent part:
   (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.
   A food shall be deemed to be adulterated—if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 408(a) [21 U.S.C. § 346(a)].
36. § 408(a) of the FDCA, 21 U.S.C. § 346a (1970), provides in pertinent part:
   (a) Any poisonous or deleterious pesticide chemical, or any pesticide chemical which is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of pesticide chemicals, as safe for use,
a regulation nor an exemption excusing defendants from compliance with the interim guideline. Expert testimony indicated that DDT in excess of five ppm was not generally recognized as safe. The district court concluded that raw chubs containing DDT in excess of five ppm were adulterated within the meaning of section 402(a)(2)(B) and enjoined defendants from further distribution.

On appeal, defendants argued that under section 408(a) the Environmental Protection Agency (EPA) must establish by regulation permissible tolerances of DDT and its derivatives in fish before injunctive relief could be granted. Defendants further contended that a permanent injunction issued pursuant to interim standards promulgated by FDA denied them the review procedures of sections 408(d)(3) and 408(e). The Seventh Circuit rejected defendants' arguments and held that section 408(a) "clearly provides that a pesticide chemical which is not generally recognized as safe for use, added to raw agricultural commodity, shall be deemed unsafe unless EPA has established a tolerance or provided for exemption." The court found that defendants' own lack of initiative was responsible for their being denied FDCA review procedures.

The court further reasoned that:

Since there is no tolerance or exemption for DDT in fish, any amount of this poisonous pesticide chemical must be deemed unsafe and result in an adulterated product under a literal interpretation of the statute. Yet it is obvious that at the present time all fish cannot be banned inasmuch as it would seriously affect the total food supply.

Since FDCA provided specific authority empowering FDA to refrain from prosecuting minor violations, the court gave defendants the op-

added to a raw agricultural commodity, shall be deemed unsafe for the purposes of the application of clause (2) of section 402(a) [21 USC § 342(a)(2)] unless—

(1) a tolerance for such pesticide chemical in or on the raw agricultural commodity has been prescribed by the Secretary of Health, Education, and Welfare under this section and the quantity of such pesticide chemical in or on the raw agricultural commodity is within the limits of the tolerance so prescribed; or

(2) with respect to use in or on such raw agricultural commodity, the pesticide chemical has been exempted from the requirement of a tolerance by the Secretary under this section.

38. 486 F.2d at 854 (emphasis added).
39. "The defendants, who could hardly have been unaware of the growing national concern over DDT content in fish, could have triggered the rule making procedure under 21 U.S.C. § 346a(e) if they had but requested it." Id.
40. Id. at 855.
portunity to continue operating if they could distribute fish with five or less ppm of DDT residue. The court concluded that FDA had the authority under FDCA to abide by the interim guidelines until such time as the EPA developed tolerance standards. Accordingly, the judgments of the district court were affirmed.

The consolidated appeals of *United States v. Ewig Bros.* and *United States v. Vita Food Products* presented the question of whether residues of DDT and dieldrin in smoked chubs were "food additives" within the meaning of section 201(s) of FDCA. Defendants contended that DDT was not an item added to their products, but rather was a natural component of the fish before they were caught, let alone processed. They argued that a process such as smoking, during which nothing new was added to a food, could not “transmogrify” a preexisting component of a food into an additive. The Seventh Circuit disagreed, saying:

> Although it may seem odd to place the label additive on a chemical substance which was a component of the raw produce and which is not changed by processing, Congress’ choice of that label does not result in any transmogrification. Before processing, DDT is a pesticide chemical on a raw product; after processing, it is an additive. Since there is no tolerance of DDT on fish, both before and after processing the presence of DDT causes fish to be adulterated without any proof that it is actually unfit as food. Defendants’ contention, if accepted, would result in the anomaly that a chemical such as DDT would adulterate all raw fish, but adulteration of processed fish would be determined on an uncertain case-by-case basis. We conclude that such a construction of the statute is illogical and unacceptable.

The court found that since the definition of a “food additive” was broad enough to include any residue of a pesticide chemical remaining in or on food after processing, the necessity for duplicate tolerances in raw and processed commodities was avoided. Accordingly, the

42. 502 F.2d 715 (7th Cir. 1974).
43. The fish in *Goodman* were raw chubs.
44. § 201(s) of the FDCA, 21 U.S.C. § 321(s) (1970), provides in pertinent part: (s) The term “food additive” means any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food (including any substance intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding food; and including any source of radiation intended for any such use), if such substance is not generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been adequately shown through scientific procedures to be safe under the conditions of its intended use . . . . (Emphasis added).
45. 502 F.2d at 722.
court applied the FDA's five ppm guidelines, observed that DDT and dieldrin were not protected by any tolerance and thus held that the smoked chubs were "adulterated" as a matter of law. Consequently, defendants were enjoined from distributing smoked chubs containing DDT in excess of five ppm.

The court was concerned that if five ppm of DDT in raw fish was unsafe, then five ppm in processed fish could not be any less safe. However, stretching the definition of "food additive" to encompass a pre-existing component appears to be an obviously strained construction. Given the court's reasoning, the FDA, as the court suggests, may have, at least for the present, virtually unbridled power to eliminate all such fish from our food supply.

In *United States v. An Article of Drug*, defendant appealed from a FDA order condemning his shipment of white quadrisect tablets, a prescription drug under FDCA. The district court upheld the FDA's order because defendant's production procedure violated the "current good manufacturing practice" (GMP) provision of FDCA.

Defendant contended that the GMP provision was unconstitutionally vague and denied him due process under the fifth amendment. His argument attacked the statutory terms "current" and "good". The Seventh Circuit found no merit in defendant's argument because the FDA had promulgated detailed regulations defining the precise requirements of GMP. The court concluded that the term "current good manufacturing practice . . . adequately defines a standard which the Administrator was authorized to particularize in interpretative regulations." The court recognized that the GMP provision stemmed from congressional concern that dangerously impure drugs might escape detection under a system predicated only on seizure of drugs shown to be in fact adulterated. In order to insure public safety, Congress determined that it was necessary to also regulate the means of production. The court determined that the GMP provision was as precise as necessary under the circumstances and held that it was not uncon-

46. *Id.* at 717.
47. 484 F.2d 748 (7th Cir. 1973).
49. 21 C.F.R. § 133 et seq. (1974).
50. 484 F.2d at 749.
51. "The Secretary's interpretative regulations as to good manufacturing practice for purposes of judging the adequacy of the methods, facilities, and controls would be prima facie evidence of what constitutes current good manufacturing practice in any proceeding involving § 351(a)(2) of the Food, Drug, and Cosmetic Act as amended by the bill." 1962 U.S. CONG. & ADMIN. NEWS 2890.
stitutionally vague in view of the FDA's detailed regulations. Accordingly, the court rejected defendant's semantical argument and affirmed the condemnation judgment.

In *River Forest Pharmacy v. Drug Enforcement Administration*, petitioner had pleaded guilty to four counts of felonious distribution of controlled substances and was placed on three years probation. On the basis of petitioner's guilty pleas the DEA Administrator issued an order to show cause why the pharmacy's Certificate of Registration should not be revoked. Pending disposition of the matter, the Administrator ordered an immediate suspension of the registration pursuant to section 824(a)(2) of FDCA.

At the hearing, the administrative law judge found that petitioner's failure to keep accurate records was due to forgetfulness, business pressures, and unfamiliarity with the regulations promulgated by the Administrator. The administrative law judge made findings of fact and conclusions of law, and recommended a six-month suspension of the registration. The Administrator accepted the findings of the administrative law judge, but instead imposed a two-year suspension, viewing petitioner's violations of the drug laws as substantial rather than "merely technical."

Petitioner then sought direct review in the Seventh Circuit asserting that the Administrator's order increasing the suspension was "arbitrary, capricious and an abuse of discretion" under the APA. In reviewing the Administrator's sanction, the court deferred to his policy determinations, stating:

52. 501 F.2d 1202 (7th Cir. 1974).
54. 21 U.S.C. § 824(a)(2) (1970) provides that:

A regulation pursuant to section 823 of this title to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the Attorney General upon a finding that the registrant—

(2) has been convicted of a felony under this subchapter or subchapter II of this chapter or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance . . . .

55. 501 F.2d at 1205.
56. 21 U.S.C. § 877 (1970), which provides:

All final determinations, findings, and conclusions of the Attorney General under this title shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

Although the law judge and not the Administrator was in the best position to evaluate [the pharmacist’s] credibility and demeanor, those factors are irrelevant to an assessment of the seriousness of petitioner’s violations and of the sanction most appropriate for the promotion of agency policy regarding them.58

Petitioner argued that the Administrator was required to give a detailed explanation of his reasons for increasing the suspension. The court disagreed, finding:

The Administrator’s decision, fairly read, does provide reasons why the Administrator increased the sanction recommended by the law judge. True, it does not explicitly announce why the Administrator imposed a two-year suspension rather than, say a twelve-month or an eighteen-month suspension. However, we do not construe 5 U.S.C. §706(2) (A) as requiring so refined an explanation of his exercise of discretion.59

In desperation, petitioner appealed to the court’s “sense of fairness.” The court sympathized with petitioner, but felt constrained to enforce the increased sanction, stating:

Neither section 824 nor the Administrative Procedure Act authorizes us to substitute our sense of fairness for the noncapricious decision of the regulatory agency.

. . . . Thus, while we might if we were reviewing de novo, which we are not, determine that from the petitioner’s individual point of view the suspension was harsh, we cannot say that from the point of view of overall enforcement, which is the Administrator’s responsibility, there was an abuse of discretion.60

Accordingly, the court upheld the challenged order.

**IMMIGRATION LAW**

In this area the Seventh Circuit treated denials of alien employment certifications, discretionary suspension of deportation, statutory discrimination between eastern and western hemisphere aliens, and the impact of an illegal arrest on subsequent deportation proceedings. In *Secretary of Labor v. Farino*,61 a prospective employer sought review of the denial of an alien employment certification by the Regional Manpower Administrator. Section 212(a)(14) of the Immigration and Nationality Act62 authorized the Secretary of Labor63 to determine

58. 501 F.2d at 1206.
59. Id.
60. Id. at 1206-07 (emphasis added).
61. 490 F.2d 885 (7th Cir. 1973).
63. The Secretary of Labor has delegated this responsibility to the Regional Manpower Administrator. 29 C.F.R. § 60.4 (1973).
whether there were sufficient qualified workers in the United States available to perform the work sought, and whether the employment of the alien would adversely affect the wage and working conditions of United States workers.\textsuperscript{64} The district court reversed the denial and ordered the certification to issue. The Seventh Circuit affirmed.

On appeal the government argued that alien labor certifications had been committed by Congress to the Secretary's discretion, thus prohibiting review under section 10 of the Administrative Procedure Act.\textsuperscript{65} Moreover, the government argued that an employer lacked standing to seek judicial review.\textsuperscript{66}

The Immigration Act was silent on the reviewability of alien labor certifications. This, however, was not deemed controlling. After examining the legislative history, the court held the Secretary's action to be reviewable, applying the rationale of \textit{Citizens to Preserve Overton Park v. Volpe}.\textsuperscript{67} \textit{Citizens} made clear that non-reviewability of agency discretion is a very narrow exception, applicable only upon a showing of clear and convincing legislative intent to so restrict judicial review.\textsuperscript{68} Certainly, legislative silence did not help the government's argument.

The court made equally short shrift of the employer's alleged lack of standing. Applying the test set forth in \textit{Association of Data Processing Service Organization v. Camp},\textsuperscript{69} the court found that the employer had alleged economic injury if unable to employ the desired alien, but

\textsuperscript{64} 8 U.S.C. § 1182(a)(14) (1970) provides in pertinent part;

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

\textsuperscript{65} Section 10 of the APA, 5 U.S.C.A. § 701(a) (1970) provides in pertinent part:

This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

\textsuperscript{66} 5 U.S.C. § 702 (1970) provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof.

\textsuperscript{67} 401 U.S. 402 (1971).

\textsuperscript{68} 401 U.S. at 410.

\textsuperscript{69} 397 U.S. 150 (1970).
more importantly, the court found that “potential employers of aliens are within the zone of interests to be regulated” by the agency action.\textsuperscript{70}

The employer had claimed that the procedures and data used by the Secretary in making his determination precluded him from effectively participating in or contributing to the decision making process. The employer noted that the Secretary relied on unemployed persons information compiled by the Illinois State Employment Service (ISES), but he had been denied an opportunity to rebut this data. He also pointed out that ISES did not verify the qualifications of those allegedly available, or have any system for removing names from the available list, and that ISES refused to provide the names and addresses of those allegedly available. The court concluded: “If the report of the State Employment Service stood unimpeached, we could not conclude that the Secretary's refusal to certify the alien workers was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”\textsuperscript{71}

The court set forth the procedures to be followed by the Secretary in certification proceedings.\textsuperscript{72} While not requiring a trial type hearing, the Secretary must make available all the information before him to the employer. An opportunity to submit affidavits and written argument should also be afforded, particularly an opportunity to question the reliability of information before the Secretary. Judicial review will then be had on the record and if the denial is found to be “arbitrary, capricious, [or] an abuse of discretion, then the district court should’ compel agency action unlawfully withheld by ordering the issuance of the certification.”\textsuperscript{73}

In\textit{ First Girl, Inc. v. Regional Manpower Administrator},\textsuperscript{74} another panel of the court had occasion to apply the standard of review set forth in\textit{ Farino}. The employer ran a temporary secretarial service and had sought certification for three British stenographers. Denying the request, the Secretary relied on data submitted by ISES which indicated

\textsuperscript{70} 490 F.2d at 489.
\textsuperscript{71} \textit{Id.} at 491. The court also disapproved of the Secretary's regulation prohibiting disclosure of those allegedly available as being contrary to the Freedom of Information Act. \textit{Id.} at 493.
\textsuperscript{72} \textit{Id.} at 492.
\textsuperscript{73} \textit{Id.} While stating that the district court may not substitute its judgment for that of the Secretary, nonetheless the district court must consider whether the Secretary's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. The court must also consider whether the Secretary followed proper procedures. \textit{Id.} at 489.
\textsuperscript{74} 499 F.2d 122 (7th Cir, 1974).
that secretaries were available. However, the record before the district
court did not indicate that the persons listed were in fact qualified, still
available or even willing to work in a temporary placement agency. The
district court, finding no reliable evidence to support the denial, reversed and remanded. The Seventh Circuit affirmed.

The district court's decision was rendered prior to Farino, and had
looked to see if the Secretary had abused his discretion by ascertaining
"whether an examination of the administrative record reveals no evi-
dence supporting defendant's decision." Noting that the "substantial
evidence" test was not used, and properly so, the Seventh Circuit con-
cluded that "a finding based upon no reliable evidence whatever is
a clear error of judgment and an abuse of discretion." At least in
the Seventh Circuit there is no doubt that in future certification denials,
the administrative record will be subject to strict judicial scrutiny.

In Guzman-Flores v. United States Immigration and Naturaliza-
tion Service, a number of aliens petitioned for review of deportation
orders entered against them by the Board of Immigration Appeals.
Deportability was admitted. However, the issue on appeal was
whether an illegal arrest by city police on suspicion of alienage alone,
required suppression of their physical persons at subsequent INS hear-
ings under the "fruit of the poisonous tree" doctrine. The Seventh
Circuit answered in the negative, noting that there was no evidence
seized at the admittedly illegal arrest that was used against petitioners.
The court cited United States v. Calandra, for the proposition that
"the (exclusionary) rule is a judicially created remedy designed to
safeguard Fourth Amendment guarantees by utilizing the technique of
suppression of evidence to achieve deterrence and not a rule to safe-
guard personal constitutional freedoms." Continuing, the court
noted: "Historically the remedy for an unconstitutional arrest has been
a civil action for false arrest and false imprisonment." The Seventh
Circuit found it to be a well established principle that the illegality of
an arrest does not destroy a later valid proceeding. Accordingly, it

76. Id. at 1341.
77. 499 F.2d at 124. Even if the "substantial evidence" test was used, the Secre-
tary's denial could not have been upheld if based on "no evidence".
78. 496 F.2d 1245 (7th Cir. 1974).
79. 496 F.2d at 1246, 1247.
81. 496 F.2d at 1247.
82. Id.
83. Id. at 1248,
held that since petitioners admitted their deportability and since INS did not rely on any evidence seized at the time of their arrests by local authorities to establish deportability, that “even if those arrests were illegal, this does not invalidate the subsequent deportation proceedings.”

The difficulty with Guzman-Flores is that if the alien is deported or allowed to voluntarily depart, his remedy of a civil action for false arrest becomes illusory. However, it is to be noted that the reported “flood” of illegal aliens into the United States poses a rather unique problem for law enforcement authorities. The court did note that the arrests in the case at bar were made by local and not immigration authorities. Given the deterrence rationale for suppression of evidence, it is uncertain what the result would be if the arresting authorities had been immigration officials.

In Pedroza-Sandoval v. Immigration and Naturalization Service, petitioners raised an equal protection challenge to section 245(c) of the Immigration Act which provided that western hemisphere aliens while illegally in the United States may not be allowed to adjust their status to a lawfully admitted alien otherwise permitted, under certain circumstances, to eastern hemisphere aliens. The court rejected petitioners’ attack noting that Congress has “broad powers,” subject to limited judicial review, on immigration policies because of the policy mixture of foreign relations, war power, and maintenance of a republican form of government inherent in such legislation. The court concluded that immigration policy-making is best left to the political branches of government. However, the court did find a rationale for distinguishing between eastern and western hemisphere aliens. Western hemisphere aliens, geographically, have easier access to the United States and therefore are more of a “recurring problem.”

If we assume the propriety of immigration laws restricting admission, then Congressional limitation on adjustment of status by western

84. Id.
85. 498 F.2d 899 (7th Cir. 1974).
87. Section 1255 generally provides that it is within the discretion of the Attorney General to adjust the status of an alien to one of lawful permanent residence in certain cases. One such case, as was claimed by petitioner, is where the alien claims to be an immediate relative of a United States resident alien. However, section 1255(c) states that “the provisions of this section shall not be applicable to any alien who is a native of any country of the Western Hemisphere.”
89. 498 F.2d at 900-01.
hemisphere aliens would appear to be a realistic legislative response to problems encountered in enforcement of immigration law. Unfortunately, an in depth examination of preferential treatment in immigration policy is beyond the scope of this article.

In *Rassano v. Immigration and Naturalization Service*, petitioner sought review of the INS' denial of a discretionary suspension of his deportation. Admittedly deportable, petitioner sought suspension of deportation based on his showing of good moral character for the ten year period preceding the act which gave rise to deportability in accordance with section 244(a)(2) of the Immigration Act. The precise issue was whether petitioner had met his burden of showing that he was of good moral character thus warranting suspension of deportation.

The court noted that appellate review is for the purpose of determining whether the agency action was arbitrary or capricious or an abuse of discretion. "Whether we apply the reasonable, substantial and probative evidence test on the record considered as a whole . . . or consider that the decision is not based on a reasonable foundation . . ., we are convinced that a mistake has been made." The court affirmed the order of deportation, but reversed the denial of the deportation suspension, noting that "this holding is limited to the unusual factual situation present in this case and is not otherwise to be considered as precedent."

Considering that the court's holding in any given case will necessarily reflect the facts before it, further examination of this case is obviously required. It appears that this case reflects the court's view that the penalty of deportation was excessive under the circumstances. Given the finding of deportability and given no alternative but to affirm

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90. 492 F.2d 220 (7th Cir. 1974). Petitioner's case had been before the court before in 377 F.2d 971 (7th Cir. 1966) but on rehearing had been vacated and remanded.
91. Section 244(a)(2), 8 U.S.C. § 1254(a)(2) (1970), provides in pertinent part:
   The Attorney General may, in his discretion suspend deportation . . . in the case of an alien who . . .:
   
   (2) is deportable . . ., has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.
92. 492 F.2d at 227.
93. *Id.* at 227-28.
94. *Id.* at 228.
or reverse the court said: "To affirm here would be to exile this petitioner to a foreign country for the remainder of his life. To invoke this extreme penalty under all the facts in this case relevant for consideration, in our considered judgment, goes too far." 95

The INS had issued a "show cause" order on January 26, 1961. Petitioner had been convicted of robbery in 1934, convicted of burglary in 1952, and arrested other times without conviction. Brought here by his parents in 1914 at the age of six months, petitioner became a permanent resident of the United States. He married a United States citizen and had two sons. His youngest son was killed in Vietnam in 1968. 96 After reviewing the entire record on the issue of petitioner's good moral character, the Court concluded that "petitioner was found to have failed to discharge his burden of good moral character because of his association with Joseph Aiuppa. This appears to be a clear case of guilt by association." 97 However, the Service argued that highly credible evidence linked petitioner "to gambling and prostitution through his employment and investments." 98 The court characterized such evidence as being inextricably comprised of fibers of hearsay and guilt by association. 99 On balance, the scale tipped in favor of the petitioner "because of the events following the tragic loss of his son in Vietnam; in his earlier family care during his wife's prolonged suffering from leukemia; and following her death, in the care of his young sons." 100

Had there been an alternative to deportation the Seventh Circuit may have ruled differently. However, this is a difficult case to reconcile with the "clear error of judgment" standard. Perhaps, because of the court's characterization of much of INS' character evidence as hearsay, and presumably unreliable, the only remaining evidence in the record was that which tended to show good moral character, thus supporting reversal.

**Social Security**

The frequency and complexity of poverty law litigation has made judicial review of welfare agency action increasingly important to applicants and recipients seeking to enforce statutory rights. Section 205

95. Id.
96. A more complete factual history is set out in 492 F.2d at 222-25.
97. Id. at 226.
98. Id.
99. Id. at 227.
100. Id.
(g) of the Social Security Act permits the test to be applied on judicial review. Under this rule the court's inquiry is limited to whether on the record as a whole, the agency could reasonably make the challenged factual finding. The court decides questions of law de novo, but limits itself to the test of reasonableness in reviewing findings of fact.

An unexplained absence of over seven years gives rise to a presumption of death under a Social Security Administration regulation. In *Blew v. Richardson,* plaintiff applied for children's insurance benefits on her son's behalf eleven years after her husband had abandoned them. An evidentiary hearing was had to determine whether the husband's absence was "unexplained" within the meaning of the regulation. Evidence was adduced that the husband had abandoned his family shortly after signing a child support agreement in court in lieu of a jail sentence for non-support. The hearing examiner determined that the husband's absence was not "unexplained" within the meaning of the regulation, and based on this decision the Secretary denied plaintiff's claim.

Plaintiff then sought review pursuant to section 205(g). The district court held that the presumption of death attached unless there was evidence of continued life *during* the seven-year period. Summary judgment was entered for the plaintiff and the Secretary appealed.

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101. 42 U.S.C. § 405(g) (1970). Section 205(g) provides, in part:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia.

The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive.


Whenever it is necessary to determine the death of an individual in order to determine the right of another to a monthly benefit or a lump-sum payment under section 202 of the Act, and such individual has been unexplainedly absent from his residence and unheard of for a period of seven years, the Administration, upon satisfactory establishment of such facts and in the absence of any evidence to the contrary, will presume that such individual has died.

104. 484 F.2d 889 (7th Cir. 1973).

The issue on appeal was whether an explanation which was found in events preceding the absence could serve to defeat the presumption. The Seventh Circuit answered this question in the affirmative, holding:

[T]he text of the regulation itself quite plainly authorizes alternative means of rebutting the presumption. The regulation requires that the individual be 'unexplainedly absent' and also 'unheard of' for a seven year period. The presumption then applies 'in the absence of any evidence to the contrary.' A fair reading of this language indicates that the Secretary may adduce evidence to contradict either the unexplained character of the absence or the fact that the individual has not been heard of for seven years.108

Finding that there was substantial evidence to support the finding that the husband's absence was not "unexplained," the court reversed for the Secretary.

In Stark v. Weinberger,107 plaintiff applied for disability benefits under the Social Security Act.108 At the time of her application plaintiff was clearly disabled within the meaning of the Act, but because of the special earnings requirement of the statute,109 the Secretary determined that she had to establish a period of disability commencing no later than December 31, 1950.

Plaintiff suffered from scleroderma, a progressive, fatal disease which causes extreme stiffness of the hands and is without cure. Prior to 1951, plaintiff's only job had involved working with her hands on an assembly line operation. At the agency hearing, plaintiff introduced uncontradicted medical testimony based on her symptomology that her scleroderma "was present in and from the late 1930's."110 Further medical evidence indicated that had her condition been properly diagnosed, she almost certainly would have been advised to discontinue work which could aggravate her condition.111 The administrative law judge concluded that plaintiff's "attempts to work resulted from severe economic need,"112 and found in her favor. The Appeals Council reversed based on plaintiff's post-1950 employment and various post-1950 medical records. Plaintiff sought review under section 205(g). The district court entered summary judgment for the Secretary, and plaintiff appealed.

106. 484 F.2d at 893.
107. 497 F.2d 1092 (7th Cir. 1974).
110. 497 F.2d at 1097.
111. Id. at 1100.
112. Id. at 1096.
The dispositive issue on appeal was whether plaintiff's post-1950 employment constituted substantial evidence of non-disability as of December 31, 1950. The majority held that it did not. It was conceded that plaintiff worked after 1950, but that was not held to preclude a finding of disability within the meaning of the Act. The court independently examined the documentary medical evidence and concluded that, viewed in its entirety, plaintiff was disabled. Judge Stevens recognized that while the normal procedure is to remand for further expert testimony, equitable considerations justified straight reversal.

Judge Pell filed a strong dissent. He could not find that any of Judge Stevens' equitable considerations had been encompassed in the statutory scheme so as to obviate the need for remandment. Judge Pell clearly deferred to the interpretations and inferences given the evidence by the Appeals Council, and emphasized that it was not the province of the court to redetermine the facts de novo:

Our only inquiry is to determine whether the Secretary's findings of fact are supported by substantial evidence. Even if the court should be of the opinion that documentary evidence can be reinterpreted by us, here the evidence fails to support a determination that the claimant met the disability requirement prior to 1951.

The difference between Judge Pell's reasoning and that of the majority lies in their treatment of questions of inferences. The majority turned questions of inferences into questions of law, thereby placing them within the ambit of the court's proper scope of review.

Hassler v. Weinberger, another disability benefits case, was argued the same day as Stark before the same judges. In Hassler, plaintiff applied for benefits under the Act on the basis of physical and mental disability. Proceedings before the agency revealed that Hassler suffered from hypochondriacal symptoms and his claim was denied. With respect to the psychiatric evidence taken, the Appeals

113. Judge Stevens considered the rapidly deteriorating condition of the plaintiff; the strength of the uncontroverted medical evidence favorable to plaintiff; the disproportionate cost of further proceedings to the amount at stake; and the settled policy of construing the statute favorably to the claimant. Id. at 1101.
114. Id.
115. Id. at 1102-1103.
116. Davis, supra note 102, at 533. Although the test for review of inferences is reasonableness, not rightness, a court may always substitute judgment on what inference to draw if its chooses to turn the question of inference into a question of law, for courts often turn questions of fact into questions of law by creating law about them.
117. 502 F.2d 172 (7th Cir. 1974).
118. Circuit Judges Pell, Stevens, and Sprecher.
Council stated: "[T]he claimant's functional capabilities because of a nervous impairment are evaluated at only 15 percent disabling." The Council affirmed the hearing examiner's decision, which affirmation became the final decision of the Secretary. Plaintiff then sought review under section 205(g). Hassler argued that his mental impairments precluded him from engaging in any substantial gainful activities. The district court disagreed, and entered summary judgment for the Secretary, holding that the doctor's "determination that plaintiff had only a fifteen percent (15%) mental impairment constituted more than substantial evidence that the plaintiff did not have a mental impairment within the meaning of the Social Security Act." Plaintiff appealed, the sole issue being whether his mental impairments were so severe as to make him "disabled" within the meaning of the Act.

The Seventh Circuit rejected the Secretary's interpretation of the doctor's report, and held that he had erroneously equated the degree of mental impairment with the degree of functional disability. "The Secretary may not rely on a portion of an expert's report where a fair reading of the entire report indicates that the expert reached a conclusion contrary to that asserted by the Secretary." Since there was no substantial evidence to counter the doctor's prognosis of total disability, the Secretary's decision was reversed. Here, as in Stark, the court read the documentary evidence for itself and exercised its prerogative to draw its own inferences. Judge Pell, who had strongly dissented in Stark, not only joined the Stark majority but wrote the Hassler opinion. Judge Pell reversed for the plaintiff, but remanded to the district court for further proceedings since the "equitable considerations" found by Judge Stevens in Stark were seemingly absent in Hassler.

120. 42 U.S.C. § 423(d)(3) (1970) provides in pertinent part:
   [A] 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

121. 42 U.S.C. § 423(d)(1)(A) (1970) provides in pertinent part:
   The term 'disability' means inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . .
   Therefore, in order to qualify for disability benefits under the Act, a claimant must show, first, that he is suffering from a medically determinable physical or mental impairment, and, second, that, due to this impairment, he is unable "to engage in any substantial gainful activity."

122. 502 F.2d at 175. In the district court Hassler primarily relied on mental impairment.

123. Id. at 178.

124. See note 113 supra.
The Department of Housing and Urban Development (HUD) survived two challenges in the Seventh Circuit this past year. Both cases raised due process attacks against action taken by HUD in its capacity as the mortgage insurer for private low income housing projects.

*T.A. Moynihan Properties, Inc. v. Lancaster Village Corp.*,\(^{125}\) provides a focus for a due process attack on agency action. The plaintiff had entered into a property management contract for three years with Lancaster. HUD was the mortgage insurer for Lancaster and, as such, HUD and the mortgagee had the right to cancel the contract "with or without cause."\(^{126}\) A dispute arose between plaintiff and Lancaster which, to HUD, appeared irresolvable. On April 26, 1972, HUD, without assessing fault, notified plaintiff of cancellation effective May 31, 1974. Prior to the effective date informal meetings were held between HUD and plaintiff to discuss the cancellation. HUD reaffirmed its decision to cancel. Plaintiff filed suit, claiming violation of both substantive and procedural due process rights as to the manner and basis for the cancellation. The district court agreed and enjoined HUD from further action.

Though the contract provided for cancellation with or without cause, the Seventh Circuit concluded that a substantive due process standard was applicable in reviewing the cancellation. The court noted that HUD had both "a financial interest, in a proprietary sense, and a governmental interest, in terms of the public welfare, in successful operation of the housing project."\(^{127}\) Since there was evidence in the record to justify HUD's position that the dispute appeared to be irresolvable, the court agreed that HUD acted reasonably in order to insure success of the project.

The Seventh Circuit agreed with plaintiff that he had a protected property interest in the contract which gave rise to his procedural due process contention.\(^{128}\) Noting that plaintiff's property right entitled him to be protected from arbitrary action without a rational basis, the court concluded that "the minimum requirements are a written statement of the reasons for the proposed action and an opportunity to present material at least in writing, challenging the accuracy of supposed

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\(^{125}\) 496 F.2d 1114 (7th Cir. 1974).

\(^{126}\) Id. at 1117.

\(^{127}\) Id.

\(^{128}\) Id. at 1118. Note the court rejected HUD's argument that plaintiffs' agreement to cancellation "with or without cause" was a voluntary waiver of a hearing.
facts relied on and the rationality of the reasons stated." Though
the initial written notice to plaintiff of April 26, 1972, was deemed in-
adequate, the Seventh Circuit concluded that because of the subse-
quent meeting between HUD and plaintiff, as well as the district court's
hearings, that plaintiff, in fact, had sufficient notice of reasons for can-
cellation as well as an opportunity to rebut the basis for cancellation,
thus curing the defects in the original notice.

From HUD's standpoint, one can simply conclude that in owner-
management disputes the latter are obviously dispensable. From the
court's perspective, in the absence of allegations of racial, religious or
political discrimination, judicial intervention is unlikely beyond a nar-
row review of the commercial practicality of HUD action.

In South East Chicago Commission v. HUD, community resi-
dents sought to set aside the federal defendant's commitment for mort-
gage insurance and interest subsidization to a redeveloper for a low in-
come housing project in the Kenwood area of Chicago. Upon learning
of the HUD commitment, plaintiffs were concerned that federal subsi-
dization, which necessarily limited prospective tenancy to low income
persons, would bring a number of poor blacks into the Kenwood area,
upsetting its racial balance. It was felt that HUD had not given this
matter sufficient consideration. After HUD rejected their contentions,
plaintiffs filed suit claiming that the administrative findings were erro-
eneous and not in accordance with law, that plaintiffs were denied proce-
dural due process in that HUD's regional director was not an impartial
decision-maker and further that they were improperly denied cross-
examination of witnesses. The district court, upon a narrow review of the agency action, granted summary judgment for defendants.
The Seventh Circuit affirmed.

On appeal, plaintiff first attacked HUD's failure to apply its own
regulations, known as the Project Selection Criteria, in weighing
plaintiffs' objections to the federal commitment. These criteria, how-
ever, did not become effective until February 7, 1972. HUD, after
hearing plaintiffs' objections, reaffirmed its commitment on August 11,
1971 and construction was well under way at the time of filing of the

129. Id. The court is consistent in this approach. See, e.g., Frietag v. Carter, 489
F.2d 1377 (7th Cir. 1973).
130. 496 F.2d at 1118.
131. 488 F.2d 1119 (7th Cir. 1973).
132. Id. at 1121.
133. The district court's decision is reported at 343 F. Supp. 62 (N.D. Ill. 1972).
The redeveloper had erected the building prior to the court's decision and it was clear to the court that antecedent rights would be disturbed by a retroactive application of the criteria. The court also noted that the regulation on its face contemplated only prospective effect.

Plaintiffs next contended that the HUD commitment was illegal because of defendant's error of judgment "in weighing and analyzing the facts," and "from a misapprehension . . . of the governing legal standard." Specifically, plaintiffs claimed that federal defendants gave lip service to the national housing policy concern for integrated open housing, and further that they totally ignored the fact that public or federally assisted housing in the area was "substantially all black in occupancy." Plaintiffs thus concluded that HUD's concern for low and moderate income housing was too narrow and without regard for perpetuating and increasing racial segregation.

The Seventh Circuit stated that their review of the administrative action taken was necessarily narrow and confined to a determination of whether the administrative decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Review of the record did not show clear error: "That [HUD] efforts bore some risk of failure is not, we think, reason enough to overturn them as a product of a clear error of judgment." Actually, upon hearing of the plaintiffs' objections, HUD did take some measures in an attempt to prevent racial concentration. However, as plaintiffs contended, these same measures had been demonstrated to have been ineffective in prior projects. Thus by the time the Seventh Circuit was

135. 488 F.2d at 1121, 1126. The opinion does not indicate what, if any, construction or development had occurred at the time HUD entertained plaintiffs' objections to the commitment.

136. Plaintiffs urged that the redeveloper "took his chances by electing to proceed with construction in the face of their appeal of the HUD commitment to the district court and their filing of a lis pendens notice prior to execution of the contracts at issue. 488 F.2d at 1126, 1127. The Seventh Circuit stated, however, that preservation of the status quo pending final judgment is the function of a preliminary injunction. "Having failed to obtain this, the plaintiffs cannot complain of activity by the (redeveloper) after this suit was filed." Id.

137. Id. at 1127 n.9.

138. Id. at 1127.

139. Id. at 1128, 1130.

140. Id.


142. 488 F.2d at 1131.
called upon to decide the question, the court was presented with a completed, and presumably occupied, structure.

Plaintiffs finally contended that they were denied an impartial decision-maker in their appearance before HUD and were neither allowed cross-examination of witnesses nor sufficient access to information. Recognizing the inherent flexibility of due process requirements, the court first observed: "It is curious, indeed, to find the plaintiffs arguing for advanced procedural protections in a context where their right even to a hearing is open to question." Treating the question of cross-examination, the court appeared to characterize much of HUD's action as involving "legislative" rather than "adjudicative" facts, thus requiring "little need for cross examination." The court also could find nothing in the record indicating that HUD was partial to the redeveloper.

However, HUD and the court did not dispute that plaintiffs' concerns were legitimate and should be taken into account. If judicial review is to be meaningful, it must be based on a sufficiently complete administrative record. Therefore, it would seem that some opportunity must be afforded, at the agency level, to properly put the question in issue. It appears that the court went to great lengths in order to affirm. One cannot help but ponder the result if the court had not been presented with a completed housing project.

**Commerce**

In *Borden v. Federal Trade Commission*, FTC notified Borden that it was investigating whether Borden's milk sales at substantially low prices, or at prices below cost were for the purpose of eliminating or lessening competition, thus constituting illegal price discrimination. Pursuant to FTC's requests, Borden furnished information and documentary evidence regarding the sales. However, FTC subsequently issued a complaint charging Borden with effecting illegal price stabilization. Borden requested dismissal of the complaint for violation of FTC Rule 2.6, which provides:

143. *Id.* at 1132.
144. The denial of cross-examination arose in the context of whether measures taken by HUD to prevent perpetuation of racial segregation were adequate to that end. The court indicated that this was an "issue involving expert opinion and forecasts which cannot be decisively resolved by testimony." *Id.*, citing American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir. 1966).
145. 495 F.2d 785 (7th Cir. 1974).
146. 16 C.F.R. § 2.6 (1974).
Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised with respect to the purpose and scope of the investigation.

Borden claimed that it had not been given proper notice of the scope of the investigation and had been denied the opportunity to submit exculpatory materials which might have aborted the issuance of the administrative complaint.

The administrative law judge refused to dismiss. Borden then applied to the district court for a preliminary injunction. The district court denied injunctive relief and dismissed Borden's complaint for failure to exhaust administrative remedies. The Seventh Circuit affirmed, holding that the issue of the procedural propriety of steps taken during the investigatory stage leading to an administrative complaint could be raised on appeal from FTC's final order.

An important question is left unanswered by the opinion. Assuming that FTC had violated Rule 2.6, does such a violation necessarily require termination of the FTC proceedings? The Administrative Procedure Act requires that the reviewing court take notice of the rule of prejudicial error. Since Borden's complaint was directed at improper notice of the scope of the investigation, which denied it an opportunity to present exculpatory materials, it would still have an opportunity at the "complaint" stage to establish exculpation. Thus, the cost to Borden would appear to be substantially the same whether or not the rule was violated.

Protection of the consumer prevailed over a seemingly harmless advertising technique in Spiegel v. Federal Trade Commission. The FTC issued an administrative complaint charging Spiegel with using...
“false, misleading and deceptive statements” in its circulars and catalogs which had the “capacity and tendency” to mislead the public into purchasing large quantities of merchandise on a “free trial” or “percent off” basis. The gravamen of the FTC’s charge was not a failure to disclose credit approval requirements, but rather Spiegel’s “inconspicuous disclosure” that the offers were subject to credit approval. Credit approval requirements were stated on the catalogue order forms. Spiegel answered that its advertising followed the custom and usage of the trade and denied deception and injury to customers or competition. Following an evidentiary hearing, FTC issued a cease and desist order which Spiegel sought to have set aside by the Seventh Circuit.¹⁵¹

Spiegel first contended that the order be set aside as too trivial for FTC attention because there was no proof of injury to the public or to Spiegel’s competitors. The majority stressed in a moral tone the “primacy of truthfulness in advertising” noting that proof of actual injury was unnecessary to support a FTC cease and desist order.¹⁵² Judge Pell, in dissent, observed that the record revealed a de minimis violation, if any, and would have set aside the order because of the “utter triviality”¹⁵³ of the matter, stating:

> [E]ven though there be no proof of actual deception required, there must be a showing that the acts and practices sought to be proscribed are detrimental to the public interest in order to satisfy the statutory requirement that the proceeding be in the public interest.¹⁵⁴

Judge Pell found that the use of an “eyecatcher” was not detrimental to the public interest so long as the rest of the advertising material put the eyecatcher in proper perspective.

Spiegel then argued that FTC’s order was not supported by the evidence since FTC did not find that Spiegel stated the offers were unconditional. The majority examined the circulars and catalogs in the record and held that the evidence gave substantial support to FTC’s finding of a “capacity and tendency” to mislead the public.¹⁵⁵ Judge

¹⁵² 494 F.2d at 62.
¹⁵³ Id. at 65. “The FTC conceded the correctness of the general rule that detriment to the public interest must be shown. Here, by issuing its order, the FTC has in effect found there was detriment to the public interest in the situation of deadbeats being deceived into thinking that they are going to receive a free trial of, or a discount on, merchandise which they could not realistically purchase on either a cash or a deferred basis. It is difficult to imagine a less egregious affront to the public interest.” Id.
¹⁵⁴ Id.
¹⁵⁵ Id. at 63.
Pell agreed with Spiegel and concluded that in varying language, the order form made it clear that all orders were subject to credit acceptance by Spiegel. Judge Pell reasoned that since there was neither disclosure of an economic loss of any consequence nor consumers' testimony indicating a misunderstanding of Spiegel's credit disclosures, the entry of the order was unwarranted on the record. The majority, however, stated that "a good society depends upon promises being kept", and directed enforcement of FTC's order.

Since advertising catalogues and circulars are periodically revised, the additional cost, if any, to Spiegel of complying with the FTC's order would appear to be minimal. However, the record appears to have been devoid of any evidence suggesting a misleading effect on the public. Additionally, according to Spiegel, competitors followed similar practices. Complete candor in public offerings is obviously desirable, and policy-making is the province of the FTC. Viewed in this manner, the majority opinion properly declines to substitute its judgment for that of the agency. It remains to be seen whether such deference will likewise be accorded when a more substantive challenge is before the court.

LABOR

In Chicago, Rock Island and Pacific R.R. Co. v. Wells, the railroad sought review of an order of the Railroad Adjustment Board. The Board had denied, as untimely, the railroad's request for a third extension of time to respond to Well's claim of improper discharge. The request had been sent by mail. The postage meter mark was timely, but the post mark was one day late. Otherwise the extension would have been automatically granted under Board procedures. Accordingly, the Board defaulted the railroad, and without a hearing, barred it from further participation in the proceedings. However, the Board did not pass on the merits of the employee's claim until three and one-half years later, at which time the railroad sought judicial review as an aggrieved person under section 153 First (q) of the Railway Labor Act.

156. 498 F.2d 913 (7th Cir. 1974).
157. Id. at 914.
158. On January 8, 1971, the railroad filed suit to enjoin the Board from conducting further proceedings without affording the railroad an opportunity to defend. However, on October 7, 1971, in a memorandum opinion the district court dismissed the complaint as premature, but without prejudice to renewal should the Board continue to deny the railroad an opportunity to defend.
159. 45 U.S.C. § 153 First (q) (1970) provided:
After hearing evidence on the Board's procedures for granting extensions and on the railroad's efforts to make a timely request for extension, the district court ordered the Board to allow the railroad to defend at a new hearing. The Board appealed, claiming that under section 153 First (q), the "finding of an untimely request" was conclusive and thus non-reviewable. The court flatly rejected this assertion because of the "constitutional dimensions" of the procedural defect, concluding that the Board had violated the employer's fifth amendment rights:

"To find Plaintiff in default without giving it an opportunity to establish that the [request] was timely, or if not, whether there were sufficient extenuating circumstances to warrant granting the extension, is at best harsh action and at worst inexcusable."

The court's conclusion rests on findings by the district court that, in addition to the three automatic extensions, it was not unusual for the Board to grant any number of discretionary extensions, that the record was totally devoid of any indication of prejudice to the Board's consideration of the merits by the "untimely" request, and that the Board did not give the railroad an opportunity to explain the lateness of its request. Certainly, the court's rejection of the Board's "finding"

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in section 1291 and 1254 of Title 28.

160. The court did not refer to Citizens to Preserve Overton Park where the Supreme Court emphasized that non-reviewability is to be narrowly read if at all unless there is clear and convincing legislative intent to the contrary.
161. 498 F.2d at 917.
162. Wells' claim had spawned prior litigation. See 498 F.2d at 913 n.1. In one such opinion, disposing of the railroad's mandamus action seeking the convening of a special panel to hear Wells' claim, the court had stated: "(T)he first Division should make every effort to dispose of this over stale submission forthwith." 435 F.2d 339, 342 (7th Cir. 1970), cert. denied, 402 U.S. 944 (1971).
is correct despite the "conclusive" effect given to Board findings under section 153 First (q). At the time the railroad mailed its request, the Board had no official policy on timeliness of mailed requests. Thus, the denial was not a factual finding, but rather an exercise of discretion. Moreover, findings are generally based on evidence, and the Board heard no evidence.

(Local 134, IBEW v. NLRB,\textsuperscript{163} raises the issue of what is an "impartial hearing officer" under the Administrative Procedure Act (APA). The union appealed from an order of the NLRB finding the union to have committed an unfair labor practice in a jurisdictional dispute. On the merits of the finding the Seventh Circuit stated: "We certainly cannot say that the Board's decision was not supported by the controlling facts of the case."\textsuperscript{164} However, the union contended that the Board violated section 5(d) of the APA\textsuperscript{165} because the hearing officer officer in the section 10(k) proceeding\textsuperscript{166} subsequently served in a prosecutorial capacity as counsel at the section 8 Unfair Labor Practice Hearing.\textsuperscript{167}

Section 5(d) of the APA is clearly aimed at eliminating the practice of combining prosecutorial and judicial functions in one person.

\textsuperscript{163} 486 F.2d 863 (7th Cir. 1973).
\textsuperscript{164} Id. at 866.
\textsuperscript{165} § 5(d), 5 U.S.C. § 554(d) (1970), provides in part:

The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

*(1)* consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

*(2)* be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

\textsuperscript{166} § 10(K), 29 U.S.C. § 160(K) (1970), provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

However, the Board first contended that section 5 was not violated because the 10(k) hearing "was without binding effect on anyone." Yet, the court noted that the hearing officer's rulings at the 10(k) hearing make up the basis for the complaint and evidence subsequently heard at the unfair labor practice hearing. The hearing officer's duties included hearing the evidence adduced at the 10(k) hearing and "subsequently urging and relying upon it as prosecutorial evidence" if the dispute was not settled: "We think that the knowledge on the part of the presiding officer that he will subsequently advocate a position based upon his own evidentiary ruling at the § 10(k) hearing could very well influence his decisions at that hearing." Accordingly, despite the Board's argument that the hearing officer completes his "judicial" function prior to prosecution, the court concluded: "This commingling of functions is plainly inconsistent with both the spirit and letter of the Act [APA], and, we think, incompatible with the accepted norms for the proper administration of justice. An order of the Board thus tainted should not be enforced."

The opinion is interesting for a number of reasons. The court did agree that an unfair labor practice had been committed by the union, yet without any claim or showing of actual prejudice from the "commingling" the court denied enforcement. Furthermore, there is no indication in the opinion that the union raised the point in its proceedings before the Board. Nor was there any indication that "evidentiary" rulings at the 10(k) hearing precluded the union from re-raising disputed points at the section 8 adversary hearing. Apparently presuming prejudice, the court was concerned with the psychological improbability of impartiality in view of the hearing officer's commingled functions.

Although the parties did not contest the applicability of section 5(d) of the APA, the court resolved that it did apply. However, section 5(d) prohibits "commingling" of investigative or prosecutorial functions with the decision-making function. Certainly it is not clear from the opinion that the 10(k) hearing officer's subsequent function

168. 486 F.2d at 866.
169. Id. at 867-68. The applicability of § 5(d) of the APA to 10(K) hearings was not argued; however, the court resolved that it did apply. Id. at 867.
170. Id. at 868.
171. 5 U.S.C.A. § 706 (1970) does provide that "due account shall be taken of the rule of prejudicial error." Perhaps the court felt that this prejudice was to be presumed.
as counsel at an adversary hearing constitutes the prohibited participation in the decision making process since it is the Board who makes the final decision. In fact, section 5(d) seems, on its face, to permit the 10(k) officer to further participate as "counsel in public proceedings." Accordingly, it remains to be seen what impact this case will have on those agencies subject to section 5(d) of the APA.

TRANSPORTATION

Though the Interstate Commerce Commission (ICC) generally does not have authority to order the payment of refunds under the Motor Carrier Act, the Seventh Circuit upheld such an order in Aluminum Company of America v. Admiral Merchants Motor Freight.175 Defendant motor carriers had filed a proposed rate increase with the ICC.176 ICC permitted an interim increase, but set the matter for an evidentiary hearing to determine the propriety of the increased rates. Two government agencies and the carriers requested a continuance of the evidence filing date and the hearing date claiming that the evidence could not be prepared in time. ICC granted the continuance on the condition that the carriers refund the interim rate increase to the shippers if the ICC did not ultimately approve the increased rates. The carriers protested the conditional continuance but then withdrew their objection. Thereafter, ICC denied permanent rate increases and ordered that refunds be paid to the shippers. The carriers challenged the validity of ICC's refund order, but it was upheld by a three-judge court in Colorado and subsequently upheld by the United States Supreme Court on appeal.177

Plaintiff-shipper then sought enforcement of the refund order. The district court found defendant motor carriers to be in privity with the Colorado plaintiff carriers and held them estopped from challenging the validity of the refund order. Summary judgment was entered for the shipper,178 and the carriers appealed.

The Seventh Circuit, affirming the district court's findings of privi-

174. See note 168 supra.
176. Motor carriers file proposed rates with the ICC. These rates go into effect unless the ICC suspends, cancels or otherwise prevents their becoming effective. The Commission may also suspend the increase pending a hearing. See 49 U.S.C. § 316(g) (1938).
ity and estoppel, considered the issue of whether ICC's refund order was enforceable as an order to pay money within section 16(2) of the Interstate Commerce Act. The district court had held that section 205(g) of Part II of the Act incorporated section 16(2) of Part I of the Act thereby providing plaintiff with a statutory remedy for enforcement of the refund order. Defendants argued that this "incorporation" had no basis in law, emphasizing the complete lack of any evidence indicating congressional intent for creation of such a remedy and the fact that not a single case existed in which section 205(g) was utilized to create a cause of action by incorporation of section 16. The court noted:

We are mindful of the fact that the Commission, 'as a generally accepted procedure,' does not have statutory authority to order the payment of refunds under the Motor Carrier Act and that the refund order in question was only justified on the basis of the Commission's procedural powers, coupled with the equitable estoppel and waiver conditions which were found to exist by the three-judge panel.

But it could see no reason why ICC's order should not be enforced. The Seventh Circuit held that, having accepted the benefits afforded by the continuance of the rate hearing, the defendants were now required to provide the agreed-upon exchange, i.e., the rate refunds.

In a related case, Container Corporation of America v. Admiral Merchants Motor Freight, the defendant motor carriers asserted that the statute of limitations had run on enforcement of the ICC refund orders found valid in Alcoa. The district court dismissed the

179. 49 U.S.C. § 16(2) (1970) provides in part:
If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises . . . .
See 321 F. Supp. at 356 n.8, 357.

180. Section 205(g), 49 U.S.C. § 305(g) (1970), provides in part:
Any final order made under this part [§301-305, 306-327 of this title] shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I.

181. 337 F. Supp. at 681.
182. 486 F.2d at 721.
183. 486 F.2d at 722.
184. Id.
shippers' complaint holding that the action was barred by the one-year limitations provision of the Act.186

The Seventh Circuit found that the shippers had filed their complaint well before judicial review of ICC's order had been completed, but more than one calendar year after ICC had entered its order directing the refund. The court held that the proper date for purposes of limitations was the date on which the litigation prosecuted by the carriers to obtain judicial review of ICC's order was completed. That litigation was, in effect, a continuation of the carriers' efforts to persuade ICC itself to modify or set aside its original refund order.187 The court reasoned that:

It would be anomalous to hold that a Commission order is final before judicial review is completed if, but only if, review leaves the Commission's order undisturbed.

No statutory policy would be served by requiring shippers to incur the expense and inconvenience of filing protective suits prior to the termination of the judicial proceedings initiated by the carriers to review the legality of the Commission's order.188

As such, the court deemed the action to have been filed even before the limitations period began to run. Accordingly, the order dismissing the complaint was reversed, and the case was remanded for further proceedings consistent with Alcoa.

Because the carriers were estopped from challenging the validity of the refund order, the Seventh Circuit did not attempt to decide whether the ICC could order motor carriers to pay refunds based on a subsequent determination of unreasonableness. Rather, the court referred to the estoppel as being coupled with the procedural powers of the Commission. Certainly the ICC had the power to suspend the rate increase pending investigation and hearing.189 The Colorado three-judge court recognized that the order in question was not unlike the exercise of the suspension power which the Commission has under 49 U.S.C. § 316(g).190 One can only wonder why the ICC chose not to exercise this power. It is also undetermined whether the carriers could

186. 49 U.S.C. § 16(3)(f) (1970). Section 16(3)(f) provides:
A complaint for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.
187. 489 F.2d at 828.
188. Id.
190. 321 F. Supp. at 359,
have taken the conditional continuance order directly to court rather than await completion of the ICC proceedings.

Voyager 1000 v. Civil Aeronautics Board191 involved CAB regulation of an "air travel club"192 which consisted of an estimated 43,000 members, whose sole affinity appeared to be that of travel. Voyager employed over eighty individuals, operated seven aircraft, and maintained extensive flight schedules. Mass media campaigns were undertaken to increase memberships with emphasis on the immediacy of eligibility for flight discounts solely upon payment of dues. CAB determined that the relevant characteristics of the club's operation brought it within the definition of a common carrier, thereby requiring CAB issuance of a certificate of convenience and necessity. CAB entered an order directing Voyager to cease and desist from engaging in air transportation in violation of section 401(a) of the Federal Aviation Act.193 On review," the Seventh Circuit upheld the CAB's order,195 finding no distinction between the individual ticket service and the group service offered by Voyager.

In essence, the court found the CAB's definition of common carriage to be reasonable. The opinion does not indicate that the CAB had found Voyager's operations to actually be injurious to the commercial airlines; rather such appears to be presumed. Judge Sprecher noted: "The economic stability of commercial airlines is to be preserved not for the benefit of the airlines per se but only insofar as that stability is necessary to the maintenance of an adequate national and interna-

191. 489 F.2d 792 (7th Cir. 1973).
192. 14 C.F.R. § 123.1(b) (1974) provides:
   An air travel club is, by definition, a 'person who engages in the carriage by airplanes of persons who are required to qualify for that carriage by payment of an assessment, dues, membership fee, or other similar type remittance.'
193. § 401(a), 49 U.S.C. § 1371(a) (1970), provides in part:
   Certificate of public convenience and necessity.—(a) Certificate required.—No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.
194. 49 U.S.C. § 1486(a) (1970) provides in part:
   Orders of Board and Administrator subject to review.—Any order, affirmative or negative, issued by the Board or Administrator under this Act shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order.
195. 49 U.S.C. § 1486(e) (1970), which provides:
   (e) Findings of fact conclusive.—The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.
tional transportation system.” However, in a brief concurring opinion, Judge Pell observed:

"It is somewhat ironical, and perhaps to be deplored, that in a society which generally encourages competitive free enterprise a service is to be stifled which a substantial segment of citizenry of the Midwest portion of the country found to be highly desirable in making available travel by air which might not otherwise have been enjoyed by them, and which travel has been conducted in full compliance with governmental safety requirements."

Since the CAB is required to foster sound economic conditions, promote efficient service at reasonable rates, and prevent destructive competitive practices in the field of air transportation, it would seem that the court’s acceptance of the CAB’s evaluation is correct. However, perhaps competition from a Voyager type operation would have benefited the individual ticket market.

The Seventh Circuit overturned another Department of Transportation safety regulation in *Rex Chainbelt v. Volpe.* The administrator of the National Highway Traffic Safety Administration (NHTSA) promulgated regulations requiring “final-stage manufacturers” to (1) complete truck assemblies so that the trucks would conform to all applicable federal safety standards and (2) certify that the entire vehicle conformed to applicable federal standards. NHTSA rejected Rex’s objections to these regulations. Thereafter, Rex, a final-stage manufacturer, filed a declaratory judgment action challenging the requirement that it certify the entire vehicle on grounds that NHTSA had either exceeded its statutory power or had enacted unreasonable regulations that would impose liability upon Rex under a warranty theory for defects in equipment which it had not installed or affected. The district court ruled against Rex on both grounds and entered summary judgment for NHTSA.

The Seventh Circuit found that NHTSA had the power to impose additional certification requirements, but that the particular certifica-

196. 489 F.2d at 799 n.13.
197. Id. at 802.
198. *See H & H Tire Co. v. Department of Transportation, 471 F.2d 350 (7th Cir. 1972), involving “retread” tire regulations. See also the comment thereon in 50 KENT L. REV. 214 (1973), in which H & H Tire was referred to as a case of “excessive judicial review”.*
199. 486 F.2d 757 (7th Cir. 1973).
200. 49 C.F.R. § 568.6(a), (b) (1974).
202. 486 F.2d at 759.
tion regulations in issue were invalid as clearly contravening the lan-
guage of the Act. The court reasoned:

[T]he regulations currently in effect relieve incomplete vehicle
manufacturers who sell their trucks to Rex customers of the duty to
certify their vehicles and to assume any legal liabilities that may be
imposed because of this certification. Congress has mandated that
the incomplete vehicle manufacturer conform to all applicable fed-
eral safety standards before selling his vehicles. §1397(a). We
believe that Congress intended certification to be a necessary ad-
 juxtap to the enforcement of this requirement.

Therefore, to the extent that the regulations require Rex to
make the sole certification of compliance of the entire vehicle and
contravene the clear language of §1403, they must be declared in-
valid.203

Notably, the court's holding did not decide the legal implications
raised by Rex of certifying a vehicle under either a warranty or negli-
gent misrepresentation theory.204 The court reasoned that NHSTA's
regulation relieved incomplete vehicle manufacturers of their duty to
certify and of any legal liabilities that might be imposed. However,
the court did recognize that the challenged regulations required incom-
plete vehicle manufacturers to supply Rex with a listing of all safety
standards which applied to equipment installed by them, including a
statement of whether such equipment conformed to the applicable
standards.205 The question never answered by the court was whether
such duties imposed on the incomplete vehicle manufacturers amount-
ed to the required certification. Moreover, the court's concern for
Rex's burden, without deciding liability implications, seems to be no
more than that Rex would have to take the initial brunt of a lawsuit.
The opinion does not mention whether Rex could, in turn, join the in-
complete vehicle manufacturer at least as a third party defendant. An
injured plaintiff would probably join anyone who participated in the
manufacturing process. It would thus appear that the court has substi-
tuted its judgment for that of the agency.

A different judicial panel, in an opinion by Senior Judge Kiley,

The Secretary is authorized to issue, amend, and revoke such rules as he
deems necessary to carry out this subchapter.
Such a broad grant of authority enabling the Secretary to impose all requirements which
he deems “necessary” to facilitate his enforcement functions is indeed quite extensive.
Regulations promulgated pursuant to this delegation of power are to be upheld by a re-
viewing court if they conform to the purposes and policies of the Act and if they do
not contravene any of its terms.
204. 486 F.2d at 762 n.7.
205. Id. at 760 n.2.
upheld a Department of Labor safety regulation to which Judge Pell dissented. In *National Roofing Contractors Association v. Brennan*, the Secretary of Labor, pursuant to the Occupational Safety and Health Act of 1970 (OSHA) promulgated a regulation to protect workers on sloping roofs of buildings. The regulation provided that catch platforms be installed for all roofing work done more than sixteen feet from the ground, thus departing from the twenty foot standard for industry in general. Petitioners, an association of roofing subcontractors and individual roofers, sought to have the Seventh Circuit set aside the regulation on several grounds.

Petitioners argued that since only general contractors sat on the advisory committee which promulgated the new standard, their interests were not represented in the rulemaking proceedings. The majority found no prejudicial error, if any error at all, viewing the interests of petitioners and general contractors as "plainly the same." Judge Pell, in vigorous dissent, felt petitioners were prejudiced since "on this particular standard the roofers were not a subgroup but instead were the only affected employers." Yet it was undisputed that the advisory committee did consider petitioner's objections before making its final recommendation.

Petitioners next claimed that there was not substantial evidence in the record viewed as a whole justifying departure from the old twenty foot standard, and that therefore, the agency's action was capricious, arbitrary, and unreasonable. The majority held that it was clearly within the Secretary's discretion to promulgate a safer

206. 495 F.2d 1294 (7th Cir. 1974).
208. 29 C.F.R. § 1926 (1974), § 451(u)(3). The safety standard provides that:
A catch platform shall be installed below the working area of roofs more than 16 feet from the ground to eaves with a slope greater than 4 inches in 12 inches without a parapet. In width, the platform shall extend 2 feet beyond the protection of the eaves and shall be provided with a guardrail, midrail, and toeboard. This provision shall not apply where employees engaged in work upon such roofs are protected by a safety belt attached to a lifeline.
209. 29 U.S.C. § 655(f) (1970) provides in pertinent part:
[Al]ny person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard.
210. 495 F.2d at 1300.
211. 29 U.S.C. § 655(f) (1970) provides in pertinent part:
The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.
212. 29 U.S.C. § 655(a) (1970) provides in pertinent part:
[T]he Secretary shall, as soon as practicable during the period beginning
standard and that his determination was supported by the record. Judge Pell questioned the benefits of the new standard based on his examination of the record. Since cost factors were required to be considered, Judge Pell concluded that the additional cost to petitioners, and, ultimately, to consumers, outweighed the additional "protection" afforded workers.

Petitioners' final argument challenged the new standard as being impermissibly vague in view of OSHA criminal sanctions and claimed that it denied them equal protection of the law. The majority found no merit in either contention, and agreed with the Secretary that all persons doing the same kind of work were subject to the sixteen foot standard, even though only the roofing construction industry would be presently affected by the remedial standard. Accordingly, the petition was denied.

Judge Pell again strongly dissented, particularly to the majority's dismissal of petitioner's vagueness contentions. During the agency hearings, petitioners had noted the substantial costs from the proposed regulation. The record indicated that the need for a "catch platform" might be obviated if the roofer constructed a temporary parapet. Whether this less costly alternative would suffice appeared to depend on site examinations by OSHA compliance officers. Judge Pell felt that in view of the drastic enforcement potential of OSHA whereby heavy fines could be summarily imposed and criminal penalties sought, the rule was impermissibly vague.

This case requires further examination. Judge Pell's dissent is particularly persuasive and draws special attention to the question of the proper composition of OSHA advisory committees.

GENERAL OBSERVATIONS

While it is difficult and, perhaps, even inappropriate to attempt to draw any conclusions from such a broad spectrum of cases, a few observations can be made. The reported decisions exhibit a definite tendency to expand judicial review to encompass most, if not all, administrative action. Contentions of non-reviewability were consistently

with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, . . . unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees.

213. See note 208 supra.
rejected. In fact, from the opinions, it is difficult to see the court up-
holding nonreviewability claims in the absence of a clear legislative
statement to that effect.

The Seventh Circuit was also generally consistent in its insistence
that the administrative process develop a complete record upon which
the courts could perform their review function. In instances of review-
ing quasi-legislative agency action, the court generally insisted that the
record reveal the basis upon which such a decision was made. More-
over, the opinions indicate little judicial reluctance to review the pro-
cedures utilized by the agency in arriving at its decision. In sum, it
would appear to be a fair characterization, as partially evidenced by
the number of reversals, that the Seventh Circuit tends to be aggressive
in its review of administrative action.