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Administrative Law

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SURVEY ARTICLES

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This survey of Eleventh Circuit administrative law decisions[1] covers the law applicable to the administrative agencies, rather than the law applied by those agencies. The substantive law administered by the agencies is beyond the scope of this survey. The surveyed cases may be broken down into two major categories: decisions relating to administrative decisionmaking and decisions concerning judicial review of administrative actions.

I. Administrative Decisionmaking

A. Authority to Act

Administrative agencies are creatures of the legislature, and exercise only the authority that has been delegated to them. Since the half-century old Supreme Court decisions striking down portions of the New Deal

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1. This Article surveys decisions rendered by the Eleventh Circuit for December 1981 through November 1983, including former Fifth Circuit cases decided by Eleventh Circuit panels.

program on delegation grounds, challenges to the constitutional validity of delegation seldom have been successful.[2] The Eleventh Circuit Court of Appeals, in *United States v. Lippner*,[3] raised the issue of the validity of a subsequent delegation of authority. This sub-delegation issue[4] arose in an appeal from a conviction for conspiracy to possess a controlled substance with intent to distribute. Methaqualone had been classified as a controlled substance by the Drug Enforcement Agency, even though the authority to schedule controlled substances had been delegated by Congress to the Attorney General.[5] At issue was not whether further delegation of the Attorney General's authority was permitted, but rather whether the sub-delegation had been carried out in a Reorganization Plan, and thus was arguably beyond the scope of what could be legitimately accomplished in such a plan.[6] The Eleventh Circuit was able to avoid the issue of whether the sub-delegation would have been proper if it had occurred in a Reorganization Plan[7] by finding that the Attorney General actually effected the delegation by a separate order "within the scope of permissible delegation set by Congress."[8] The court properly displayed a skeptical attitude toward the delegation challenge presented in *Lippner*. The same efficiency and expertise rationales that support delegation of authority from Congress to administrative bodies can be applied to delegation from a Cabinet-level officer—the delegatee—to the agency—the sub-delegatee—with line responsibility for the particular problem. Putting roadblocks in the way of such sub-delegation, or upholding peripheral challenges such as those that occurred in *Lippner*, would introduce an undesirable element of delay, uncertainty, and excessive formality in the transfer of authority to the administrative level where it can most effectively be exercised.

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2. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). There are rumblings in recent Supreme Court opinions suggesting a renewed interest in the use of nondelegation principles to invalidate agency action. *See generally* Schwartz, *Some Recent Administrative Law Trends: Delegations and Judicial Review*, 1982 WIS. L. REV. 208, 210-14.

3. 676 F.2d 456 (11th Cir. 1982).

4. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3:16-:18 (2d ed. 1978).

5. 21 U.S.C. § 811 (1976).

6. 676 F.2d at 460-61.

7. Apparently, language in a Fifth Circuit opinion was responsible for the impression that the Drug Enforcement Administration received its classification authority from the Reorganization Plan. *See* United States v. Gordon, 580 F.2d 827, 838 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978). The Eleventh Circuit Court of Appeals explained this language in *Lippner*, 676 F.2d at 460 n.6.

8. 676 F.2d at 461.

B. Choice of Rulemaking or Adjudication

One of the principal advantages of delegating problem-solving authority to an administrative agency is the agency's ability to proceed by generalized, prospective rulemaking rather than case-by-case adjudication. When an agency possesses both rulemaking and adjudicatory power, a line of United States Supreme Court cases supports the proposition that the choice of which power to exercise is within the informed discretion of the agency.[9] The propriety of an agency's exercise of that discretion was questioned in litigation challenging Social Security Administration rules used in making disability benefit determinations.[10] The court's initial consideration of the issue in *Broz v. Schweiker*[11] resulted in a judgment that was vacated by the United States Supreme Court.[12] On remand, the court of appeals essentially adhered to its earlier decision.[13] The regulations that were being challenged required an agency to decide the issue of whether the disability claimant was capable of other substantial and gainful work in the national economy. A negative conclusion was required for an award of benefits.[14] The grid factors employed in the regulations included the claimant's age, education, and work experience characteristics.[15] In its 1982 decision, the Eleventh Circuit invalidated the application of the regulations insofar as they deprived the claimant of an individual hearing on the question of the effect of age on the ability to adapt to a new job.[16] Conclusive determination of ability to adapt based on age can thus be viewed as an abuse of the agency's discretion to choose between rulemaking and adjudication. The effect of age on the ability to adapt "is decidedly an adjudicative factor and therefore must be given individual consideration through adjudication rather than legislative resolution through rulemaking."[17] At roughly the same time as the Eleventh

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9. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); Morton v. Ruiz, 415 U.S. 199 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); SEC v. Chenery Corp., 332 U.S. 194 (1947). *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW §§ 4.15-.16 (2d ed. 1984); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

10. Broz v. Schweiker, 677 F.2d 1351 (11th Cir. 1982), *vacated sub nom.* Heckler v. Broz, 103 S. Ct. 2421 (1983), *on remand* Broz v. Heckler, 711 F.2d 957 (11th Cir. 1983). The rules at issue were the Medical-Vocational Guidelines, 20 C.F.R. § 404.1599, app. 2 at 313 (1983). The rules are known generally as 'grid regulations.' 677 F.2d at 1354.

11. 677 F.2d 1351 (11th Cir. 1982).

12. Heckler v. Broz, 103 S. Ct. 2421 (1983), remanded for reconsideration in light of Heckler v. Campbell, 103 S. Ct. 1952 (1983).

13. Broz v. Heckler, 711 F.2d 957 (11th Cir. 1983).

14. *See* 42 U.S.C. § 423(d)(2)(A) (1976).

15. 20 C.F.R. at § 404.1599, app. 2 at 313 (1983).

16. 677 F.2d at 1355.

17. *Id.* at 1360.

Circuit issued its relatively narrow holding in *Broz*, the Court of Appeals for the Second Circuit issued a more sweeping invalidation of the use of the grid regulations.[18] The Supreme Court, however, reversed the Second Circuit's decision.[19] The Court subsequently vacated the Eleventh Circuit judgment for reconsideration in light of its decision upholding the regulations,[20] even though the Court had noted that *Broz* presented a different issue.[21] The Eleventh Circuit then reaffirmed its earlier holding regarding the validity of the regulations.[22]

The Eleventh Circuit's decisions in *Broz* attempted to delineate the range of decisionmaking that can be handled on a general rather than a specific basis. The key to the validity of an agency's choice between rulemaking and adjudication is the distinction between legislative facts, which are properly determined in a rulemaking proceeding, and adjudicative facts, which must be determined only after an opportunity for an individual hearing.[23] The court admitted that the distinction between legislative facts and adjudicative facts may not always be an easy one to draw.[24] Nevertheless, the court properly undertook a functional review of the agency procedure, deciding what type of fact the agency was finding, and then requiring the agency to employ the kind of proceeding that was appropriate for that type of fact.

The converse of the issue in *Broz* was before the court in *McHenry v. Bond*.[25] Whereas *Broz* concerned an agency's attempt to determine adjudicative facts in a rulemaking proceeding, *McHenry* raised the issue of whether an agency could set standards and policies in an adjudicative proceeding. Subject to limitations requiring an explanation of departures from prior decisions,[26] the practice obtained at least tacit approval from the Eleventh Circuit. The *McHenry* decision may appear to undercut the distinction carefully constructed in *Broz*. If adjudicative facts are inappropriately determined in a rulemaking proceeding, standards and policies arguably would be most appropriately set in rulemaking proceedings. In that type of proceeding the agency would have the fullest opportunity

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18. Campbell v. Secretary of the Dep't of Health & Human Servs., 665 F.2d 48 (2d Cir. 1981), *rev'd*, 103 S. Ct. 1952 (1983).

19. Heckler v. Campbell, 103 S. Ct. 1952 (1983).

20. Heckler v. Broz, 103 S. Ct. 2421 (1983).

21. Heckler v. Campbell, 103 S. Ct. at 1956 n.8.

22. Broz v. Heckler, 711 F.2d 957, 959 (11th Cir. 1983).

23. 677 F.2d at 1356-58. "Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent . . . . Legislative facts . . . are the general facts which help the tribunal decide questions of law and policy and discretion." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 12:3, at 413 (2d ed. 1979).

24. 677 F.2d at 1358.

25. 668 F.2d 1185 (11th Cir. 1982).

26. *See infra* text accompanying notes 83-106.

to explore the implications of the policy options open to it, to obtain the benefit of broader participation by interested and affected parties, and to provide more widespread notice of its decision.[27]

The court's failure to force the agency into rulemaking for setting policy may indicate that the heightened scrutiny of the *Broz* case will be applied only when the agency's choice of procedure affects the hearing rights of the persons concerned. Even that conclusion, however, is called into question by the court's decision in *Anniston Broadcasting Co. v. FCC*.[28] In 1975, the Federal Communications Commission (FCC) had issued divestiture requirements for owners of multiple media outlets in a community, but had included a waiver provision.[29] After petitioners' requests for waivers were denied,[30] one of the grounds for challenging the denial was the agency's refusal to provide evidentiary hearings. The court held that hearings were not required, concluding that because the FCC was concerned with a class of entities rather than focussing on a particular individual, the agency was performing a rulemaking function.[31] The *Broz* analysis would call for a more careful inquiry into the type of facts the agency used as the basis for its decision. If the agency relied on adjudicative facts in deciding whether to grant a waiver, then a hearing could not be avoided under the guise of the agency simply applying previously issued rules. One of the criteria for granting a waiver was that the purposes of the divesture rule would be better served by the continuation of the current ownership pattern.[32] Consideration of this factor would seem to involve precisely the kind of specific facts that could be designated adjudicative.[33] An argument could be made that the overall agency decision is legislative in nature because the agency conclusion is a matter of policy; however, the better view would be that the facts about a particular market are adjudicative facts that are best developed at a hearing.

In its decision in *American Trucking Association v. United States*,[34] the Eleventh Circuit rejected the Interstate Commerce Commission's (ICC) attempt to characterize one of its actions as "a series of decisions in discrete cases . . . all taken at the same time."[35] The court decided that the agency's decision to revoke all outstanding authority and implicitly indicate that future authorities would not be issued "is clearly a rule,"[36]

27. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 14:4-:6 (2d ed. 1980).
28. 668 F.2d 829 (5th Cir. 1982) (Unit B).
29. *Id.* at 830.
30. *Id.*
31. *Id.* at 832.
32. *Id.* at 831.
33. *See* 2 K. DAVIS, *supra* note 23, § 12:3.
34. 688 F.2d 1337 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 3109 (1983).
35. 688 F.2d at 1348.
36. *Id.*

and therefore was invalid for failure to comply with the appropriate rulemaking procedures.[37] The court's analysis was clearly wrong on both counts. First, the court failed to distinguish between a rule and a policy developed in a course of adjudication, precisely the distinction that was recognized in *McHenry*.[38] A departure from previously settled policy may need to be explained,[39] but characterizing the departure as rulemaking indicates a misunderstanding of the discretion that agencies have in choosing whether to proceed by adjudication rather than by rulemaking procedures. Second, even if the court properly decided that the agency had issued a rule, the court failed to address the possibility that the rule was exempt from the rulemaking procedures the agency omitted.[40]

C. *Rules and Rulemaking Procedure*

Types of Rules. The Administrative Procedure Act (APA) contemplates four different types of nonadjudicatory decisions[41] by administrative agencies: interpretative rules, general statements of policy, procedural and organizational rules, and a category the Eleventh Circuit helpfully designates legislative rules.[42] The classification of a particular rule can have importance in determining what procedure the agency is required to follow,[43] and what degree of deference reviewing courts will give to the rule.[44]

In *American Trucking Association v. United States*,[45] the Eleventh Circuit distinguished legislative from nonlegislative rules on the basis of "the power the agency chooses to exercise in promulgating its rules."[46] Rules that merely interpret and implement legislation are nonlegislative, because the statute itself remains the ultimate source of the obligations imposed on those subject to the agency's authority.[47] Rules that impose additional obligations rather than simply interpreting the statute are legislative in nature.[48] In essence, this test asks whether the source of the duty imposed on the regulated parties is the statute or the subsequent agency pronouncement. This inquiry, however, is not likely to be a profit-

37. *Id.*
38. *See supra* notes 25-27 and accompanying text.
39. *See infra* text accompanying notes 83-106.
40. *See infra* text accompanying notes 41-50.
41. *See* 5 U.S.C. § 553(b) (1982).
42. *See* American Trucking Ass'n v. United States, 688 F.2d 1337 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 3109 (1983).
43. *See infra* text accompanying notes 51-56.
44. *See infra* text accompanying notes 57-71.
45. 688 F.2d 1337 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 3109 (1983).
46. 688 F.2d at 1344.
47. *Id.* at 1341-42.
48. *Id.* at 1341.

able one. All administrative agencies ultimately can be traced back to legislation. The test seems, therefore, to turn on a determination of whether the agency is merely finetuning a statutory scheme or is instead filling in details that the statutory scheme does not address. The line between those two types of agency action is not one that would be easy to locate. A better standard to distinguish legislative from nonlegislative rules is the test employed by the court in *Ryder Truck Lines v. United States*[49] to distinguish between a rule and a general statement of policy. According to the court, the key inquiry is

> the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow the general policy in an individual case, or . . . whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.[50]

The *Ryder* test classifies rules according to the degree to which they turn subsequent agency decisionmaking into a ministerial application of predetermined policy. Applying this test to the ICC rules challenged in *American Trucking Association* would have the advantage that a single standard would be used for classification of rules on both of the major issues for which such classification is relevant—rulemaking procedure and the amount of deference to the agency decision.

Rulemaking Procedures. One of the ICC decisions challenged in *American Trucking Association*[51] was invalidated for failure to follow the notice and comment rulemaking provisions of the APA.[52] Assuming that the agency action was properly characterized as rulemaking,[53] the court then should have considered whether the rule fell into one of the categories exempt from notice and comment rulemaking.[54] Implicit in the court's imposition of the APA's procedural requirements is the conclusion that the rule was legislative in nature.[55] This conclusion appears to be inconsistent with the court's stance in the rest of its opinion emphasizing the nonlegislative nature of the challenged rules. The suggestion made at

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49. 716 F.2d 1369 (11th Cir. 1983).

50. *Id.* at 1377.

51. *See supra* notes 45-48 and accompanying text.

52. The ICC decision reduced the time in which a proposed rate change would become effective from thirty days to five days. 688 F.2d at 1347-48.

53. *See supra* notes 34-40 and accompanying text.

54. *See* 5 U.S.C. § 553(b) (1982).

55. The court stated that it was not called upon to rule on the availability of the good cause/unnecessary exception to notice and comment rulemaking, 688 F.2d at 1348 n.16, but did not even address the interpretative rule/general statement of policy exception.

the end of the preceding subsection, that the extent of the rule's binding effect on the agency should be used as the test to determine whether a rule is legislative[56] may lend support to the court's conclusion that the agency action was subject to notice and comment rulemaking procedures. Using that test likely would result in a determination that the rule fell into the category of nonexempt legislative rules.

Effect of Rules. When an agency has issued rules, an unremarkable consequence of that agency action is that the rules must be followed. The Eleventh Circuit considered the binding effect of rules on the issuing agency itself in a number of cases. For example, in *Payne v. Block*,[57] the court required the Farmers Home Administration to reopen the application period for an emergency loan program because the agency had failed to comply with its own regulations on providing notice to the public about the program's availability.[58] The court strictly applied regulations calling for inclusion of a specific provision in a state medicaid reimbursement plan in *Alabama Hospital Association v. Beasley*.[59] In that case, the court concluded that the regulations left no discretion for the agency to approve a plan that omitted that specific provision.[60] The strictness of the requirement that the agency adhere to the regulations was enhanced by a statutory requirement to the same effect.[61] One of the grounds for setting aside an administrative penalty in *Allied Products Co. v. Federal Mine Safety and Health Review Commission*[62] was the agency's failure to follow its own regulations for determining the number of penalty points that form the basis for the amount of the penalty.[63]

Agency rules can bind bodies other than the issuing agency. In *King v. Housing Authority of Huntsville*,[64] the court required a local housing authority to adhere to the letter of the Department of Housing and Urban Development procedural regulations, even though the procedures actually employed did not deprive the affected party of due process.[65] Finally, a court can be bound by legislative rules properly within the scope of an agency's authority, although courts can set aside rules as being inconsistent with statutory language and purpose.[66]

Under some circumstances, an agency's failure to follow its regulations

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56. *See supra* text accompanying notes 49-50.
57. 714 F.2d 1510 (11th Cir. 1983).
58. *Id.* at 1518.
59. 702 F.2d 955 (11th Cir. 1983).
60. *Id.* at 962.
61. *Id.* at 956-57.
62. 666 F.2d 890 (5th Cir. 1982) (Unit B).
63. *Id.* at 896.
64. 670 F.2d 952 (11th Cir. 1982).
65. *Id.* at 954-55.
66. *See* United States v. Tilton, 705 F.2d 429, 431 (11th Cir. 1983).

may rise to the level of a violation of due process. In *Southern Cooperative Development Fund v. Driggers*,[67] the Eleventh Circuit affirmed a district court's judgment[68] to that effect.[69] Reasoning that an arbitrary restriction on land use would violate due process, the court held that county subdivision regulations imposed an administrative duty on the county commission to approve a subdivision plat that complied with the regulations, thus making the commission's refusal to approve the plat arbitrary.[70] Although this case concerns land use standards dating back to the Supreme Court's decision in *Euclid v. Ambler Realty Co.*,[71] a principle of somewhat broader applicability may emerge from the decision. When agency action implicates an interest protected by due process, an objection to an agency's failure to adhere to its own regulations might be cast in terms of a due process violation.

D. Adjudication

Hearings. Two cases previously discussed,[72] *Broz v. Schweiker*[73] and *Anniston Broadcasting Co. v. FCC*,[74] address the issue of whether an agency could preclude individual adjudicatory hearings by applying previously developed rules. *Broz* suggests that when the agency decision turns on adjudicative rather than legislative facts, the agency must provide an opportunity for an individual hearing.[75] When the agency's decision is nothing more than the application of policy decisions embodied in rules, the cases suggest that individual hearings are not required. In *Anniston Broadcasting*, the court upheld the agency's refusal to hold evidentiary hearings in denying the waivers the petitioners had requested.[76] Hearings were not required when the agency action concerned a class of entities rather than specific individuals.[77] As suggested earlier,[78] this analysis stops short of addressing the important question of whether the agency's decision would be better informed if a hearing were held. In *Broz*, the

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67. 696 F.2d 1347 (11th Cir.), *aff'g* 527 F. Supp. 927 (M.D. Fla. 1981), *cert. denied*, 103 S. Ct. 3539 (1983).

68. Southern Coop. Dev. Fund v. Driggers, 527 F. Supp. 927 (M.D. Fla. 1981).

69. 696 F.2d at 1356.

70. *Id.*

71. 272 U.S. 365 (1926).

72. *See supra* text accompanying notes 10-24 & 28-33.

73. 677 F.2d 1351 (11th Cir. 1982), *vacated sub nom.* Heckler v. Broz, 103 S. Ct. 2421 (1983), *on remand* Broz v. Heckler, 711 F.2d 957 (11th Cir. 1983) (reaffirmed previous holding on validity of regulations).

74. 668 F.2d 829 (5th Cir. 1982) (Unit B).

75. 677 F.2d at 1360.

76. 668 F.2d at 832.

77. *Id.*

78. *See supra* text accompanying notes 32-33.

court's focus on whether adjudicative facts need to be developed offers a more promising line of analysis, by recognizing that adjudicative facts might be relevant even when the agency is engaged in the application of previously formulated policy decisions.

One decision of the Eleventh Circuit suggests that oral hearings will not be required when the party requesting such a hearing has had an opportunity to address all the issues in its written submissions. In *Refrigerated Transport Co. v. ICC*,[79] the court raised a challenge to the agency's grant of operating authority to a motor carrier. The hearing issue arose when an intervenor claimed a right to an oral presentation during a rehearing of the agency's initial decision, alleging lack of notice that certain issues would be considered.[80] The Eleventh Circuit upheld the agency decision to refuse oral testimony on rehearing on the basis that the intervenor was on notice of the issues the agency would consider in its initial consideration of the application.[81] The court's decision is directed specifically at the intervenor's opportunity to know the issues that would be relevant to the agency's determination.[82] Implicit in the decision, however, seems to be the conclusion that an oral presentation on rehearing would add nothing to what the intervenor could have accomplished at the earlier opportunities to be heard, nor would it add to the arguments that were presented in the written petition for rehearing.

Findings and Reasons. The APA requires statements on findings and reasons in formal adjudicatory proceedings that are subject to the procedural requirements of the Act.[83] In several decisions during the last two years, the Eleventh Circuit has drawn on its power of judicial review to require more specific findings and reasons than the agencies have provided when engaged in formal and informal adjudication.[84]

Challenges to the Social Security Administration's denial of benefits provided the most instructive set of opinions on the need for agency articulation of findings and reasons for an agency decision. The court seems

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79. 673 F.2d 1196 (11th Cir. 1982).

80. *Id.* at 1197, 1199.

81. *Id.* at 1199.

82. *Id.* at 1199 n.6.

83. *See* 5 U.S.C. § 557(c) (1982). The same requirements would apply to formal rulemaking, while the notice and comment procedures of informal rulemaking contain a separate basis and purpose requirement. *See id.* § 553(c). The term 'formal' is used to designate those agency actions that cross the threshold of being "required by statute" to be decided "on the record after opportunity for an agency hearing." *See id.* §§ 553(c), 554(a).

84. The Supreme Court's restrictions on judicial imposition of additional procedural requirements in rulemaking cases governed by the notice and comment procedures of the APA (see Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)) might be avoided by grounding the Court's dissatisfaction with the agency procedure in the inability of the court to perform its judicial review function.

to be particularly insistent that reasons be given in a determination of the credibility of an applicant or witness who appears before an Administrative Law Judge (ALJ). *Walden v. Schweiker*,[85] *Viehman v. Schweiker*,[86] and *Smallwood v. Schweiker*[87] are cases in which district court affirmances of agency denials of benefits were set aside by the court of appeals and remanded for agency findings on the credibility issues. In each of the cases, a claimant presented evidence that, if believed, would have entitled the claimant to succeed in his or her claim. In *Walden*, the claimant testified that she was disabled because she suffered pain. She also introduced testimony by her daughter and a physician that she did have pain.[88] The Eleventh Circuit stated that, in order to deny her claim, the ALJ must have disbelieved or disregarded the testimony of all three witnesses, but the ALJ had made no findings on the credibility issue.[89] In *Viehman*, the claimant requested a waiver of an overpayment of social security benefits on the ground that he was without fault in continuing to accept payments after eligibility had ceased.[90] His story, if believed, would have established his lack of fault, but the ALJ left open the issue of credibility.[91] In *Smallwood*, the claimant testified that he experienced periodic blackouts that made him disabled.[92] Medical testimony supported a conclusion that he was disabled if he suffered blackouts, but the ALJ made no finding on the credibility of the claimant's story.[93] There is a common thread running through these cases that provides an important clue for predicting when the court should remand for more complete findings.

When the success of the claimant depends on the credibility of testimony, the ALJ should make an express determination on the credibility issue. In the absence of such a finding, the agency decision may either appear to be based on the use of an improper test or otherwise be unsupported by substantial evidence. In two of the cases discussed, it appears that if the ALJ actually had disbelieved the testimony, the agency decision would have been upheld. Disbelief of the *Smallwood* blackout testimony would have lessened the weight of the medical testimony about the effect of such blackouts 'if' they occurred. Disbelief of the *Viehman* story would have left the claimant with no other evidence to establish his lack

85. 672 F.2d 835 (11th Cir. 1982).
86. 679 F.2d 223 (11th Cir. 1982).
87. 681 F.2d 1349 (11th Cir. 1982).
88. 672 F.2d at 837, 839.
89. *Id.* at 839.
90. 679 F.2d at 225.
91. *Id.* at 228-29.
92. 681 F.2d at 1351.
93. *Id.* at 1352.

of fault. Although there were other errors in *Walden*,[94] disbelief of the pain testimony would have removed one of the grounds for establishing disability. If the testimony in the three cases had been credible, however, the agency, in denying the benefits, would appear to have been acting under an improper legal standard,[95] or requiring more evidence than was necessary,[96] or reaching a decision that was unsupported by substantial evidence.[97]

In contrast to these three cases is *Smith v. Schweiker*,[98] in which the court commented favorably on the ALJ's eight page memorandum and findings of fact. The agency decision was a denial of the claim for benefits, but in this case the completeness of the reasons for the decision enunciated by the agency persuaded the court of appeals of the soundness of the decision. While there is admittedly some additional administrative cost in making more detailed findings at the ALJ level, the extra effort would prove to be a worthwhile investment to avoid a remand for more complete findings, particularly in those cases concerning credibility. In those cases, if the agency had explicitly based its decisions on the witnesses' lack of credibility, the decisions would probably have been upheld.[99]

When a lack of findings and reasons raises the possibility that improper legal standards were applied, remand to the agency is the appropriate remedy. When the complaint, however, is that there is no way to tell how the agency reached its decision, the Eleventh Circuit cases display a functional approach to the question of whether to remand. If there is no indication whatsoever of the basis for an agency conclusion, the court would be abdicating its reviewing function if it failed to insist on a "reviewable determination on the record."[100] But as long as the reviewing court can fulfill its reviewing function and the aggrieved party can determine whether and on what basis to seek judicial review,[101] the court will not

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94. *See infra* notes 145-47 and accompanying text.

95. 672 F.2d 835 (11th Cir. 1982).

96. 679 F.2d 223 (11th Cir. 1982).

97. 681 F.2d 1349 (11th Cir. 1982).

98. 677 F.2d 826 (11th Cir. 1982).

99. It is not only credibility issues in which more complete findings and reasons might avoid a judicial remand for reconsideration. In Wiggins v. Schweiker, 679 F.2d 1387 (11th Cir. 1982), the failure of the ALJ to describe the weight given to certain medical testimony left open the possibilty that the ALJ had not followed the correct legal principles. *Id.* at 1390. Again, the point is that more detailed findings and reasons can reveal that the decision was supported by substantial evidence and was reached by applying the proper legal standards to the evidence.

100. Refrigerated Transp. Co. v. ICC, 663 F.2d 528, 531 (5th Cir. 1981) (Unit B).

101. Railroad Concrete Crosstie Corp. v. Railroad Retirement Bd., 709 F.2d 1404, 1407 (11th Cir. 1983).

remand to the agency simply to force compliance with a formal requirement of reasons. The court has recognized that among the ways of fulfilling those purposes are an opinion by an agency member,[102] or a reference to an earlier agency decision that provides a full analysis.[103]

In *Baggett Transportation Co. v. United States*,[104] the court properly could have demanded more detailed findings. The court reviewed the issue of whether an ICC grant of authority required the agency to make specific findings on each of the factors set out in a statutory provision on transportation policy.[105] The Eleventh Circuit noted that the factors were inconsistent, and that Congress intended for the agency to balance and weigh all the factors in any given case. The court then accepted as adequate the agency's identification of what the competing considerations were.[106] That treatment of the findings requirement may be perfectly reasonable if the requirement is geared solely to judicial review. If the agency's balancing of these factors is to be given great deference, then the court's reviewing function can be fulfilled on a minimal statement of reasons from the agency. Furthermore, the aggrieved party contemplating judicial review under such a deferential standard of review should realize that little will be required in the way of findings for the agency decision to survive a challenge on judicial review. There is, however, another major function that can be served by findings and reasons. An agency could be required to explain to the regulated parties 'how' it strikes the balance and 'how' it weighs the different factors. In doing so, the agency may eliminate some pointless administrative challenges, as well as make it easier for the regulated parties to predict agency decisions and plan their conduct in light of those agency expressions of how decisions are reached.

Consistency in Agency Decisions. By issuing a number of decisions in specific cases, administrative agencies acting in an adjudicatory capacity are in a position to develop an 'agency common law'. When agencies depart from their own precedents, however, reviewing courts may set aside the decisions under the arbitrary and capricious standard of review.[107]

The consistency requirement does not require an agency to adhere to prior decisions. The court's concern is not so much with departure from

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102. *Id.*

103. Veterans Admin. Medical Center v. FLRA, 675 F.2d 260, 266 (11th Cir. 1982).

104. 666 F.2d 524 (11th Cir. 1982).

105. *Id.* at 526.

106. *Id.* at 530-31. *See also* C & H Transp. Co. v. ICC, 704 F.2d 834, 849 (5th Cir. 1983) (Thornberry, J., dissenting) (dissenting judge argued that an agency must identify the competing interests).

107. *See* 5 U.S.C. § 706(2)(A) (1982); *see also* Central Florida Gas Corp. v. Federal Energy Regulatory Comm'n, 678 F.2d 932 (11th Cir. 1982).

agency precedent as it is with 'unexplained' departure from precedent. The policy rationale of this corollary to the findings and reasons requirement[108] is described by the Eleventh Circuit in *McHenry v. Bond.*[109] Not only does agency adherence to its own precedent enable affected persons to predict future agency action, but adherence to agency precedent also raises an inference that "the agency is pursuing the policies committed to it by Congress."[110] In *McHenry*, the agency had reached the opposite conclusion on an issue that it decided seven years earlier. In 1972, the National Transportation Safety Board had concluded that a particular medical diagnosis was an adequate explanation for a loss of memory. The Board then overruled that decision in *McHenry*, only offering statements that the agency now believed its earlier decision was incorrect.[111] If the agency decision had been explained in terms of an increased concern for the risks incident to issuing a commercial pilot's license to someone who had experienced memory loss, then it is unlikely that a court would substitute its judgment on safety and risk factors for that of the agency. An explanation by the agency probably would have preserved the agency decision from judicial overturning, by justifying the agency's departure from its earlier decision.

Ironically, the Eleventh Circuit's treatment of inconsistent agency decisions has not been consistent. In *McHenry*, the court remanded for an explanation of the departure from prior agency decisions;[112] however, in *Bray v. Director, Office of Workers' Compensation Programs*,[113] instead of remanding to the agency, the court apparently speculated on what the agency's explanation would be and found that conjectured explanation unconvincing.[114]

The challenged agency action in *Southern Motor Carriers Rate Conference v. United States*[115] was also inconsistent with prior agency decisions.[116] The agency simply should have explained that the departure from its precedent was justified by the adverse effects the agency had experienced under that precedent. A change of circumstances and the lessons of experience are sufficient to justify departure from agency precedent, as illustrated by the court in *Ryder Truck Lines v. United States.*[117] In *Ryder*, however, the agency's reliance on its experience and

108. *See supra* text accompanying notes 83-106.
109. 668 F.2d 1185 (11th Cir. 1982).
110. *Id.* at 1192.
111. *Id.* at 1192-93.
112. *Id.* at 1194.
113. 664 F.2d 1045 (5th Cir. 1981) (Unit B).
114. *Id.* at 1048.
115. 676 F.2d 1374 (11th Cir. 1982).
116. *Id.* at 1379.
117. 716 F.2d 1369 (11th Cir. 1983).

expertise had been "documented and made a part of the record so that the courts can determine whether the agency's action is facially rational,"[118] and the decision was announced as a general statement of policy.

When an agency's decision is inconsistent with its prior decisions but interprets the enabling legislation in a manner that is "consistent with the statute's language, structure, scheme, and available legislative history,"[119] the court has dismissed the inconsistency argument as being insubstantial.[120] Such judicial action suggests that as the degree of judicial deference to agency decisionmaking authority increases, the court may be willing to focus its review on the latest in the line of decisions without displaying as much concern for inconsistency with prior agency decisions.

The court's treatment of inconsistent decisions in *Allied Products Co. v. Federal Mine Safety and Health Review Commission*[121] suggests that the court was engaging in a form of proportionality review. In setting aside administrative penalties as excessive and contrary to law, the court noted that the amounts of these fines were inconsistent with amounts assessed in other cases.[122] Although this was not the only problem with the penalties,[123] the court's remark suggests that departures from a pattern of penalty decisions may need to be explained in order to survive judicial review.

Estoppel. The applicability of the principles of equitable estoppel to administrative actions is a matter on which the signals sent by the Supreme Court have been less than clear.[124] In its recent decisions on estoppel, the Eleventh Circuit has displayed a reluctance to bind an agency, but the opinions consistently leave open the possibility that, on the proper showing, the court may decide that the agency is bound by the acts of lower echelon officials.

In *Deltona Corp. v. Alexander*[125] plaintiff asserted that the Corps of Engineers was estopped to deny permits for plaintiff's projects because the Corps was aware of plaintiff's plans and had failed to indicate disap-

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118. *Id.* at 1385.

119. Alabama Power Co. v. Federal Energy Regulatory Comm'n, 685 F.2d 1311, 1318 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3573 (1983).

120. 685 F.2d at 1318.

121. 666 F.2d 890 (5th Cir. 1982) (Unit B).

122. *Id.* at 896. The Supreme Court has held that the Eighth Amendment does not require appellate court proportionality review in death penalty cases. Pulley v. Harris, 104 S. Ct. 871 (1984).

123. The penalties were also contrary to the enabling legislation, its legislative history, and the regulations of the agency. 666 F.2d at 896.

124. *See generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 20:1-:6 (2d ed. 1983).

125. 682 F.2d 888 (11th Cir. 1982).

proval.[126] The Eleventh Circuit rejected the estoppel argument, resting its decision on the broad principle that estoppel may not be asserted against the government acting in its sovereign capacity.[127] Recognizing a potential exception to that rule, the court concluded that the agency's inaction had not risen to the level of affirmative misconduct.[128] Thus, the court left open the question of whether estoppel would have been appropriate if the agency had been engaged in an essentially private activity, or if the officials had acted in a way that could be characterized as affirmative misconduct.

One issue that runs through the estoppel cases is whether the agency is authorized to act in accordance with earlier representations that it made. In one case, the Veterans Administration had erroneously calculated the benefits an individual was entitled to collect, and thus a substantial share of the individual's tuition was left unpaid.[129] The Eleventh Circuit refused to bind the agency to its mistaken calculation, because Congress had not authorized payment in excess of the statutory ratio of entitlements based on time in service.[130] Even the lack of authorization of a specific agency official to act in a certain way can lead to the rejection of an estoppel argument. Because authority to take action was lodged in an agency committee rather than with the official to whom the representatives of the plaintiff had spoken, the Eleventh Circuit in *Mandalay Shores Cooperative Housing Association v. Pierce*[131] held that unauthorized actions by that agency official did not bind the agency.[132]

The Eleventh Circuit had an opportunity in *Fidalgo/Velez v. Immigration and Naturalization Service*[133] to rule on the issue of whether equitable defenses could be asserted against a party seeking to estop a government agency. Without expressly acknowledging that it was applying an unclean hands defense, the court did indicate approval of the agency conclusion that any harm to the plaintiff as a result of agency delay had been brought about by plaintiff's own conduct.[134]

The most significant of the Eleventh Circuit's statements regarding estoppel occurred in *Payne v. Block*,[135] previously discussed under the topic of the requirement that agencies follow their own rules.[136] The agency in

126. *Id.* at 891.
127. *Id.* at 892.
128. *Id.*
129. Augusta Aviation, Inc. v. United States, 671 F.2d 445 (11th Cir. 1982).
130. *Id.* at 448, 450.
131. 667 F.2d 1195 (5th Cir.) (Unit B), *cert. denied*, 103 S. Ct. 446 (1982).
132. 667 F.2d at 1197.
133. 697 F.2d 1026 (11th Cir. 1983).
134. *Id.* at 1030.
135. 714 F.2d 1510 (11th Cir. 1983).
136. *See supra* text accompanying notes 57-58.

that case had failed to provide the public notice of availability of relief called for in its own regulations.[137] The agency argued that the attack on the agency action was based on estoppel principles, but the court rejected that argument, indicating a number of factors that took the case out of the estoppel category.[138] The court characterized the agency action as "gross failure on the part of an entire agency to follow self-imposed regulations," producing an irrevocable error to the detriment of the beneficiaries of the regulatory program, with no serious adverse "ramifications on the public fisc" involved in remedying the error.[139] The distinction between requiring an agency to adhere to its regulations and binding the agency to representations it had made is a close one, particularly when the action the affected party wants the agency to take is something the agency was authorized to do. The *Payne* decision suggests that, whenever possible, it is advisable to present the challenge in terms of forcing the agency to adhere to its own regulations rather than estopping the government.

Right to Counsel. In *Smith v. Schweiker,*[140] the court emphasized that a claimant in a Social Security hearing must be given adequate notice that he has a right to be represented by counsel. The Eleventh Circuit held in *Smith*, however, that the performance of the ALJ presiding at the hearing removed whatever prejudice the unrepresented claimant might otherwise have suffered due to the inadequacy of notice.[141] The court noted that the length of the hearing,[142] the care with which the ALJ involved the claimant in the development of the evidence, and the completeness of the findings and reasons for the decision [143] combined to persuade the court that presence of counsel would not have provided any substantial advantage to the claimant.[144] The role of the ALJ in the *Smith* case can be contrasted with that of the presiding officer in *Walden v. Schweiker.*[145] As in *Smith*, the claimant in *Walden* was not represented by counsel in the hearing, but unlike *Smith*, the hearing in *Walden* lasted only fifteen minutes, the agency asked no questions and presented no witnesses,[146] and the ALJ issued inadequate findings.[147]

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137. 714 F.2d at 1517-18.
138. *Id.*
139. *Id.* at 1518.
140. 677 F.2d 826 (11th Cir. 1982).
141. *Id.* at 829-30.
142. The hearing lasted nearly one and one-half hours. *Id.* at 829.
143. *See supra* note 98 and accompanying text.
144. 677 F.2d at 829-30.
145. 672 F.2d 835 (11th Cir. 1982).
146. *Id.* at 837 n.2.
147. *Id.* at 839-40.

E. Administrative Review

Jurisdiction and Timing of Administrative Appeal. In two cases raising fairly technical issues of the jurisdiction and timeliness of administrative appeals, the Eleventh Circuit adopted common sense solutions to the problems presented. In *McHenry v. Bond*,[148] the Federal Aviation Administration (FAA) had denied a commercial pilot's recertification. The pilot petitioned for review by the National Transportation Safety Board (NTSB).[149] After an ALJ ruled in favor of the pilot, the FAA filed a notice of appeal with the NTSB, which reversed the decision of the ALJ.[150] One of the issues presented to the Eleventh Circuit in the pilot's challenge of the Board's decision was the timeliness of the FAA's notice of appeal to the NTSB.[151] The applicable regulations required the filing of a notice of appeal within ten days after service of the written decision, with filing accomplished by personal delivery or by mail. If a timely notice of appeal is not filed, the decision of the ALJ becomes final.[152] The notice filed by the FAA was dated the last day for filing, but did not receive a postmark because it was mailed in a franked government envelope. The NTSB did not receive the notice until five days after the last day for timely filing. The Board held that the notice was timely filed, refusing to require notice sent by mail to be postmarked within the ten day period.[153] That decision was upheld by the Eleventh Circuit, which concluded not only that the Board had made a reasonable interpretation of its regulations, but also that the agency's interpretation promoted an essential policy that an agency charged with protecting the safety of the public ought to decide cases on the merits rather than on procedural technicalities.[154]

In *Bray v. Director, Office of Workers' Compensation Programs*,[155] the Eleventh Circuit held that an agency had jurisdiction over an administrative appeal, but in this case the court did so in spite of an agency decision that it did not have jurisdiction.[156] A deputy commissioner held in 1980 that an award of benefits made to Bray under a 1969 order had reached the statutory limit on aggregate benefits. When Bray appealed that ruling to the Benefits Review Board, the Board dismissed the appeal, asserting that it lacked jurisdiction to hear an appeal on the interpretation of the

148. 668 F.2d 1185 (11th Cir. 1982).
149. *Id.* at 1187.
150. *Id.* at 1189.
151. *Id.* at 1194.
152. *Id.*
153. *Id.* at 1195.
154. *Id.* at 1195 & n.11.
155. 664 F.2d 1045 (5th Cir. 1981) (Unit B).
156. *Id.* at 1048.

amount due under the language of a compensation order.[157] The court adopted a pragmatic characterization of Bray's proceeding before the Board, deciding that Bray was not asserting any error of law or fact in the 1969 order, and thus his challenge did not fall into the category of decisions subject to the requirement to assert the error within thirty days of the error.[158] Instead, Bray was seeking the clarification of an ambiguity that had arisen in the implementation of the 1969 order, and the 1980 determination was a supplementary order in an appropriate administrative proceeding to resolve questions that arise during the period of payment. Characterizing the 1980 decision as a supplementary order meant that the Benefits Review Board was authorized to hear an appeal raising substantial questions of law or fact concerning that order.[159] The court's decision accomplishes a number of worthy goals: it recognizes that there is an administrative channel for clarification of ambiguities that are revealed while a compensation order is in effect, it provides for an administrative appeal from decisions made within that channel, and it helps to keep the district courts from having to decide questions that are addressed more appropriately to the administrative tribunals that have the most experience and expertise in the matters.

Agency Authority on Administrative Review. An ALJ acts in some respects as the trial judge in agency adjudications, but administrative review of ALJ decisions is not conducted under the same restrictions that govern appellate court review of trial court decisions.[160] The most frequent issue raised by this state of affairs is whether an agency decision contrary to that of the ALJ is supported by substantial evidence.[161] Another issue addressed by the Eleventh Circuit in *Thornton v. United States Department of Agriculture*,[162] concerned the enhancement of penalties on administrative review of an ALJ decision. Initially fined two thousand dollars for violation of the Horse Protection Act, Thornton was additionally disqualified for one year by the agency official to whom he appealed.[163] The court affirmed that penalty, analogizing the administrative appeal to a judicial retrial, and drew on Supreme Court authority[164] that permitted the imposition of a new sentence, even if greater than the original, in the event of retrial.[165]

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157. *Id.* at 1046.
158. *Id.* at 1047.
159. *Id.* at 1047-48.
160. *See* 5 U.S.C. § 557(b) (1982).
161. *See infra* text accompanying notes 335-44.
162. 715 F.2d 1508 (11th Cir. 1983).
163. *Id.* at 1510.
164. North Carolina v. Pearce, 395 U.S. 711, 723 (1969).
165. 715 F.2d at 1513.

F. Costs and Fees

The Eleventh Circuit had two opportunities to consider the award of fees under the Equal Access to Justice Act.[166] In *Donovan v. Dillingham*,[167] the agency's position on the merits of the controversy was contrary to a 1980 decision of the Fifth Circuit.[168] Concluding that it was bound by that decision,[169] the Eleventh Circuit held that the agency's position was nevertheless substantially justified, and thus was not a basis for an award of fees under the statute.[170] The court based its characterization of the justifiability of the agency position on the grounds that the agency could not be expected to anticipate the holding of the Fifth Circuit case, the basis of that holding, or the binding effect of that holding on the newly formed Eleventh Circuit.[171]

Greater predictive abilities were required of the agency in *Enerhaul, Inc. v. NLRB*.[172] The Eleventh Circuit interpreted the Equal Access to Justice Act as imposing on the agency the burden of proving that a fee award should not be made when the agency does not prevail in an adversary adjudication conducted by the agency.[173] The court found no support in the case law of the circuit for the position taken by the agency; instead, the court found that the agency relied "on a legal theory that has been clearly and repeatedly rejected by this Court,"[174] and held that the agency had not sustained its burden and thus the petition for fees had been erroneously dismissed.[175]

Fees and cost issues can arise in an administrative law context not governed by the Equal Access to Justice Act. When a party prevails in a state administrative proceeding and has been made whole in that proceeding, the court in *Estes v. Tuscaloosa County*[176] held that section 1988[177] does not authorize an award of attorneys' fees for representation in that proceeding.[178]

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166. *See* 5 U.S.C. § 504 (1982), 28 U.S.C. § 2412 (Supp. V 1981).

167. 668 F.2d 1196, *rev'd on reh'g on other grounds*, 688 F.2d 1367 (11th Cir. 1982).

168. Taggart Corp. v. Life & Health Benefits Admin., 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

169. 668 F.2d at 1197.

170. *Id.* at 1199.

171. *Id.* Another court of appeals has read *Donovan* with approval as an indication that the Eleventh Circuit is applying a reasonableness test. *See* Foster v. Tourtellotte, 704 F.2d 1109, 1112 (9th Cir. 1983).

172. 710 F.2d 748 (11th Cir. 1983).

173. *Id.* at 750.

174. *Id.* at 751.

175. *Id.*

176. 696 F.2d 898 (11th Cir. 1983).

177. 42 U.S.C. § 1988 (1976).

178. 696 F.2d at 901. Another court of appeals seems to have read this decision too

G. *Administrative Search and Seizure*

Authority to review the legitimacy of administrative searches and seizures was addressed in two Eleventh Circuit cases. *Donovan v. Sarasota Concrete Co.*[179] presented the issue of the agency's competence to make fourth amendment determinations in the course of an adjudicative proceeding. A federal magistrate had issued an administrative inspection warrant at the request of the Occupational Safety and Health Administration (OSHA).[180] After Sarasota Concrete was cited by OSHA for violations discovered during the search conducted pursuant to the warrant, the company moved to suppress all the evidence gathered in the search that exceeded the scope of the original complaint on which the warrant application had been based.[181] The ALJ and, on review, the Occupational Safety Health Review Commission evaluated the sufficiency of the evidence to support a full scope inspection warrant, and concluded that the specific employee complaint in this case did not provide probable cause for the investigation.[182] OSHA's decision to apply an exclusionary rule, and its refusal to incorporate a good faith exception to the rule, were upheld by the Eleventh Circuit.[183]

In *Federal Election Commission v. Florida for Kennedy Committee*,[184] the Eleventh Circuit considered how courts should evaluate administrative subpoenas. The district court's enforcement[185] of a Federal Election Commission (FEC) subpoena was reversed on the ground that the agency lacked jurisdiction over the matters sought in the subpoena.[186] The Eleventh Circuit acknowledged the *Morton Salt* rule[187] that limits the judicial scrutiny of administrative subpoenas, but noted that the rule was a judicially self-imposed restraint that could be overriden by countervailing

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broadly. In Webb v. County Bd. of Educ., 715 F.2d 254 (6th Cir. 1983), *Estes* was cited in support of the proposition that section 1988 does not create an independent cause of action for attorneys' fees for services performed in optional administrative proceedings. *Id.* at 257. Nothing in the district court's memorandum opinion adopted by the Eleventh Circuit indicates whether the administrative proceedings invoked by Estes were optional, or, if they were in fact optional, whether that played a part in the court's decision of the section 1988 issue.

179. 693 F.2d 1061 (11th Cir. 1982).

180. *Id.* at 1063.

181. *Id.* at 1064.

182. *Id.* at 1064-65.

183. *Id.* at 1063, 1066.

184. 681 F.2d 1281 (11th Cir. 1982).

185. Federal Election Comm'n v. Florida For Kennedy Comm., 492 F. Supp. 587 (S.D. Fla. 1980).

186. 681 F.2d at 1282.

187. *See* United States v. Morton Salt Co., 338 U.S. 632 (1950).

considerations.[188] Among the factors calling for a higher degree of scrutiny in this case were the substantial risks of government infringement of political expression involved in FEC subpoenas,[189] and the absence of a need for any further factual development in order to decide the question of the agency's authority to issue this subpoena.[190] Freed from the restraints of the *Morton Salt* rule, the court concluded, after careful scrutiny, that the agency did not have jurisdiction to investigate the Committee's activities on behalf of a noncandidate.[191]

H. Freedom of Information Act

The Eleventh Circuit considered two of the exemptions found in the Freedom of Information Act (FOIA) in *Miami Herald Publishing Co. v. United States Small Business Administration*,[192] and found neither exemption applicable to the agency information sought by the newspaper.[193] The requests at issue pertained to advance payments and loans made by the agency. The agency declined to release information that would personally identify borrowers or provide the current status of loans and advances, basing its refusal on Exemption 4,[194] commercial or financial information, and Exemption 6,[195] personnel and similar files leading to unwarranted invasion of personal privacy.

In response to the Exemption 4 argument, the court required the agency to establish that disclosure would cause substantial competitive injury to an entity in actual competition.[196] Characterizing the testimony of the agency's district director as "mere unsupported speculation about the business world generally, with no focus on small business debtors or guaranteed loans in particular,"[197] the court of appeals agreed with the district court that the agency had not sustained its burden to establish the applicability of the exemption.[198]

The court avoided the balancing process of Exemption 6 by a narrow interpretation of the kinds of records that met the threshold requirement for the exemption. Deciding that the information must invoke privacy interests similar to the privacy interests in personnel and medical files, the

188. 681 F.2d at 1284.
189. *Id.*
190. *Id.* at 1285-86.
191. *Id.* at 1288.
192. 670 F.2d 610 (5th Cir. 1982) (Unit B).
193. *Id.* at 611.
194. *Id.* at 612-13. 5 U.S.C. § 552(b)(4) (1982).
195. 5 U.S.C. § 552(b)(6) (1982).
196. 670 F.2d at 613-14.
197. *Id.* at 614.
198. *Id.*

court found no such privacy interest attached to the information sought in this case. The expectation of a delinquent or defaulting borrower was that publicity would be given to its status when the lender proceeded against the borrower.[199] At the heart of the court's test for 'similar files' under Exemption 6 is apparently an expectation that the information would not be publicly disclosed other than by the FOIA requester.[200]

In *Chilivis v. SEC*,[201] the court reviewed the applicability of Exemption 5,[202] inter-/intra-agency memoranda, and a number of FOIA procedural matters. The court held that drafts of complaints and indictments, as well as memoranda and lists prepared by attorneys or agency personnel under their direction in anticipation of litigation, were exempt as either work product or deliberative.[203]

A narrow reading of the authorization of an award of attorneys' fees kept plaintiff from recovering fees in this case, even though the agency did turn over a large number of documents after the FOIA lawsuit had been instituted.[204] The court read a causation requirement into the attorneys' fees provision, so that a plaintiff must show that the FOIA "lawsuit provided the necessary impetus for disclosure."[205] When the agency releases documents that are no longer exempt due to changed circumstances, a showing that the "lawsuit provided the necessary impetus for disclosure" will not have been made.[206]

The court also clarified the relationship between FOIA and the Federal Rules of Civil Procedure. The court stated that a motion to dismiss or a motion for summary judgement is sufficient to satisfy the FOIA's requirement that an agency file an answer or otherwise plead within thirty days after service of the complaint.[207] Such a motion, however, is not a responsive pleading as that term is used in the pleading requirements of the Federal Rules, and thus exemptions that are not raised in that initial motion will not be treated as affirmative defenses that are waived if not included in the responsive pleading.[208]

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199. *Id.* at 615-16.

200. *Id.* at 616 n.11.

201. 673 F.2d 1205 (11th Cir. 1982).

202. *See* 5 U.S.C. § 552(b)(5) (1982).

203. 673 F.2d at 1211.

204. *Id.* at 1212.

205. *Id.*

206. *Id.* at 1212-13.

207. *Id.* at 1209. *See* 5 U.S.C. § 552(a)(4)(C) (1982).

208. 673 F.2d at 1208-09.

II. Judicial Review of Administrative Decisions

A. Jurisdiction to Review Agency Decisions

The choice of the appropriate forum for judicial review of administrative action is typically not a matter left to the challenger. Enabling legislation for agencies and programs often gives a court jurisdiction to review particular agency action. Statutory provisions may be confusing when they try to distinguish between issues that are to be reviewed by a district court and issues that are specifically assigned to the exclusive jurisdiction of an appellate court. The interpretive issue then becomes whether the challenged agency action is one of those matters singled out for appellate court jurisdiction on judicial review. Three decisions of the Eleventh Circuit dealt with those interpretive issues.

In *Haitian Refugee Center v. Smith*,[209] the court carved out a narrow but potentially significant exception to a statutory requirement that certain orders in deportation proceedings be reviewed only by a court of appeals. The district court had enjoined further deportation of Haitians until the government submitted and the court approved a plan for reprocessing their applications for asylum.[210] Relying on a statutory provision placing jurisdiction in the courts of appeals to review deportation orders, the government argued that the district court lacked subject matter jurisdiction.[211] The Eleventh Circuit upheld the district court's jurisdiction, but pointed out the "factual uniqueness" of the case, which involved allegations of "a pattern and practice by immigration officials to violate the constitutional rights of a class of aliens."[212] The court distinguished between challenges to individual deportation orders and actions taken in the deportation proceeding that affect the outcome, which were exclusively within the jurisdiction of a court of appeals, and challenges of the type before it, which fell within the jurisdiction of a district court "to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged."[213] The court emphasized the narrowness of its holding in the immigration context, insisting that the statutory review scheme could not be avoided simply by alleging that a procedural ruling was constitutionally impermissible.[214] The significance of this decision may extend beyond the immigration area, if statutes vest-

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209. 676 F.2d 1023 (5th Cir. 1982) (Unit B), *aff'g & modifying sub nom* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980).

210. 676 F.2d at 1027.

211. *Id.*

212. 676 F.2d at 1033.

213. *Id.*

214. *Id.*

ing judicial review exclusively within the appellate courts now may not stand in the way of the type of challenge that was raised by the plaintiffs in this case.

The characterization of different types of agency decisions was crucial to the jurisdictional determination in *Georgia Department of Medical Assistance v. United States Department of Health and Human Services.*[215] 'Noncompliance' decisions[216] are within the judicial review of the courts of appeals, but no such statutory review provision governs 'disallowance' decisions.[217] Noting that the decision being challenged in this review proceeding instituted in the court of appeals had some of the characteristics of both categories, the court characterized the Department of Health and Human Services' decision as a disallowance and thus resolved the jurisdictional issue by focussing on the policies served by performing judicial review in trial rather than appellate courts.[218] The major factor in favor of direct appellate court review is the adverse impact of the administrative agency decision. When the decision, as here, did not affect the design or administration of a state's plan, and did not lead to a halt of federal funds, the necessity for speed in judicial review was less compelling.[219] The Eleventh Circuit's use of a functional rather than a conceptual approach to the characterization of the administrative decision in this case offers a useful model for similar jurisdictional issues under other statutory review schemes.

In a Federal Tort Claims Act case, the Eleventh Circuit considered the jurisdictional prerequisite of the presentation of the claim to the administrative agency that allegedly committed the tort.[220] *Bush v. United States*[221] was a medical malpractice action based on the negligence of Veterans Administration surgeons who had operated on plaintiff's husband.[222] The district court took a very narrow approach to the filing requirement, concluding that it had no jurisdiction to decide questions

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215. 708 F.2d 627 (11th Cir. 1983).

216. The court referred to noncompliance decisions as involving "a determination that the state's overall rate methodology has been so changed that it no longer complies with federal requirements or that the state's administration of its plan violates federal requirements." *Id.* at 628.

217. *Id.* Disallowance decisions typically involve a "technical audit dispute concerning specific and isolated payments." *Id.* The distinction thus seems to be between programmatic violations and individual errors.

218. *Id.* at 628-30. The best treatment of those policies is Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975).

219. 708 F.2d at 630.

220. *See* 28 U.S.C. § 2675 (1976).

221. 703 F.2d 491 (11th Cir. 1983).

222. *Id.* at 493.

presented by the theories of recovery that plaintiff had not put forth in her administrative claim.[223] The Eleventh Circuit corrected the district court's view of the prerequisite, stating that the requirement was satisfied as long as the administrative claim put the government on notice that a particular set of facts gives plaintiff a right to recover.[224] The court's treatment of this issue, and its application of the test in the instant case, is a sensible approach analogous to the general move away from fact or issue pleading and toward notice pleading in the Federal Rules of Civil Procedure.[225]

B. Nonreviewability

Certain administrative agency decisions have been shielded from judicial scrutiny by legislative preclusion of judicial review. A number of those preclusion provisions were invoked to prevent judicial review in cases presented to the Eleventh Circuit.

The most difficult preclusion cases are those involving apparently conflicting statutory provisions in which one statute gives broad authority for judicial review and the other withdraws such authority. The Eleventh Circuit resolved that type of conflict in *McCard v. Merit Systems Protection Board*[226] by concluding that the two provisions, read together, operated to narrow but not foreclose judicial review. McCard applied for disability retirement, but his application was disapproved by the Office of Personnel Management.[227] The Merit Systems Protection Board denied his petition for review, and McCard sought judicial review in the appellate court.[228] One statutory provision provided for judicial review of final orders of the Board.[229] Another declared the Board's decision final and not subject to review.[230] The Eleventh Circuit rejected the total preclusion argument of the Board, deciding instead that the legislative intent of the latter provision was to narrow judicial review rather than forbid it.[231] The court's decision is consistent with the principle that strong evidence of preclusive intent is necessary for courts to close all avenues of judicial review to parties aggrieved by administrative action.

Evidence of preclusive intent was found by the court in the statutory

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223. *Id.* at 494.
224. *Id.*
225. *See generally* J. MOORE & J. LUCAS, 2A MOORE'S FEDERAL PRACTICE ¶ 8.13 (2d ed. 1983).
226. 702 F.2d 978 (11th Cir. 1983).
227. *Id.* at 979.
228. *Id.* at 980.
229. *See* 5 U.S.C. § 7703 (1982).
230. *See* 5 U.S.C. § 8347(c) (1982).
231. 702 F.2d at 981-82.

provision in *V.N.A. of Greater Tift County, Inc. v. Heckler*.[232] A better reading of the statutory provision, however, would have led to the conclusion that the provision actually imposes a specific exhaustion requirement rather than preclusion of judicial review. V.N.A. objected to a determination that it had received a Medicare overpayment, and simultaneously filed for administrative and judicial review of the decision.[233] The court noted the broad preclusive language of one statutory provision,[234] but further noted that the language must be read in light of another provision[235] that permits judicial review of final decisions of the administrative agency to which V.N.A. had appealed the overpayment determination.[236] The court then concluded that the effect of the two provisions was to preclude review of Medicare reimbursement decisions until the administrative agency has issued its decision in the matter.[237] That treatment of the statutory provisions can easily be recast as a requirement that challengers of reimbursement decisions must exhaust the administrative appeal remedy before obtaining judicial review. The statutes probably should be interpreted as making the exhaustion requirement a jurisdictional prerequisite rather than a matter of judicial self-restraint.[238]

A different kind of Medicare provider, not specifically covered by the provision allowing judicial review after an administrative appeal of reimbursement decisions,[239] was subject to the full force of the general preclusion provision of the Medicare Act.[240] In *United States v. Sanet*,[241] the government had sued to recover overpayment made to Sanet. The Eleventh Circuit held that judicial review of the method of determining the amount of overpayment was precluded by the general preclusion provision, and that Sanet could not assert a challenge to that method in the action filed by the agency to recover the overpayments.[242] The proper procedure would have been for Sanet to pay the contested amount and then bring an action for repayment in the Court of Claims.[243] Because

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232. 711 F.2d 1020 (11th Cir. 1983).

233. The judicial action sought to enjoin suspension of payments pending the administrative review decision. *Id.* at 1024. That aspect of the case is discussed *infra* at notes 307-14.

234. *See* 42 U.S.C. § 405(h) (1976). The Medicare Act, by 42 U.S.C. § 1395ii (Supp. V 1981), incorporates the preclusion provision in 42 U.S.C. § 405(h).

235. *See* 42 U.S.C. § 1395oo(f)(1) (Supp. V 1981).

236. 711 F.2d at 1024.

237. *Id.* at 1025.

238. *See infra* notes 256-60 and accompanying text.

239. *See supra* note 235.

240. *See supra* note 234.

241. 666 F.2d 1370 (11th Cir. 1982).

242. *Id.* at 1375.

243. *Id.* at 1374-75.

there was an avenue by which Sanet could have presented his challenge to a judicial tribunal, the court was not forced to decide whether the challenge could be totally barred from judicial consideration.

When an agency, whose decisions are generally precluded from judicial review, issues regulations that will be used in making individual decisions, the Eleventh Circuit has indicated that the preclusion will not extend to the regulations. In *Memorial Hospital v. Heckler*,[244] the court distinguished agency policy decisions about Medicare reimbursement that were embodied in agency regulations from individual decisions concerning reimbursement.[245] The court then concluded that the agency could not close the administrative and judicial review channels that were available after individual decisions[246] by issuing supposedly nonreviewable regulations that removed a class of decisions from those channels.[247] The Eleventh Circuit, in trying to find a way to avoid the total elimination of judicial consideration of a matter entrusted to the agency, held that the regulations were reviewable under an "arbitrary and capricious" standard of review.[248]

C. *Exhaustion*

In half a dozen decisions during the last two years, the Eleventh Circuit dealt with the requirement that, before obtaining judicial review, an aggrieved party must exhaust available administrative remedies. In none of these decisions did the court break new theoretical ground, but the court's consistent approach to exhaustion was to base its decision on a sound consideration of the policy objectives of the exhaustion requirement. *Haitian Refugee Center v. Smith*[249] is typical of the court's approach. The court decided in *Haitian Refugee Center* that plaintiffs did not have to exhaust their administrative remedies on the rationale that the policies served by exhaustion were not thwarted by immediate judicial consideration of the claims.[250] The standard exceptions to the exhaustion requirement were enunciated in *Deltona Corp. v. Alexander*.[251] None

244. 706 F.2d 1130 (11th Cir. 1983).
245. *Id.* at 1133.
246. *See supra* notes 232-37 and accompanying text.
247. 706 F.2d at 1133. *See* 42 U.S.C. § 1395oo(g) (Supp. V 1981).
248. 706 F.2d at 1133.
249. 676 F.2d 1023 (5th Cir. 1982) (Unit B).
250. *Id.* at 1034-35. The policies the court identified were: (1) to allow the agency to develop a more complete factual record; (2) to permit the exercise of agency discretion and expertise on issues requiring this; (3) to prevent the deliberate disregard and circumvention of established agency procedures; and (4) to enhance judicial efficiency and eliminate the need for judicial vindication of legal rights by giving the agency the first opportunity to correct any error. *Id.* at 1034.
251. 682 F.2d 888, 893 (11th Cir. 1982).

of the exceptions, however, were found applicable in that case, and the policies supporting exhaustion were strong enough to lead the court to avoid deciding the issue before the agency had acted.[252]

The same exceptions were held not to apply in *Linfors v. United States*,[253] when the court required a Coast Guard officer to pursue administrative review of a denial of his request for retirement credit for his service academy years. Because the original decision was based on established Coast Guard policy,[254] and the next reviewing body appeared to be engaged mainly in a ministerial correction of service records,[255] the real purpose of requiring exhaustion in this case would seem to be to give the Secretary of Transportation, the person with ultimate administrative authority, an opportunity to become aware of the retirement credit policy and decide whether to maintain it. Thus, the decision to require exhaustion does have functional support, even though the court did not adequately outline that support.

Needless confusion about whether exhaustion is a jurisdictional requirement might be avoided by analysis of the underlying statutory provision for judicial review. The court has stated that exhaustion is not jurisdictional,[256] but is more in the nature of an affirmative defense that cannot be raised for the first time on appeal.[257] Those statements find support in the leading administrative law treatises.[258] But when judicial review is contingent upon an administrative review procedure, as is the case in Medicare reimbursement claims,[259] or when a judicial review provision requires an objection to be presented to the agency,[260] compliance with the statute may easily be viewed as a statutory jurisdictional analogue to exhaustion.

In *Patsy v. Board of Regents*,[261] the Supreme Court held a section 1983 plaintiff was not required to exhaust administrative remedies as a prerequisite to the civil rights action.[262] The Eleventh Circuit in *Gleason v. Mal-*

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252. *Id.* at 893-94.

253. 673 F.2d 332 (11th Cir. 1982).

254. *Id.* at 333. In Jacobs v. United States, 680 F.2d 88 (9th Cir. 1982), the Ninth Circuit found that a Coast Guard Commandant's act of informing an officer that the denial of a request identical to Linfors' was administratively final was sufficient to satisfy whatever exhaustion requirements were applicable. 680 F.2d at 88 n.1.

255. See 673 F.2d at 334, for the regulation setting out the function of the Board for Correction of Military Records.

256. Haitian Refugee Center v. Smith, 676 F.2d at 1034.

257. Dougherty County School Sys. v. Bell, 694 F.2d 78, 80 (5th Cir. 1982) (Former 5th).

258. *See, e.g.*, 4 K. DAVIS, *supra* note 124, § 26:15; B. SCHWARTZ, *supra* note 9, at 502-03.

259. *See supra* notes 232-38 and accompanying text.

260. Power Plant Div., Brown & Root, Inc. v. Occupational Safety and Health Review Comm'n, 673 F.2d 111, 114 (5th Cir. 1982) (Unit B).

261. 457 U.S. 496 (1982).

262. *Id.* at 500-01.

com[263] did not extend the *Patsy* rationale to a plaintiff bringing a *Bivens*-type constitutional tort action.[264] The court in *Gleason* affirmed the district court's dismissal of the *Bivens*-type claim, stating that such claims "are somewhat extraordinary and are restricted to the vindication of the constitutional rights of an aggrieved victim only when no equally effective remedy is available,"[265] and that the federal employee plaintiff should not be permitted to "bypass comprehensive and carefully balanced statutory and administrative remedies in order to seek direct judicial relief."[266]

D. Timeliness of Judicial Review

Statutory requirements that judicial review of agency action must be sought within a specified period of time are often strictly construed, and compliance may be treated as a jurisdictional prerequisite.[267] In *Hatchell v. Heckler,*[268] the Eleventh Circuit took the reasonable approach that substantial compliance with the timing provision had been established. Papers had been received, but not filed, by the district court clerk within the appropriate time, and apparently the only reason for not filing was the absence of a supporting affidavit along with the pro se claimant's own affidavit of insolvency in his petition to proceed *in forma pauperis.*[269]

Tortuous reasoning was employed by the court in *Bloodworth v. Heckler,*[270] when the court distinguished Social Security Administration Appeals Council denials of requests for review from that Council's denials of requests to reopen. The former type of denial, which was before the court, was held to be final agency action that triggered the sixty-day time limit for judicial review in a federal district court.[271] The characterization based on that distinction enabled the court to preserve the claimant's opportunity for judicial review of the agency action.[272]

E. Finality

Judicial review is normally only available, and only appropriate, when the agency has rendered a decision that is final, but what constitutes finality is sometimes a matter that requires careful analysis. The court's

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263. 718 F.2d 1044 (11th Cir. 1983).
264. *Id.* at 1048. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
265. *Id.* at 1047.
266. *Id.* at 1048.
267. *See* B. SCHWARTZ, *supra* note 9, § 8.3, at 440.
268. 708 F.2d 578 (11th Cir. 1983).
269. *Id.* at 579.
270. 703 F.2d 1233 (11th Cir. 1983).
271. *Id.* at 1237.
272. *Id.* at 1239.

analysis in *City of Miami v. ICC*[273] was essentially technical rather than pragmatic in reaching the conclusion that an ICC order was not final. The agency had issued a declaratory order that a railroad facility was a 'line of railroad,' and thus subject to agency jurisdiction.[274] In deciding that it had no jurisdiction because there had been no final agency action, the court of appeals decided that the ICC order, in and of itself, did not produce any necessary legal consequences.[275] The court adopted an exceedingly narrow view of the 'necessity' of legal consequences. The ICC discontinued its proceedings after issuing the order in question. Furthermore, the ICC decision would almost certainly be employed in state court proceedings concerning the City's attempt to condemn the facility in question. The court would have done well to focus on the practical effects, in a manner such as that developed under certain provisions of the Federal Rules of Civil Procedure.[276]

Questions of finality can arise when the initial judicial review of agency action occurs in a federal district court. In *Howell v. Schweiker*,[277] the court held that it did not have jurisdiction of an appeal from a district court order remanding a case to the Social Security Administration for determination of whether a disability benefit claimant was fit for substantial gainful activity in something other than his previous employment.[278] Because the agency had first determined that the applicant was not disabled, this specific question had not been considered by the agency.[279] The Eleventh Circuit concluded that the district court's order of remand was not appealable because the district court order was not a final order terminating the litigation. Further judicial review would lie only from the action of the agency in denying the benefits, if that was in fact the agency's decision on remand from the district court.[280] From the standpoint of agency action, there had been no final agency action on the issue of whether the disabled claimant was fit for other employment, so further judicial review of that matter in a court of appeals was correctly considered inappropriate.

F. Ripeness

Preenforcement review of administrative action often raises the issue of whether the agency action is ripe for judicial review. The guiding princi-

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273. 669 F.2d 219 (5th Cir. 1982) (Unit B).
274. *Id.* at 219.
275. *Id.* at 221-22.
276. *See, e.g.*, FED. R. CIV. P. 19 & 24 and accompanying Advisory Committee Notes.
277. 699 F.2d 524 (11th Cir. 1983).
278. *Id.* at 526-27.
279. *Id.* at 527.
280. *Id.* at 526.

ples are still those set out by the Supreme Court in *Abbott Laboratories v. Gardner*,[281] and the Eleventh Circuit fairly routinely resolves its ripeness issues by using those principles. Three different constitutional challenges were made to provisions of the Power Plant and Industrial Fuel Act of 1978[282] and its accompanying Department of Energy regulations. In *Atlanta Gas Light Co. v. United States Department of Energy*,[283] the Eleventh Circuit found two of the three challenges ripe for judicial resolution. The commerce clause and tenth amendment attacks were ripe because the nature of the challenge was unlikely to change as a result of actual prosecution, and the parties before the court were the most appropriate parties to raise the objections, because fines would be levied against them.[284] A due process vagueness challenge was not ripe, however. The court read the statute as delegating primary regulatory authority to the states, and until a state actually promulgated a regulatory program, claims that the regulations would be vague and uncertain were premature.[285] This decision appears to be a straightforward application of the finality prong of the *Abbott Laboratories* ripeness test,[286] but it does have interesting federalism overtones. When federal regulatory programs have state implementation components,[287] judicial review will be bifurcated on ripeness grounds, with challenges to state implementation plans postponed until those plans are actually in place.

The finality factor of ripeness was decisive in *Placid Oil Co. v. Federal Energy Regulatory Commission*,[288] in which the court's decision that a procedural order was not ripe for review preserved the challenger's opportunity to obtain judicial review of the agency's denial of the individual application under the procedure established by the order.[289] Until action occurred on that application, there was no assurance that there would be an adverse impact on the applicant.[290] *Placid Oil* can be contrasted with *Alabama Power Co. v. Federal Energy Regulatory Commission*,[291] in which the court concluded that a declaratory ruling was ripe for review because of the direct and immediate impact the order would have.[292]

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281. 387 U.S. 136 (1967).
282. 42 U.S.C. §§ 8301-8484 (Supp. V 1981).
283. 666 F.2d 1359 (11th Cir.), *cert. denied*, 103 S. Ct. 81 (1982).
284. 666 F.2d at 1363 n.7, 1368 n.16.
285. *Id.* at 1370.
286. 387 U.S. at 148-56.
287. This is the case under much of the federal environmental protection legislation. *See, e.g.*, 42 U.S.C. §§ 7410, 7411(c), 7412(d) (Supp. V 1981).
288. 666 F.2d 976 (5th Cir. 1982) (Former 5th).
289. *Id.* at 980-81.
290. *Id.* at 981.
291. 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3573 (1983).
292. 685 F.2d at 1315.

G. Mootness

The Eleventh Circuit's decision in *Alabama Hospital Association v. Beasley*[293] demonstrated how administrative action can render previously viable challenges moot. While the case was pending, the agency amended its regulation to correct one of the deficiencies that had been pointed out by the challengers.[294] The possibility that the agency might rescind the amendment to the regulations was insufficient to make the challenge 'live' again, at least in part because of the adequacy of a post-rescission opportunity to challenge the plan.[295]

H. Standing

Few matters of administrative law are as little understood by courts as the issue of whether a particular person has standing to challenge an administrative agency decision. In *R.T. Vanderbilt Co. v. Occupational Safety & Health Review Commission*,[296] the Eleventh Circuit fell into precisely the kind of analytical confusion this author has recently warned against.[297] The court's opinion treats as a standing issue the question of whether a supplier "has a right of action under the Occupational Safety and Health Act."[298] This may sometimes be a legitimate inquiry, and the court may very well be correct on this issue when it decides there is no right of action; however, the crucial point is that this is not a question of 'standing.'[299] Indeed, one could argue that whether a party has a right of action is not an appropriate question when considering a petition for review in a court of appeals under a broad "person adversely affected or aggrieved" statutory review provision such as was available in this case.[300] What the court was apparently attempting to do was apply the 'zone of interest' test of *Association of Data Processing Service Organizations v. Camp*.[301] That portion of the standing test is probably now defunct,[302] but in any event it is not a test that turns on whether the "litigant possesses a right of action."[303] The correct interpretation of the statutory provision is that it displays a Congressional intent to lift all but the con-

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293. 702 F.2d 955 (11th Cir. 1983).
294. *Id.* at 957.
295. *Id.* at 961.
296. 708 F.2d 570 (11th Cir. 1983).
297. *See* LeBel, *Standing After Havens Realty: A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013.
298. 708 F.2d at 574.
299. *See* LeBel, *supra* note 297, at 1016-32.
300. *See* 29 U.S.C. § 660(a) (1976). *See generally* LeBel, *supra* note 297, at 1037-49.
301. 397 U.S. 150, 153-56 (1970).
302. *See generally* 4 K. DAVIS, *supra* note 124, § 24:17.
303. 708 F.2d at 574.

stitutional barriers to standing, and thus would support the petitioner's standing in this case.

In *Atlanta Gas Light Co. v. United States Department of Energy*,[304] the court engaged in a more expansive standing analysis. In deciding that local gas distribution companies had standing to assert constitutional challenges to statutory and regulatory provisions limiting the sale of natural gas for certain uses, the court took a relaxed view of the injury-in-fact test for the constitutional aspect of standing to raise commerce clause issues,[305] and extended that reasoning to recognize standing to assert a tenth amendment challenge as well.[306]

I. Stay of Agency Action Pending Judicial Review

One problem faced by parties seeking judicial review of agency action is the possible adverse impact the administrative decision can have while the judicial review process is under way. A restricted view of the availability of interim relief pending the completion of administrative and judicial review was displayed in *V.N.A. of Greater Tift County, Inc. v. Heckler*,[307] when the court refused to approve an injunction sought by a health care provider who was subject to a suspension of Medicare funds for an alleged overpayment.[308] The court adapted to the Medicare context the analysis used by the Supreme Court in *Sampson v. Murray*,[309] focussing not only on whether a refusal to grant the injunction would defeat the reviewing court's jurisdiction, but also on the Congressional intent with regard to injunctions that stayed agency action pending judicial review.[310] The Eleventh Circuit decided that the *Murray* analysis as applied to this case called for a heightened showing on each of the four factors traditionally used to decide whether to grant a status quo injunction: (1) probability of success on the merits, (2) harm to other parties, (3) the public interest, and (4) irreparable injury.[311] Measured against the "new way of analyzing" the traditional factors,[312] V.N.A.'s showing was insufficient to entitle it to the injunction it sought.[313] Chief Judge Godbold, in his dissent, criticized the majority for its overly technical interpretation

304. 666 F.2d 1359 (11th Cir.), *cert. denied*, 103 S. Ct. 81 (1982).
305. 666 F.2d at 1363 n.7.
306. *Id.* at 1368 n.16.
307. 711 F.2d 1020 (11th Cir. 1983).
308. *Id.* at 1022.
309. 415 U.S. 61 (1974).
310. 711 F.2d at 1029.
311. *Id.* at 1030.
312. *Id.*
313. *Id.* at 1034-35.

of the defeat of the jurisdiction factor from the *Murray* analysis,[314] and would have permitted the district court to use the traditional test without any added burden on the challenger trying to enjoin the agency from suspending its payments while judicial review took place.

J. Judicial Remedy for Agency Error

A number of Eleventh Circuit decisions addressed the question of what power a reviewing court possesses and should exercise after an administrative agency decision has been found to be erroneous or unauthorized. The results the court reached were in each instance a predictable and sensible disposition of the case.

When an agency operates under a two-part legal standard, in which reaching the second part is contingent on an affirmative finding on the first part, then the agency can dispose of the matter by a negative finding on the first issue without ever reaching the second issue. Such is the case in Social Security Administration disability benefit cases, and the question raised is what disposition should be made if the reviewing court reverses the agency's negative finding on the first issue of whether the claimant is disabled. In *Boyd v. Heckler*,[315] the Eleventh Circuit held that the proper course of action was for the district court to remand the case to the agency.[316] On remand, the agency could exercise its statutory authority on the issue of whether the claimant could perform alternative employment that was available in the national economy, which the agency originally had no need to reach.[317] Another possible solution that would also uphold the agency authority would be for the court to encourage the agency to make contingent findings on the second issue in case the disability issue were to be reversed by the reviewing court. This procedure is analogous to a trial court's rulings on conditional new trial and judgment notwithstanding the verdict motions[318] and would save time in the individual case that was reversed. This procedure, however, might add substantially to the burden on an agency already engaged in processing a high volume workload.

In two decisions, the Eleventh Circuit rejected arguments that the specific remedial action it proposed was beyond the court's authority. In *Payne v. Block*,[319] the court held that the agency failed to issue proper public notice of the availability of federal disaster relief funds.[320] The

314. *Id.* at 1035-37 (Godbold, C.J., dissenting).
315. 704 F.2d 1207 (11th Cir. 1983).
316. *Id.* at 1211.
317. *Id.*
318. *See* FED. R. CIV. P. 50(c)-(d).
319. 714 F.2d 1510 (11th Cir. 1983).
320. *Id.* at 1520.

court took the pragmatic approach that the only meaningful relief to the aggrieved parties who had been denied the opportunity to apply for the funds would be to force the agency to extend the application period.[321] "To hold otherwise," the court said, "would allow [the agency] to totally fail to provide notice to congressionally intended potential beneficiaries and avoid being called to task for such conduct."[322] In a similarly pragmatic vein, the court, in *Refrigerated Transport Co. v. ICC*,[323] asserted its authority to direct the agency to vacate or modify an improperly issued certificate of operating authority, because holding otherwise would require challengers to seek a stay of the issuance of the certificate if they were to preserve the reviewing court's ability to grant effective relief.[324] The court found nothing in the statutory scheme that required a challenger to take that additional step in order to assure that the court would have meaningful remedial authority.[325]

A federal court's remedial powers with respect to state administrative proceedings were at issue in *Baggett v. Department of Professional Regulation, Board of Pilot Commissioners*.[326] Baggett was licensed as a marine pilot by both state and federal authorities; different licenses were required for different kinds of vessels being piloted. The state agency instituted disciplinary proceedings for conduct that occurred while Baggett was piloting a vessel whose pilotage was exclusively a matter of federal control.[327] Holding that the state proceeding was beyond the state's regulatory authority because of federal preemption, the Eleventh Circuit instructed the district court to issue an injunction against the state proceedings.[328] The dissenting judge disagreed with the majority's finding of preemption and thought it would have been appropriate for the district court to abstain so that the preemption issue could have been decided initially in the state proceedings.[329]

In *Bray v. Director, Office of Workers' Compensation Programs*,[330] the court held that it is a matter for the agency to decide whether new issues could be asserted before the agency after the initial reviewing court reversed an agency decision because of lack of jurisdiction. The court decided that administrative agencies should possess the same discretionary authority that district courts exercise over amendments to pleadings

321. *Id.* at 1517.
322. *Id.*
323. 686 F.2d 881 (11th Cir. 1982).
324. *Id.* at 889.
325. *Id.* at 889-90.
326. 717 F.2d 521 (11th Cir. 1983).
327. *Id.* at 522-23.
328. *Id.* at 524.
329. *Id.* at 524-25 (Hatchett, C.J., dissenting).
330. 664 F.2d 1045 (5th Cir. 1981) (Unit B).

when an action has been dismissed for want of jurisdiction and the judgment is later reversed.[331]

Finally, in cases taking identical views of the unconstitutionality of state intestacy laws concerning illegitimates, the court held that the proper remedy was for the court to grant the Social Security Administration benefits that would have been awarded but for the unconstitutional state laws. Those decisions dealt with the intestacy laws of Georgia[332] and Alabama.[333]

K. Standard of Review

No administrative law issue appears more frequently before a court than the standard of review the court should apply to the agency decision being challenged. The general categories of review under the APA[334] were routinely invoked by the Eleventh Circuit, and applied with no startling or remarkable developments. One leading administrative law text uses a recent Eleventh Circuit standard of review decision as an example of the typical judicial review of the reasonableness rather than the 'rightness' of agency determinations of fact.[335]

The essential question involved in standard of review issues is how much deference the reviewing courts will give to agency decisions. The answer depends, of course, on what the agency has decided.[336] The Eleventh Circuit decisions surveyed in this two year period illustrate the importance of the deference issue.

In a few Eleventh Circuit decisions, an agency's interpretation of statutory terms was held to be subject to substantially independent review by

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331. *Id.* at 1049.

332. Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982) (Former 5th).

333. Handley v. Schweiker, 697 F.2d 999 (11th Cir. 1983).

334. *See* 5 U.S.C. § 706 (1982). A comprehensive analysis of standards of review can be found in Koch, *Confining Judicial Authority Over Administrative Action*, 49 Mo. L. Rev. ___ (1984).

335. B. Schwartz, *supra* note 9, § 10.8, at 601 & n.8 (citing Home Health Servs., Inc. v. Schweiker, 683 F.2d 353, 357 (11th Cir. 1982)).

336. More fruitful exploration of the intricacies of standard of review decisions would probably proceed on an agency-by-agency basis. In part, I think this is true because writing at other than abstract levels about the law of standards of review is an attempt to hit a moving target. One of the practical factors that undoubtedly affects the degree of deference a court displays toward an agency is the trust the court has in the agency's good faith commitment to carrying out both the letter and the spirit of the statutory program it administers. When such trust is absent, as I believe it probably should be absent in the present administration's operation of the major entitlement programs, the standard of review could easily become more rigorous without any change in the general language courts use to define and describe the standard being employed. Empirical studies of the relationship between courts and the Social Security Administration under the present administration may bear out this hypothesis.

the court.[337] In some cases, however, when the agency's interpretation involved a choice between competing policy concerns, and that interpretation was consistent with the statutory language and purpose, as independently determined by the court, then deference was given to the agency.[338]

A substantial evidence standard of review is essentially a reasonableness standard. In several Eleventh Circuit decisions, the reviewing court required the agency to explain 'how' it reached its decision, so that the court could determine whether the correct legal standard had been applied.[339] In addition, the Eleventh Circuit held that decisions turning on the credibility of witnesses are proper for the agency to make without much interference by courts. As a corollary to the proposition that the agency be required to explain how it reached its decision, the agency may be required to report that the decision actually was based on a credibility determination.[340] During the survey period, the court generally gave closer scrutiny to agency decisions when they were contrary to the initial decision of the ALJ who presided over the hearing. This scrutiny is employed by the court to determine whether the decision is supported by substantial evidence even though the ALJ ruled adversely.[341]

The court also gave more deference to legislative rules adopted under procedures that assured some opportunity for public participation than they gave to rules adopted without such procedures.[342] The Eleventh Cir-

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337. *See, e.g.*, Hospital Auth. v. Heckler, 707 F.2d 456 (11th Cir. 1983); American Trucking Ass'n v. ICC, 672 F.2d 850 (11th Cir. 1982); Charter Limousine, Inc. v. Dade County Bd. of County Comm'rs, 678 F.2d 586, 588 (5th Cir. 1982) (Unit B).

338. *See, e.g.*, Marti-Xiques v. Immigration & Naturalization Servs., 713 F.2d 1511, 1515-16 (11th Cir. 1983); Railroad Concrete Crosstie Corp. v. Railroad Retirement Bd., 709 F.2d 1404, 1407-09 (11th Cir. 1983); Powell v. Schweiker, 688 F.2d 1357 (11th Cir. 1982); Brown & Root Dev., Inc. v. TVA, 681 F.2d 1313, 1316-17 (11th Cir. 1982); Southern Motor Carriers Rate Conference, Inc. v. United States, 676 F.2d 1374, 1377 (11th Cir. 1982).

339. *See, e.g.*, Thornton v. United States Dep't of Agriculture, 715 F.2d 1508, 1510 (11th Cir. 1983); Smith v. Heckler, 707 F.2d 1284 (11th Cir. 1983); Boyd v. Heckler, 704 F.2d 1207, 1209 (11th Cir. 1983); Jones v. Heckler, 702 F.2d 950 (11th Cir. 1983); Home Health Servs., Inc. v. Schweiker, 683 F.2d 353 (11th Cir. 1982); Freeman v. Schweiker, 681 F.2d 727 (11th Cir. 1982); Wiggins v. Schweiker, 679 F.2d 1387 (11th Cir. 1982); Walden v. Schweiker, 672 F.2d 835, 839-40 (11th Cir. 1982); Watkins v. Schweiker, 667 F.2d 954 (11th Cir. 1982).

340. *See, e.g.*, Bloodworth v. Heckler, 703 F.2d 1233, 1242 (11th Cir. 1983); Walden v. Schweiker, 672 F.2d 835, 839-40 (11th Cir. 1982).

341. *See, e.g.*, Georgia Pub. Serv. Comm. v. United States, 704 F.2d 538, 542-43 (11th Cir. 1983); Cities of Lakeland & Tallahassee, & Gainesville Regional Util. v. Federal Energy Regulatory Comm'n, 702 F.2d 1302 (11th Cir. 1983); Georgia Kraft Co. v. NLRB, 696 F.2d 931 (11th Cir. 1983); Equifax, Inc. v. FTC, 678 F.2d 1047 (11th Cir. 1982).

342. *See, e.g.*, Ryder Truck Lines v. United States, 716 F.2d 1369, 1377-78 (11th Cir. 1983); Memorial Hosp. v. Heckler, 706 F.2d 1130 (11th Cir. 1983); Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325, 1329-30, (11th Cir. 1983); American Trucking Ass'n v. United States, 668 F.2d 1337, 1341-42 (11th Cir. 1982).

cuit also treated with deference agency interpretations of authority that were adopted contemporaneously with the enactment of the enabling legislation or that have been consistently applied.[343] In addition, agency interpretations of their own regulations are entitled to greater deference than agency constructions of the statutes under which they operate. A reviewing court, however, may still determine whether the interpretation is plainly erroneous, or whether it is inconsistent with either the regulation itself or the underlying statute.[344]

343. *See, e.g.*, Fidalgo/Velez v. Immigration & Naturalization Serv., 697 F.2d 1026, 1029 (11th Cir. 1983); Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325, 1330 (11th Cir. 1983); Veterans Admin. Medical Center v. Federal Labor Relations Auth., 675 F.2d 260, 262 (11th Cir. 1982).

344. South Georgia Natural Gas Co. v. Federal Energy Regulatory Comm'n, 699 F.2d 1088, 1090 (11th Cir. 1983).