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# COMMENTS

## TRIAL DE NOVO UNDER THE FOOD STAMP ACT OF 1964; THE PERMISSIBLE LIMITS OF JUDICIAL INTRUSION

Pursuant to the administrative scheme<sup>1</sup> of the Food Stamp Act of 1964,<sup>2</sup> James Cross, after admitting he violated<sup>3</sup> provisions of the federal food stamp program,<sup>4</sup> was disqualified from the program for one year. In the District Court for the District of South Carolina, Cross sought de novo review of the sanction imposed. The court characterized the sanction as "harsh," but declined to review its validity.<sup>5</sup> On appeal, in *Cross v. United States*,<sup>6</sup> the Court of Appeals for the Fourth Circuit remanded the case and permitted the district court to modify the sentence upon finding arbitrary or capricious action by the agency. This comment focuses upon the propriety of this decision.<sup>7</sup>

Specifically, *Cross* involved review of administrative action under section 2020 of the Food Stamp Act of 1964,<sup>8</sup> which authorizes the suspension of trading privileges of stores found in violation of the Act or programs promulgated thereunder. While there was some uncertainty

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1. 7 C.F.R. §§ 270.1-70.5 (1975).

2. 7 U.S.C. §§ 2011-25 (1970).

3. Under the food stamp program, stamps may be accepted only for certain items, 7 C.F.R. § 272.2(b) (1975), and no more than 49 cents may be exchanged for stamps in any one transaction. *Id.* § 272.2(e). Cross admitted that his grocery store, on certain occasions, had violated both of these regulations. In mitigation, he stated that his clerk, a man with a "drinking problem," was the offender, and that, upon discovery of the clerk's conduct, Cross discharged him. *Cross v. United States*, 512 F.2d 1212, 1215 (4th Cir. 1975).

4. See notes 13-14 *infra* & accompanying text.

5. *Cross v. United States*, 512 F.2d 1212, 1216 (4th Cir. 1975).

6. *Id.*

7. For an analysis of judicial review of administrative action in general, see *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973); *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958) (per curiam); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936); *Crowell v. Benson*, 285 U.S. 22 (1932); 4 K. DAVIS, *ADMINISTRATIVE LAW* §§ 28.01-30.14 (1958 & 1970 Supp.) [hereinafter cited as K. DAVIS]; L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (abr. student ed. 1965) [hereinafter cited as L. JAFFE]; Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 769 (1958).

8. 7 U.S.C. § 2020 (1970).

in cases arising under the Act as to whether administrative sanctions could be brought under judicial scrutiny at all (where the administrative determination that the participant had violated the Act was found to be valid),<sup>9</sup> decisions prior to *Cross* uniformly held that district courts had no power to modify the suspension imposed.<sup>10</sup> In deciding to the contrary, *Cross* has authorized "an impermissible intrusion into the administrative domain."<sup>11</sup>

### ADJUDICATORY PROCEDURE UNDER THE FOOD STAMP ACT

The Food Stamp Act of 1964, administered on the national level by the Food and Nutrition Service (FNS) of the United States Department of Agriculture,<sup>12</sup> establishes a program whereby low income consumers can increase their food purchasing power within the private retail market.<sup>13</sup> The operation of the program is relatively simple. A qualified recipient buys stamps which have a face value higher than their purchase price, exchangeable at face value for food at an authorized retail

9. Compare *Welch v. United States*, 464 F.2d 682, 684 (4th Cir. 1972) and *Miller v. United States Dep't of Agr., F. & N. Serv.*, 345 F. Supp. 1131, 1132 (W.D. Pa. 1972) with *Shurkin v. United States*, 32 Ad. L.2d 120 (4th Cir. 1973) (per curiam) and *Great Atl. & Pac. Tea Co. v. United States*, 342 F. Supp. 492 (S.D.N.Y. 1972) (by implication).

10. See, e.g., *Welch v. United States*, 464 F.2d 682 (4th Cir. 1972) (district court may not reduce an administrative sanction for admitted violations of the Food Stamp Act); *Martin v. United States*, 459 F.2d 300 (6th Cir.), cert. denied, 409 U.S. 878 (1972); *Save More of Gary, Inc. v. United States*, 442 F.2d 36 (7th Cir.) (by implication), petition for cert. dismissed, 404 U.S. 987 (1971); *Marcus v. United States Dep't of Agr., F. & N. Serv.*, 364 F. Supp. 374 (E.D. Pa. 1973); *Miller v. United States Dep't of Agr., F. & N. Serv.*, 345 F. Supp. 1131 (W.D. Pa. 1972) (despite court's admission that administrative sanction was oppressive, the court held the district court powerless to modify the period of disqualification); *Great Atl. & Pac. Tea Co. v. United States*, 342 F. Supp. 492 (S.D.N.Y. 1972); *Farmingdale Supermarket, Inc. v. United States*, 336 F. Supp. 534 (D.N.J. 1971) (by implication); *Marbro Foods, Inc. v. United States*, 293 F. Supp. 754 (N.D. Ill. 1968) (seemingly); cf. *American Nat'l Foods, Inc. v. United States Dep't of Agr.*, 381 F. Supp. 1021 (M.D. Tenn. 1974); *Shurkin v. United States*, 32 Ad. L.2d 120 (4th Cir. 1973) (per curiam). But cf. *J.C.B. Super Markets, Inc. v. United States*, 57 F.R.D. 500 (W.D.N.Y. 1972) (finding division on issue, citing *Welch v. United States*, supra, and dissent in *Martin v. United States*, supra).

11. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 188 (1973). In deciding that the district court may modify a sanction imposed by the Secretary (acting through his designates), the court overruled *Welch v. United States*, 464 F.2d 682 (4th Cir. 1972). 512 F.2d at 1215.

12. 7 C.F.R. § 270.3(a) (1975). Locally, the food stamp program is administered by the appropriate state agency. *Id.* § 270.3(b).

13. 7 U.S.C. § 2011 (1970). See also S. REP. No. 1124, 88th Cong., 2d Sess. (1964) in 1964 U.S. Code Cong. & Ad. News 3275.

marketing concern which, in turn, redeems the stamps for cash.<sup>14</sup> In economically depressed areas, food stamp transactions are vital to food retailing. Thus, when a store is found in violation of the terms of the Act, even a month's suspension of its participation in the program could bring severe financial hardship.<sup>15</sup> The harsh effects consequent to a suspension of trading privileges in food stamps necessitate a review procedure whereby the food merchant is afforded due process protection from arbitrary action.<sup>16</sup>

Section 2020 of the Food Stamp Act authorizes the disqualification of any food store found to be in violation of the provisions of the Act or of the regulations promulgated thereunder.<sup>17</sup> The factfinding and adjudicatory procedures are left to the Secretary of Agriculture to establish by regulation. The regulations issued pursuant to section 2020<sup>18</sup> allow disqualification "for a reasonable period of time, not to exceed 3 years, as FNS may determine . . . ." <sup>19</sup> A firm considered for disqualification "shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before a final determination is made by FNS as to the administrative action to be taken." <sup>20</sup> Accordingly, notice is given to the firm, specifying the alleged violations, and the firm is allowed to respond orally or in writing.<sup>21</sup> The allegations, response, and other available information are considered by the Director, Food Stamp Division, who then makes his determination.<sup>22</sup> Such determination is "final and not subject to further

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14. 7 U.S.C. § 2013(a) (1970).

15. See *Cross v. United States*, 512 F.2d 1212, 1217 (4th Cir. 1975).

16. While merchants have no "right" to participate in the food stamp program, it is clear that such participation is a benefit to which constitutional due process rights attach. See *Graham v. Richardson*, 403 U.S. 365, 374 (1971); 1 K. DAVIS, *supra* note 7 § 7.12-13; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

17. The regulations are set out at 7 C.F.R. §§ 270.1-274.14 (1975). Typically, when FNS suspects a store of violating the Act, it will send "shoppers" to the store who will attempt to pay for ineligible goods (alcoholic beverages, tobacco, imported food and nonfood products) with food stamps. Suspensions usually have been imposed only after repeated violations. See, e.g., *Cross v. United States*, 512 F.2d 1212, 1215 (4th Cir. 1975); *Welch v. United States*, 464 F.2d 682, 683 (4th Cir. 1972); *Save More of Gary, Inc. v. United States*, 442 F.2d 36, 38 (7th Cir. 1971); *Marbro Foods, Inc. v. United States*, 293 F. Supp. 754, 755 (N.D. Ill. 1968).

18. 7 C.F.R. §§ 272.6-272.8 (1975).

19. *Id.* § 272.6(a).

20. *Id.* § 272.6(b).

21. *Id.*

22. *Id.* § 272.6(c). By the terms of sections 272.6 (b) and (c), the firm is given "full opportunity" to meet the allegations contained in a "letter of changes," but in

administrative or judicial review," absent a timely request for such review.<sup>23</sup>

Administrative review of the Director's decision lies with the Food Stamp Review Officer;<sup>24</sup> imposition of a penalty is stayed pending his disposition.<sup>25</sup> Again the firm is allowed to submit information relating to the alleged violation,<sup>26</sup> and the Director is required to "submit, in writing, all information which was the basis for the administrative action"<sup>27</sup> previously taken. The Review Officer makes his decision after considering the information supplied by the Director, the firm, and "any other person having relevant information."<sup>28</sup> Where a suspension is involved, the Review Officer "shall sustain the action under review or specify a shorter period of disqualification, direct that an official warning letter be issued to the firm in lieu of any period of disqualification, or direct that no administrative action be taken in the case."<sup>29</sup> Opportunity thereby is given the firm to contest the suspension period as well as the fact of violation.

After the Review Officer renders his final decision, the firm may seek review in the district court by filing suit against the United States under section 2022, and may obtain a stay of the suspension upon application and "a showing of irreparable injury . . . ." <sup>30</sup> It is at this point that the problem of reviewability of an administrative sanction arises. Section 2022, in pertinent part, provides: "The suit in the United States district court . . . shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue."<sup>31</sup> The question presented is twofold: Does review extend to the sanction imposed if that sanction is within the lawful limits prescribed by the Secretary? If the scope of review does encompass the sanction, does the district court have the power to modify that penalty; in other words,

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making his determination, the Director, Food Stamp Division, may consider not only the letter and the response, but also "such other information as may be available to FNS . . ." *Id.* Presumably the Director could act on information which would not be disclosed to the firm.

23. *Id.* § 272.6(d). The preclusion of judicial review at this stage is authorized by section 2022.

24. 7 C.F.R. § 272.8 (1975).

25. *Id.* § 272.8(a), 273.7(a).

26. *Id.* § 273.6(b).

27. *Id.* § 273.7(d).

28. *Id.* § 273.8(a).

29. *Id.* § 273.8(c).

30. 7 U.S.C. § 2022 (1970).

31. *Id.* § 2022(c).

can the court reduce the period of suspension, or must it remand the case to the agency for reconsideration?

#### THE ISSUE OF PENALTY REVIEW: PRE-CROSS CASE LAW

The issue of penalty review was raised first in *Marbro Foods, Inc. v. United States*.<sup>32</sup> In *Marbro* the district court indicated that section 2022 was directed toward evidentiary issues, and not at the administrative choice of remedy: "The scope of judicial review for administrative decisions made under the Food Stamp Program was limited by Congress to a determination as to whether the agency's decision is valid. . . . Findings of an administrative agency are to be accepted upon judicial review unless they are unsupported by substantial evidence."<sup>33</sup> The court apparently severed the penalty determination from the "agency decision," by restricting its findings to validity of the factual determination that the store was in violation of the Act.<sup>34</sup> Impliedly, the sanction imposed did not fall within the scope of judicial review.

*Marbro* was followed by the Court of Appeals for the Seventh Circuit in *Save More of Gary, Inc. v. United States*,<sup>35</sup> though upon a slightly different rationale. The court in *Save More* apparently accepted plaintiff's assumption that the penalty was an integral part of the "agency decision," but upheld the district court's refusal to review the sanction on the ground that the sanction imposed did not impair the "validity" of the administrative action.<sup>36</sup> It is not clear whether the court felt that the validity of the action hinged upon a sanction which fell within lawful limits, or, alternatively, that a penalty beyond those limits could not affect the validity of the action.

The first challenge to decisions sheltering suspensions from judicial review came in Sixth Circuit Judge Edwards' dissent to *Martin v. United States*.<sup>37</sup> Judge Edwards stated: "Under any normal construction of legal language, [trial de novo] gives to the reviewing court all the power that the court or agency below possessed, including the power to enter

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32. 293 F. Supp. 754 (N.D. Ill. 1968).

33. *Id.* at 755.

34. At least a cursory judicial glance at the terms of the penalty was implicit in the court's observation that the suspension was "for a reasonable, definitely-stated period of time," *id.*, but the court's emphasis was clearly on the perceived evidentiary focus of section 2022.

35. 442 F.2d 36 (7th Cir.), *petition for cert. dismissed*, 404 U.S. 987 (1971).

36. *Id.* at 39.

37. 459 F.2d 300, 302 (6th Cir.), *cert. denied*, 409 U.S. 878 (1972).

a disposition or judgment different from that originally entered.”<sup>38</sup> The majority, however, read section 2022 as authorizing “a review only on the merits of the case, and not on the period of disqualification.”<sup>39</sup>

The Court of Appeals for the Fourth Circuit first faced the question of sanction review in *Welch v. United States*.<sup>40</sup> *Welch* adopted the *Marbro* approach, finding that “[t]he reach of the judicial review . . . is not unqualified for the trial *de novo* is limited to a determination of the validity of the administrative action, and the action which is subject to judicial scrutiny is the action of disqualification.”<sup>41</sup> However, *Welch* did not go so far as to hold that the sanction was entirely beyond judicial scrutiny: “If the violations are proven (or, as here, admitted), and if the particular sanction is within the allowable range then the validity of the administrative action has been established.”<sup>42</sup> Thus, the court implied that if a suspension in excess of three years was imposed, it would not be allowed to stand. The court, however, did not state what action would be appropriate should such a case arise.

Judge Butzner wrote a concurring opinion to *Welch* in which he raised two significant objections to the majority’s concept of review under section 2022.<sup>43</sup> First, he found that “neither the Act nor the regulation grants a merchant an evidentiary hearing in the administrative process, either initially or on review. The only hearing allowed by the Act is in the district court. . . . Adoption of the government’s view [review of disqualification only] will deprive the merchant of any hearing—administrative or judicial—on the equally important question of how long he should be disqualified.”<sup>44</sup> Secondly, he delineated two elements which he contended constituted the “action of disqualification”: the factual determination that a violation occurred, and the term of the suspension to be imposed.<sup>45</sup> Including the suspension as part of the “action of disqualification” brought the penalty within the scope of judicial

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38. *Id.* at 302.

39. *Id.* at 301. The court compared the penalty provisions of the Food Stamp Act with those of the Commodity Exchange Act, 7 U.S.C. §§ 1-17a (1970), and the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a-499s (1970). Sanctions imposed under the latter two Acts have been held unreviewable. See notes 106-18 *infra* & accompanying text.

40. 464 F.2d 682 (4th Cir. 1972).

41. *Id.* at 684.

42. *Id.*

43. *Id.* at 685.

44. *Id.*

45. *Id.*, citing *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

review as formulated by the majority. Judge Butzner's opinion marked the first objection on due process grounds to a limited scope of judicial review under section 2022.

In *Shurkin v. United States*,<sup>46</sup> the Court of Appeals for the Fourth Circuit, apparently influenced by the reasoning of Judge Butzner's opinion in *Welch*, wavered from the position that suspension of participation in the Food Stamp program is beyond judicial scrutiny.<sup>47</sup> In *Shurkin* the court stated: "[W]hether or not a district court is empowered to reduce a penalty imposed by the Department of Agriculture for violation of the Food Stamp Act, the penalty imposed in this case was not an abuse of the Secretary's discretion, and the district court should not have reduced the penalty."<sup>48</sup> The apparent discomfort with the *Welch* holding led to a reconsideration of the issue of the scope of judicial review under section 2022 in *Cross*.

#### CROSS V. UNITED STATES

The court in *Cross* based its change of position on the due process issue raised by Judge Butzner in *Welch*.<sup>49</sup> In examining the adjudicatory proceeding conducted by the Director, Food Stamp Division, the majority found "no confrontation with accusers, no opportunity to cross-examine and to test credibility, and no determination by an impartial fact-finder."<sup>50</sup> Further, the court found that during the administrative review conducted by the Food Stamp Review Officer, "the usual attributes of a full 'hearing' are not present."<sup>51</sup> Holding that disqualification from participation in the Food Stamp program constituted a deprivation of property demanding procedural due process under the Consti-

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46. 32 Ad. L.2d 120 (4th Cir. 1973) (per curiam).

47. Instances of courts holding that such suspensions are unreviewable include: *American Nat'l Foods, Inc. v. United States Dep't of Agr.*, 381 F. Supp. 1021 (M.D. Tenn. 1974); *Eckstut v. Hardin*, 363 F. Supp. 701 (E.D. Pa. 1973); *Marcus v. United States Dep't of Agr., F. & N. Serv.*, 364 F. Supp. 374 (E.D. Pa. 1973); *Miller v. United States Dep't of Agr., F. & N. Serv.*, 345 F. Supp. 1131 (W.D. Pa. 1972); *Great Atl. & Pac. Tea Co. v. United States*, 342 F. Supp. 492 (S.D.N.Y. 1972); *Farmingdale Supermarket, Inc. v. United States*, 336 F. Supp. 534 (D.N.J. 1971).

48. 32 Ad. L.2d at 120. Aside from the opinion, Judges Butzner and Craven contended that the power to modify existed, but that it was improperly exercised in this case; Judge Russell contended that there was no such power.

49. See note 44 *supra* & accompanying text.

50. 512 F.2d at 1216. The adjudicatory procedure is outlined at notes 20-23 *supra* & accompanying text.

51. *Id.* at 1217. The review procedure is outlined at notes 24-29 *supra* & accompanying text.



tution of the United States,<sup>52</sup> the court found the administrative procedure constitutionally infirm.<sup>53</sup>

No specific premise for penalty modification by the district court was evidenced in the opinion. Apparently, the court assumed that the statutory provision for a trial *de novo* conferred upon the district court broad powers insofar as its disposition of the administrative action was concerned, provided that a finding of abuse of discretion could be made.<sup>54</sup> Notably, the court held that a district court may reduce an administratively imposed sanction even if the sanction lies within parameters permitted by the Act and implementing regulations.<sup>55</sup> Yet the court confusedly defined the role of the district court in modifying the penalty:

Even in those instances in which a district court may find on *de novo* review that the Secretary erred in his determination of the fact and gravity of the violations, it would be incumbent on the district court to prescribe an alternate penalty, not on the basis of what it, in the exercise of its judgment, would consider reasonable and just, but *within the guidelines set by the Secretary* for the enforcement of the Act.<sup>56</sup>

In retrospect, it seems this premise required more justification than its mere assertion.

### *Statutory Construction of Sections 2020 and 2022*

As previously noted, the treatment initially accorded sanction review excluded the penalty from "administrative action," thereby removing it from judicial scrutiny altogether.<sup>57</sup> Courts often failed, however, to draw a clear distinction between an absolute lack of jurisdiction to review, and nonreviewability because the penalty was within lawful lim-

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52. See note 87 *infra* & accompanying text.

53. The court devised a tripartite test to evaluate a sanction in the context of due process: "Due process on the issue of sanction requires that the punishment follow rationally from the facts, be authorized by the statute and regulations, and aim toward fulfillment of the Act's purposes." 512 F.2d at 1217-18 (footnotes omitted).

54. Stated the court: "[O]nly in those instances in which it may be fairly said on the *de novo* record as a whole that the Secretary, acting through his designates, has abused his discretion by acting arbitrarily or capriciously, would the district court be warranted in exercising its authority to modify the penalty." *Id.* at 1218.

55. The court remanded the case to the district court to consider the propriety of a one year sentence; the regulations permit disqualification not to exceed a period of three years. 7 C.F.R. § 272.6(a) (1975).

56. 512 F.2d at 1218-19 (emphasis supplied).

57. See note 34 *supra* & accompanying text.

its.<sup>58</sup> Although the highly discretionary nature of the administrative decision to suspend for a given period undoubtedly contributed to the courts' reluctance to interfere, this concern should not have precluded all investigation into the limits of section 2022.

A close reading of sections 2020 and 2022 for some indication of congressional intent concerning the issue of judicial review yields inconclusive results.<sup>59</sup> Section 2020 authorizes the disqualification of merchants and provides that "[s]uch *disqualification* shall be for such period of time as may be determined in accordance with regulations . . . ." <sup>60</sup> Finally, "[t]he *action of disqualification* shall be subject to review . . . ." <sup>61</sup> There is an apparent bifurcation of the decision to disqualify and the determination of the period of suspension, with only the former "action" subject to review.<sup>62</sup> Yet, if Congress intended to place that action alone within the scope of judicial scrutiny, it could have done so explicitly by placing the review stipulation after the authorization to disqualify, and before the provision for the period of suspension. Nor is section 2022 determinative, as no clear limitations are established in the provision for "a trial de novo . . . in which the court shall determine the validity of

58. See, e.g., *Welch v. United States*, 464 F.2d 682, 684 (4th Cir. 1972); *Miller v. United States Dep't of Agr., F. & N. Serv.*, 345 F. Supp. 1131, 1132 (W.D. Pa. 1972). The limits of lawful agency action are defined not only by statute, but also by promulgated regulations. As the *Cross* opinion noted, "[a]n agency must follow its regulations as well as statutory mandates." 512 F.2d at 1218 n.9, citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969). But see *Berger, Do Regulations Really Bind Regulators?*, 62 Nw. U.L. Rev. 137 (1967). Arguably, however, an "unlawful" agency action is not "reviewable" since technically a suit challenging such action is not considered brought to "review." See *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

59. The legislative history is no more satisfactory. See S. REP. NO. 1124, 88th Cong., 2d Sess. (1964) in 1964 U.S. CODE CONG. & AD. NEWS 3275. Judge Butzner, in his concurrence to *Welch*, submitted that since the report linked "administrative and judicial review without suggesting that they differ in scope, [it] indicate[d] that they [were] coextensive. Since the duration of disqualification may be reviewed administratively [see note 29 *supra* & accompanying text], the Report illustrate[d] that Congress intended that the penalty may also be reviewed judicially." 464 F.2d at 686. The report, in its explanation of the provisions, did note that section 13 of the Act (section 2022) "provide[d] for administrative and judicial review of . . . the disqualification of . . . a participating concern . . . ." 1964 U.S. CODE CONG. & AD. NEWS at 3291. Reading "disqualification" as including the period of suspension, however, is no more plausible than limiting it solely to the decision to suspend. Hence, Judge Butzner's analysis seems based more on his inclination toward a broad scope of review than upon a demonstration of substantive congressional intent.

60. 7 U.S.C. § 2020 (1970) (emphasis supplied).

61. *Id.* (emphasis supplied).

62. This was the interpretation adopted in *Welch*. See notes 40-41 *supra* & accompanying text.

the questioned administrative action in issue.”<sup>63</sup> It is difficult even to carry the distinction drawn in section 2020 between the “action of disqualification” and the determination of the period of suspension into

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63. 7 U.S.C. 2022 (1970). There are three limiting terms in this phrase which have no universal meaning: “trial de novo,” “validity,” (see notes 70 & 73 *infra*), and “administrative action.” The majority in *Cross* found that “de novo” meant that “‘the court should make an independent determination of the issues,’” and that congressional use of the term “authorized the reviewing court to engage in its own factfinding . . .” 512 F.2d at 1216 n.4, *quoting* *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967). Whether de novo review was limited solely to adjudication depended upon the nature of the term “validity.” *Id.* Judge Widener, concurring in *Cross*, found Judge Edward's dissent to *Martin*, see notes 37-38 *supra* & accompanying text, persuasive, and would have read “de novo” in its broadest sense. 512 F.2d at 1219-20. Both opinions ascribed essentially the same liberal scope to “de novo,” differing only as to whether other terms in section 2022 imposed limits upon that scope.

Certainly there have been judicial pronouncements that justify the *Cross* interpretation of “de novo.” See, e.g., *Pittsburgh S.S. Co. v. Brown*, 171 F.2d 175, 178 (7th Cir. 1948); *Spano v. Western Fruit Growers, Inc.*, 83 F.2d 150, 152 (10th Cir. 1936); *United States v. Feller*, 156 F. Supp. 107, 110 (D. Alas. 1957); *American Fruit Growers, Inc. v. S.T. Runzo & Co.*, 95 F. Supp. 842, 844 (W.D. Pa. 1951); *Davis v. Brittain*, 89 Ariz. 89, —, 358 P.2d 322, 326 (1960); *Borreson v. Dep't of Public Welfare*, 368 Ill. 425, 432, 14 N.E.2d 485, 488 (1938). And clearly “[t]he specific review provisions in 7 U.S.C. § 2022 . . . [give food distributors] a trial de novo well beyond the scope of review available under the general provisions of the Administrative Procedure Act.” *Peoples v. United States Dep't of Agr.*, 427 F.2d 561, 565 (D.C. Cir. 1970) (dictum). But “de novo” nonetheless has meant a restricted review in numerous contexts. “A trial de novo by a reviewing court may mean (1) a retrial on the evidence presented and the record made before the lower tribunal; or (2) a retrial in which the evidence is heard anew by the appellate tribunal.” *In re Will of Collins*, — Del. —, —, 251 A.2d 345, 346 (1969). *Accord*, *Denver & R.G.W.R. Co. v. Public Serv. Comm'n* 98 Utah 431, —, 100 P.2d 552, 554 (1940).

It seems settled that under section 2022 the reviewing court may consider evidence dehors the administrative record, and may reach an independent factual determination based upon a preponderance of the evidence. See *J.C.B. Super Markets, Inc. v. United States*, 57 F.R.D. 500, 502-03 (W.D.N.Y. 1972); *J.L. Saunders, Inc. v. United States*, 52 F.R.D. 570, 573 (E.D. Va. 1971). But while statutory review provisions run “‘a gamut all the way from authorizing a judicial trial *de novo* . . . to denying all judicial review,’” 512 F.2d at 1220 (Judge Widener concurring), *quoting* *Stark v. Wickard*, 321 U.S. 288, 312-13 (1944) (Justice Frankfurter dissenting), there are constitutional objections to unlimited judicial review, even under the de novo extreme. See notes 102-05 *infra* & accompanying text.

The express stipulation for de novo review is highly unusual. Only four federal statutes currently in force, other than the Food Stamp Act, have been found which include such a provision. See 18 U.S.C. § 43 (1970), *formerly* ch. 645, § 43, 62 Stat. 687 (1948) (may not be presently in force; see citation below of Endangered Species Conservation Act of 1969); Federal Coal Mine Health and Safety Act § 819(a)(4), 30 U.S.C. § 801 (1970); Communications Act of 1934 § 504 (a), 47 U.S.C. § 35 (1970) (proviso for trial de novo added by the Communications Act Amendments, 1960, Pub. L. No. 86-752, § 7(b), 74 Stat. 899); Export Administration Act of 1969 § 2405(f), 50 App. U.S.C. § 2401 (1970). With the exception of section 43 of title 18, U.S.C., the

section 2022 since "administrative action" in section 2022 encompasses denial of applications and denial of claims, in addition to disqualifications. In the final analysis, as section 2022 is a general review provision, the period of suspension might well fall within its ambit, assuming that the

legislative history of these statutes does not reveal any factors underlying the congressional decision to provide for *de novo* review.

Section 43(c)(1) of the Endangered Species Conservation Act of 1969, Pub. L. 91-135 § 1-12(f), 83 Stat. 275 *codified at* 16 U.S.C. § 668 cc-4 (1970) *and* 18 U.S.C. § 43(c)(1) (1970) (16 U.S.C. § 668 cc-4 was repealed in 1973; 18 U.S.C. 43(c)(1) (1970) was left intact), now Endangered Species Act of 1973 § 1540(a)(1), 16 U.S.C.A. § 1531 (1974), provided for the assessment of fines up to \$5000 for violations of the Act, and authorized the Secretary to bring suit in the district court for recovery of penalties. The court was given "authority to review the violation and the assessment of the civil penalty *de novo*." S. REP. NO. 91-526, 91st Cong., 1st Sess. (1969), *in* 1969 U.S. CODE CONG. & AD. NEWS 1413, noted that the review provision as amended makes clear that the district court, in a suit to collect a penalty, shall have the authority to review *de novo* both the violation and the assessment of the civil penalty. Spokesmen for the Department of the Interior have expressed their belief that the courts have this authority already, and since several persons have requested that this safeguard be made explicit, the committee decided to write this provision into the bill. It should provide protection for private persons who fear arbitrary action by the Secretary in a penalty proceeding. 1969 U.S. CODE CONG. & AD. NEWS at 1420. Section 1540(a)(1) of title 16, U.S.C.A., is essentially the same as section 43(c)(1) of the earlier enactment, except that the review provision now reads: "The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole." No reason for the change appears in the legislative history.

Read together, the Endangered Species Acts of 1969 and 1973 raise three inferences about judicial review *de novo*: (1) where Congress used the term "*de novo*," it intended to confer upon the judiciary complete revisory powers; (2) where Congress intended to bring the administrative sanction within the scope of judicial review, it did so expressly, as in section 43(c)(1) of the 1969 act; and (3) for reasons known only to it, in the administrative setting, Congress has found the traditional form and scope of judicial review preferable to trial *de novo*. Given the evident legislative uncertainty as to the limits and appropriateness of *de novo* review, an assumption that trial *de novo* invariably encompasses the entire administrative action would be unwarranted. The boundaries of the term are unclear, but that inherent limitations obtain seems beyond question.

Finally, as to "administrative action," this may or may not include the determination of the period of suspension. Assuming that the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1970), is an appropriate conceptual framework, the decision to suspend for a particular period is within the realm of "administrative action." See 5 U.S.C. § 701(b) (1970); *id.* § 551(13); *id.* § 551(10)(F). But section 2020 can be read to exclude the period of suspension from the administrative action reviewable under Section 2022. See note 62 *supra* & accompanying text. Although the operation of the Administrative Procedure Act may be foreclosed by the specific review procedure of the Food Stamp Act, *cf.* *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *Peoples v. United States Dep't of Agr.*, 427 F.2d 561, 565 (D.C. Cir. 1970) (*dictum*), the concept of administrative action as encompassing the determination of the period of suspension is more consonant with common knowledge and legislative understanding.

explicit command of section 2020 (that "the action of disqualification shall be subject to review . . .") is not read as exclusive.

Because the regulations relating to disqualification establish a range of lawful periods of suspension,<sup>64</sup> administrative action in choosing a particular period necessarily involves the exercise of discretion. This discretion, however, does not appear to be of a type which Professor Kenneth Culp Davis would classify as "committed."<sup>65</sup> Davis states that "administrative action is usually reviewable unless either (a) congressional intent is discernible to make it unreviewable, or (b) the subject matter is for some reason inappropriate for judicial consideration."<sup>66</sup> Since "[t]he statutory requirement of de novo review is an unusual circumstance which calls for a much broader scope of judicial review of administrative actions,"<sup>67</sup> section 2022 does not meet the first Davis criterion for nonreviewability. Further, because the imposition of a penalty as a consequence of a violation of law involves matters of judgment with which courts are particularly familiar, the second criterion also is not met.<sup>68</sup>

### *Agency Discretion: The "Arbitrary and Capricious" Test*

If the choice of penalty by the agency is not "committed to agency discretion," then it must be reviewable to some extent.<sup>69</sup> *Cross* adopted

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64. 7 C.F.R. § 272.6(a) (1975).

65. Though the Administrative Procedure Act may not be applicable to action taken under the Food Stamp Act, *see* note 63 *supra*, the "committed" theory is nonetheless applicable, since review of actions taken under any statutory scheme which projects the court into areas constitutionally reserved for the legislative or executive branches necessarily will be precluded.

66. 4 K. DAVIS, *supra* note 7, § 28.16, at 965.

67. *Farmingdale Supermarket, Inc. v. United States*, 336 F. Supp. 534, 536 (D.N.J. 1971).

68. *Cf. Bamberger v. Clark*, 390 F.2d 485, 488 (D.C. Cir. 1968). It does not necessarily follow, however, that such action is reviewable simply because, in this context, courts are as competent as agencies. Remission of penalties is excluded from review; courts consistently have held this action to be "an act of grace," unreviewable even for an abuse of discretion. *See United States v. One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964); *United States v. One 1957 Buick Roadmaster*, 167 F. Supp. 597 (E.D. Mich. 1958); 1 K. DAVIS, *supra* note 7, § 4.05, at 253 (typical statute denies district courts the power to review remissions). Where administrative policy is highly technical and is effectuated through sanctions, courts may decline to review the penalties imposed, except for abuse of discretion. *See, e.g., Nadiak v. CAB*, 305 F.2d 588 (5th Cir. 1962).

69. There is a general presumption favoring judicial review of administrative actions. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); Professor Jaffe has stated that "there are very few discretions, however broad, substantially affecting the person or property of an individual which cannot at some point come under judicial surveil-

the prevailing "arbitrary and capricious" test as the threshold standard of judicial review of sanctions imposed under section 2020.<sup>70</sup> Although Judge Russell, dissenting vigorously in *Cross*, found "no language in § 2022 to support that standard of review,"<sup>71</sup> it seems unlikely that Congress, in specifying *de novo* review, intended a more stringent standard than that currently established under the Administrative Procedure Act.<sup>72</sup> Thus, if one accepts the premise of reviewability, the *Cross* formulation of review, limited by the "arbitrary and capricious" standard, is well founded.<sup>73</sup> But the court departed from traditional notions of this

lance." L. JAFFE, *supra* note 7, at 375 (emphasis deleted). Nonetheless, where there is room for the exercise of agency discretion, courts traditionally have been reluctant to interfere. See, e.g., *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958); *American Power & Light Co. v. SEC*, 329 U.S. 90, 112-113 (1946); *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *Brennan v. Occupational Safety & Health Review Comm'n*, 487 F.2d 438, 443 (8th Cir. 1973); *Wilson & Co. v. Benson*, 286 F.2d 891, 896 (7th Cir. 1961); *Daniels v. United States*, 242 F.2d 39, 42 (7th Cir. 1957).

70. "To be 'valid,' a sanction must not be arbitrary and capricious . . ." 512 F.2d at 1218. While "validity" is somewhat more satisfactory in defining a scope of review than "trial *de novo*," see note 63 *supra*, it may be an ineffectual standard in the context of the Food Stamp Act. See note 73 *infra*.

71. 512 F.2d at 1223 (footnote omitted).

72. See 5 U.S.C. § 706 (1970).

73. At the very least, an administrative action must be the result of procedures which conform to the statutory scheme and to the rules formulated by the agency. See *Leedom v. Kyne*, 358 U.S. 184, 188-89 (1958); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). Therefore, if FNS imposed a suspension upon a merchant without giving him an opportunity to submit information, or if it decreed a suspension in excess of three years, such action would be unquestionably invalid. The majority in *Cross* stated that "a sanction is arbitrary and capricious if it is unwarranted in law or without justification in fact." 512 F.2d at 1218. Since regulations have "the force and effect of law," *Accardi v. Shaughnessy*, *supra*, 347 U.S. at 265, a suspension of less than three years, *a fortiori*, must be warranted in law. But see *Espinoza v. Farah Mfg. Co.*, 94 S. Ct. 334, 339 (1973). Whether a lawful suspension can be without justification in fact presents an issue that is not resolved. Section 2020 authorizes disqualification "on a finding . . . that such store or concern has violated any of the provisions of this chapter, or of the regulations . . ." There is no indication that the agency is to scale the period of suspension to the gravity of the offense.

The problem was approached in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973), wherein the Secretary of Agriculture, having found respondent in violation of the Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181-231 (1970), chose to suspend his registration for twenty days. Suspensions had been imposed previously only in cases of "intentional and flagrant conduct," whereas respondent's violations were "negligent and careless." 411 U.S. at 185. For that reason, the court of appeals set aside the suspension. The Supreme Court reversed, stating that it could not "perceive any basis on this record for a conclusion that the suspension of the respondent was so 'without justification in fact' as to constitute an abuse of [the Secretary's] discretion." *Id.* at 188 (brackets in original). The Packers Act, in permitting suspension "for a reasonable

standard<sup>74</sup> when it stated that the validity of a sanction falling within lawful limits may be questioned.<sup>75</sup> The traditional position is illustrated by *Farmingdale Supermarket, Inc. v. United States*,<sup>76</sup> wherein the court, confronting a factual situation similar to that presented in *Cross*, stated: "The disqualification of the plaintiff is in accordance with regulations

specified period," 7 U.S.C. § 204 (1970), itself set up a standard by which to determine whether the imposition of a given suspension was an abuse of discretion.

Although section 2020 does not contain a similar provision, the regulations adopted pursuant to that section do provide that the disqualification be "for a reasonable period of time, not to exceed three years . . ." 7 C.F.R. § 272.6(d) (1975). As indicated in *Butz*, however, current theory defining the respective roles of court and agency compels the conclusion that this "reasonableness" be determined within the limits of administrative discretion, not in accordance with judicial concepts of fairness and justice. See notes 78-84 *infra* & accompanying text.

Further, *Cross* did not go so far as to imply that the penalty had to be reasonable within the purview of the district court, *cf.* *Sunshine Dairy v. Peterson*, 183 Ore. 305, —, 193 P.2d 543, 560 (1948); rather, it held that only when the Secretary had "abused his discretion by acting arbitrarily or capriciously," would the sanction be open to review. 512 F.2d at 1218. In doing so, the court adopted the standard of section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1970). But in the numerous decisions under that Act, there is nothing to support the proposition that the imposition of an administrative sanction which falls within the express statutory or regulatory limits can be an abuse of discretion. See, e.g., *Brennan v. Occupational Safety & Health Review Comm'n*, 487 F.2d 438, 442-43 (8th Cir. 1973). See generally *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 250 (1967). It would seem that a suspension by FNS for less than three years, imposed pursuant to a valid adjudication of violation, would be "an allowable judgment in its choice of the remedy." *Jacob Siegal Co. v. FTC*, 327 U.S. 608, 612 (1946). *Accord*, *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 188-89 (1973); *FTC v. Ruberoid Co.*, 343 U.S. 473 (1952); *FTC v. Cement Institute*, 333 U.S. 683, 726 (1948); *G. H. Miller & Co. v. United States*, 260 F.2d 286, 296 (7th Cir. 1958); *Arrow Metal Prods. Corp. v. FTC*, 249 F.2d 83, 85 (3d Cir. 1957).

If the *Cross* court intended to subject extremely "harsh" administrative sanctions to judicial scrutiny, the standard of "reasonableness" rather than "arbitrariness and capriciousness" would have better served that purpose. *Cf.* *Marlene's, Inc. v. FTC*, 216 F.2d 556, 559 (7th Cir. 1954). Considering the results of applying an "abuse of discretion" standard to sentencing in criminal cases, see notes 95, 119 *infra*, the *Cross* standard of review may preclude examination of the sanction for excessive severity altogether.

74. There have been no decisions which would support the proposition that severity alone can constitute arbitrary or capricious administrative action. Further, decisions in the analogous criminal sentencing context indicate that the harshness of a sentence, absent any other factors, cannot serve as a basis for finding abuse of discretion. See notes 95, 119 *infra*. But see *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973) applying U.S. Const. amend. VIII. This does not protect from judicial scrutiny the application of a sanction based upon grounds entirely unrelated to statutory purpose. See 1 K. DAVIS, *supra* note 7, § 7.20, at 507. See also L. JAFFE, *supra* note 7, at 586.

75. 512 F.2d at 1218.

76. 336 F. Supp. 534 (D.N.J. 1971). Because *Farmingdale* was decided prior to *Welch*, its reasoning probably survives the *Cross* decision overruling *Welch*. Because *Welch* relied at least in part on *Farmingdale*, however, the authority of the earlier decision may be undermined.

and is valid as a matter of law.”<sup>77</sup> The *Cross* inference, that a lawful suspension imposed solely as a consequence of violation could be arbitrary and capricious, subverts the traditional deference courts accord agencies in matters entrusted to administrative action by Congress.

Judicial deference to agency expertise is well-illustrated in *Butz v. Glover Livestock Commission Co.*,<sup>78</sup> a case arising under the Packers and Stockyards Act.<sup>79</sup> The court of appeals upheld the agency’s finding of a violation, but set aside a suspension imposed by the Secretary of Agriculture because the violations were a result of negligence rather than of wilfulness.<sup>80</sup> The Supreme Court reversed, stating:

The Secretary may suspend “for a reasonable specified period” any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of “international and flagrant conduct” or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent.<sup>81</sup>

*Cross* interpreted *Glover Livestock* as merely a reiteration of the guiding principle that the agency’s choice of remedy should stand unless “unwarranted in law or without justification in fact.”<sup>82</sup> The language of the Court in *Glover Livestock*, however, indicated a marked deference to the Secretary’s expertise in determining what measures were appropriate for enforcement of the Act.<sup>83</sup> Though the Court did not reach the question of whether a suspension which met the statutory standard

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77. *Id.* at 536 (emphasis supplied).

78. 411 U.S. 182 (1973). See note 73 *supra*.

79. 7 U.S.C. §§ 181-231 (1970).

80. *Glover Livestock Comm’n Co. v. Hardin*, 454 F.2d 109 (8th Cir. 1972).

81. 411 U.S. at 186-87.

82. 512 F.2d at 1218. For a discussion of how this principle functions in the context of the Food Stamp Act see note 73 *supra*. Although the *Cross* opinion noted the specific holding of *Glover Livestock*, (uneven application of penalties does not render a particular application unwarranted in law), the *Cross* court qualified that holding in stating that “excessive variance, something more striking than ‘mere unevenness,’ would be evidence of arbitrary or capricious action . . .” 512 F.2d at 1217 n.8. It is submitted that *Glover Livestock* does not lend itself to such an interpretation, although Professor Jaffe argues “that the concept of ‘abuse of discretion’ [should] be conceived and used with a breadth sufficient to enable the courts to condemn shocking disproportion.” L. JAFFE, *supra* note 7, at 265.

83. *But cf.* *United States v. J. B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974).



of being "reasonable" and "specified"<sup>84</sup> could be at the same time arbitrary and capricious, its concern that the integrity of the policy decision remain intact suggests a protective attitude that arguably would include the choice of sanction to be imposed under the Food Stamp Act.

*Procedural Due Process Precedent to Sanction*

The primary argument for broad review advanced in *Cross* was that since the administrative adjudicatory and review procedures did not afford due process to merchants accused of violating the Act, it was incumbent upon the court to evaluate the sanction "so as to preserve the regulatory scheme from constitutional attack."<sup>85</sup> Although the admission by the merchant of violation would ostensibly constitute a waiver of due process rights,<sup>86</sup> the court required provision for full procedural due process at some point before deprivation occurred: "It is the sanction imposed, once a violation of the Act or regulations has been found, that constitutes the deprivation of property, not the mere fact of violation, and the Constitution requires that due process be afforded before that deprivation becomes effective."<sup>87</sup> Thus, the lack of procedural due process in the adjudicatory phase was held to taint the discretionary action taken pursuant to a finding of infraction.

Assuming *arguendo* that the procedures utilized by the Department of Agriculture did not afford due process to the merchant, the majority's assertion in *Cross* that there is a constitutional right to full procedural due process before a suspension can be imposed *even where the fact of violation is not contested*, is without basis in law. Judge Russell, in his dissenting opinion in *Cross*, noted the "considerable difference . . . between the determination of a violation of law and the imposition of a sentence or penalty after the fact of violation has been established."<sup>88</sup> He continued: "The requirements of due process do not . . . mandate that the plaintiff be given a *de novo* hearing with rights of confrontation and cross-examination when the sole issue is the validity of the sanction imposed."<sup>89</sup> Procedural due process is intended to guarantee fairness to the accused during the *adjudicatory* portion of the administrative action brought against him.<sup>90</sup> Its utility ceases once the action enters the

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84. 7 U.S.C. § 204 (1970).

85. 512 F.2d at 1217 (footnote omitted).

86. See *id.* at 1222 (Russell, J. dissenting).

87. *Id.* at 1217.

88. 512 F.2d at 1222.

89. *Id.* at 1223.

90. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (evidentiary hearing required

realm of discretion entrusted to an agency for the purpose of determining the disposition best suited to advancement of the goals subserved by the action.<sup>91</sup>

The role to be accorded due process with respect to sanctioning in an administrative context is better defined by examination of the role accorded due process in the post-adjudicatory stage of criminal actions. In *Williams v. New York*,<sup>92</sup> a criminal case, the Supreme Court held that "[t]he due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."<sup>93</sup> And in several subsequent cases, the Court has noted the lack of limitations upon the trial judge in sentencing.<sup>94</sup> The relatively unfettered discretion enjoyed by the sentencing judge where fundamental individual rights are involved indicates that the exercise of similar discretion by an agency is not violative of due process.<sup>95</sup>

Under the above analysis it seems apparent that the lack of opportunity to confront and cross-examine one's accusers does not deny an accused procedural due process once he has admitted his guilt. In this respect, the adjudicatory scheme of the Food Stamp Act is not consti-

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by due process clause of the fourteenth amendment prior to termination of welfare benefits) discussed at note 96 *infra*; *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (Congress, with rare exceptions, provides those affected by agency action with procedural due process); *Hornsby v. Allen*, 326 F.2d 605, 608-09 (5th Cir. 1964). But see *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886-895 (1961) (summary exclusion of a civilian cook from a naval gun factory without hearing or notice does not violate due process clause of the fifth amendment).

91. This premise does not leave room for patently discriminatory conduct, see note 74 *supra* & accompanying text, but merely establishes the point at which the need for administrative expediency may be balanced against the need to protect individual rights.

92. 337 U.S. 241 (1949).

93. *Id.* at 251. This case is criticized by Professor Davis on the grounds that the Court overstated the allowable discretion vested in the sentencing court, given the right of allocation secured to a defendant prior to his sentencing. But Davis does not contend, as the *Cross* majority apparently would, that a convicted defendant is entitled to full procedural due process on issues regarding his sentence. See K. DAVIS, *supra* note 7, § 15.02, at 350-51. Under extraordinary conditions, however, due process (in the sense of fundamental fairness rather than full procedural protection) may require the setting aside of a sentence. See *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969).

94. See, e.g., *Williams v. Illinois*, 399 U.S. 235, 243 (1970); *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969); *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959).

95. It has been noted that the severity of a sentence *per se* has not been found an abuse of discretion. See note 74 *supra*. Traditionally, the discretion of the sentencing judge in a criminal case has been deemed an improper subject for judicial review. Recent commentators, however, have criticized this "rule of nonreview." See, e.g., Comment, *The Rule of Nonreview: A Critical Analysis of Appellate Scrutiny of Criminal Sentences*, 17 Wm. & Mary L. Rev. 184 (1975) [hereinafter cited as *The Rule of Nonreview*].

tutionally infirm. Moreover, contrary to the position of the *Cross* majority, the scheme *does* provide an impartial decisionmaker. Under the Food Stamp regulations, the evidence against a suspected offender is gathered by the Officer-In-Charge of the FNS Field Office, and by the Regional Office of the FNS, and forwarded to the Director of the Food Stamp Division for disposition.<sup>96</sup>

Finally, in response to the *Cross* majority's contention that the adjudicatory procedure followed by FNS does not afford merchants full procedural due process, it is submitted that any deficiencies inherent in this process are cured by the trial de novo provision of section 2022.<sup>97</sup> Once review is obtained in the district court, and no error in fact finding is discovered, it seems evident that the merchant suffers no unfairness

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96. 7 C.F.R. § 272.6 (1975). Impartial decisionmaking was recognized by the Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970), as being a vital element of procedural due process. The scheme confronted by the Court in *Goldberg* stands in sharp contrast to that of FNS, for in *Goldberg*, caseworkers who gathered information upon which termination of financial aid benefits was based, also assisted in deciding when termination was appropriate. *Id.* at 271.

*Goldberg* is further distinguishable from *Cross* for the simple reason that therein plaintiff did not admit the validity of accusations subjecting him to termination of financial aid. When such is the case, noted the Supreme Court, due process demands: "the opportunity to be heard . . . at a meaningful time and in a meaningful manner," *id.* at 267; "timely and adequate notice . . . and an effective opportunity to defend by confronting any adverse witnesses and by presenting . . . arguments and evidence . . ." *id.* at 267-68; "an opportunity to confront and cross-examine adverse witnesses." *Id.* at 269. "[T]he evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Id.* at 270. "[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing . . . [He] should state the reasons for his determination and indicate the evidence he relied on . . ." *Id.* at 271.

Arguably, *Goldberg* may be read as mandating that the Director, Food Stamp Division, afford an accused merchant the opportunity to personally appear before him prior to disposition. That no such opportunity was available in the *Goldberg* scheme formed one basis of appellees' attack in *Goldberg*, *id.* at 259, but there was no specific indication that the Court considered this deficiency, alone, as rising to the level of a constitutional infirmity.

For a general treatment of due process in other areas see *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Hannah v. Larche*, 363 U.S. 420, 442 (1960); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-68 (1951) (Frankfurter, J., concurring); *Hornsby v. Allen*, 326 F.2d 605, 608 (5th Cir. 1964).

97. *Cross v. United States*, 512 F.2d 1212, 1222 (4th Cir. 1975) (Russell, J., dissenting). See generally *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *Capital Traction Co. v. Hof*, 174 U.S. 1, 18-30 (1899). It should be noted though that unless certain requisites are met, see note 30 *supra* & accompanying text, the administrative action will not be stayed pending judicial review. In some cases then, at least a temporary deprivation of property will erroneously occur. It could perhaps be argued, under the doctrine of *Fuentes v. Shevin*, 407 U.S. 67 (1972), that this is a denial of due process.

because of any alleged deprivation of due process by the agency.<sup>98</sup> A fortiori, the proposition that any lack of due process at the adjudicative stage taints the sanction is unjustified.

#### THE PROPRIETY OF ALLOWING JUDICIAL MODIFICATION OF ADMINISTRATIVE SANCTIONS

Although the appropriateness of extending review to the suspension imposed pursuant to section 2020 is questionable, there exists at least a *prima facie* argument in favor of broad review premised on the uncertain limitations of a trial de novo.<sup>99</sup> Under no construction of section 2022, however, can the grant of power which permits the district court to modify the administrative sanction be sustained. The *Cross* majority apparently assumed that such power was contained within the provision for a trial de novo, but the extraordinary nature of this judicial authority requires a clearer declaration of congressional intent than was provided by section 2022 or its history.<sup>100</sup> Although the modification of a disposition made by a lower court is encompassed by the concept of de novo review, "[t]he technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which congressional power, exercised through a delegated agency, can be controlled within the limited scope of 'judicial power' conferred by Congress under the Constitution."<sup>101</sup> And, as noted by Professor Davis, "[t]he maximum limit on review is imposed for the purpose of preventing courts from engaging in nonjudicial activities. If the function performed by an agency is 'administrative' or 'legislative,' and a federal court is required to do all over again what the agency has done, the system of review violates Article III of the Constitution."<sup>102</sup> At a minimum, the trial de novo stipulation in section 2022 allows the court to reopen completely the administrative factual adjudication, and to make an independent finding based on all evidence presented before it, unconfined

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98. The same result is obtained where, as in *Cross*, the merchant admits the alleged violations. Judge Russell, dissenting in *Cross*, emphasized the undermining effect of a conceded violation on the majority's due process theory. 512 F.2d at 1221-23.

99. See note 63 *supra* & accompanying text.

100. Cf. note 63 *supra* (discussion of Endangered Species Conservation Act of 1969).

101. *FCC v. Pottsville Bdstg. Co.*, 309 U.S. 134, 141 (1940).

102. 4 K. DAVIS, *supra* note 7 § 29.10, at 180. Cf. *FTC v. Morton Salt Co.*, 334 U.S. 37, 54 (1948). See generally *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933); *Federal Radio Comm'n v. General Elec. Co.* 281 U.S. 464, 468-69 (1930); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 443-44 (1923).

by the administrative record.<sup>103</sup> The reviewing court, upon finding an arbitrary and capricious application, may examine even the sanction imposed,<sup>104</sup> but to allow the court to modify the penalty transfers to the judge the entire function performed by the agency. The limitation on this power fixed by *Cross*, that the alternate penalty be prescribed "not on the basis of what it [the district court], in the exercise of its judgment, would consider reasonable and just, but within the guidelines set by the Secretary,"<sup>105</sup> does not save the authorization from constitutional objections.

Two statutory schemes similar in their penalty provisions to the Food Stamp Act are the Commodity Exchange Act<sup>106</sup> and the Perishable Agricultural Commodities Act.<sup>107</sup> Under the Commodity Exchange Act, the Secretary of Agriculture may suspend for a maximum of six months the license of any futures commission merchant or floor broker upon a finding that such a person has violated the provisions of the Act.<sup>108</sup> Section 9 provides for review by the court of appeals which may "affirm, . . . set aside, or modify" the order of suspension.<sup>109</sup> Despite this language, the Court of Appeals for the Seventh Circuit, in *G. H. Miller & Co. v. United States*,<sup>110</sup> denied a petition to set aside an order of suspension alleging that the penalty was too severe. The court first characterized the agency's decision to impose a penalty within the limits of the statute as "an allowable judgment in its choice of the remedy"<sup>111</sup> and held that "ordinarily the Court of Appeals has no right to change the penalty because the agency might have imposed a different penalty."<sup>112</sup> Only where "the remedy selected has no reasonable relation to the practice found to exist" could the court interfere with the choice of sanction.<sup>113</sup> Judge Finnegan, in concurrence, stated that "so long as the Secretary makes findings of fact and they are based on evidence conforming to the statutory standards and he acts *intra vires* the relevant acts of Congress we cannot . . . modify sanctions because we personally think them 'too

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103. *J.C.B. Super Markets, Inc. v. United States*, 57 F.R.D. 500, 502-03 (W.D.N.Y. 1972). See *J.L. Saunders, Inc. v. United States*, 52 F.R.D. 570, 573 (E.D. Va. 1971).

104. See note 73 *supra* & accompanying text.

105. 512 F.2d at 1218-19.

106. 7 U.S.C. §§ 1-17b (1970).

107. *Id.* §§ 499a-499s.

108. *Id.* § 9.

109. *Id.*

110. 260 F.2d 286 (7th Cir. 1958).

111. *Id.* at 296, quoting *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612 (1946).

112. *Id.*

113. *Id.* at 296-97.

harsh' [or] 'too severe.' To do otherwise ignores the expertise of the Secretary . . . ." <sup>114</sup> *G. H. Miller* has not been questioned. <sup>115</sup>

In *Eastern Produce Co. v. Benson*, <sup>116</sup> the Court of Appeals for the Third Circuit held that a license suspension imposed under the Perishable Agricultural Commodities Act was "well within the allowable choice of remedy," and for that reason the court had "no right to change the penalty because the agency might have imposed a different one." <sup>117</sup> This self-imposed restriction was adhered to notwithstanding the language of the Act's review section which provided that the suspension should remain in force unless "suspended, modified, or set aside by a court of competent jurisdiction." <sup>118</sup> In light of *G. H. Miller* and *Benson*, wherein the courts confronted statutory language apparently allowing judicial modification of administrative sanctions, the *Cross* inference of amendatory power, where no such *prima facie* authorization exists, seems unwarranted. <sup>119</sup>

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114. *Id.* at 300.

115. The case was cited with apparent approval in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973).

116. 278 F.2d 606 (3d Cir. 1960).

117. *Id.* at 610.

118. 7 U.S.C. § 499j (1970).

119. The impropriety of judicial modification has been expressed by numerous courts faced with allegedly "unfair" administrative sanctions. See, e.g., *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 188-89 (1973); *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958); *FPC v. Idaho Power Co.*, 344 U.S. 17, 21 (1952); *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946); *Brennan v. Occupational Safety & Health Review Comm'n*, 487 F.2d 438, 442-43 (8th Cir. 1973); *Great Western Food Distributors, Inc. v. Brannan*, 201 F.2d 476, 484 (7th Cir. 1953). *Contra*, *West N.Y. v. Bock*, 38 N.J. 500, —, 186 A.2d 97, 107 (1962). See generally *Wilson & Co. v. Benson*, 286 F.2d 891, 896 (7th Cir. 1961); *Henry's Cafe, Inc. v. Board of Liquor Control*, 170 Ohio St. 233, —, 163 N.E.2d 678, 681 (1959).

Judicial review of sentencing in criminal cases is analogous to review of administrative actions insofar as modification is concerned. It has been demonstrated that there is no requirement of full procedural due process in sentencing. See notes 92-95 *supra* & accompanying text. Nor has any right of review generally been given to a convicted defendant where the only issue is the severity of the sentence imposed. See *Dorszynski v. United States*, 418 U.S. 424, 431, 440-41 (1974); *Gore v. United States*, 357 U.S. 386, 393 (1958); *United States ex rel. Perpiglia v. Rundle*, 221 F. Supp. 1003, 1012 (E.D. Pa. 1963). But see *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *applying* U.S. CONST. amend. VIII; *Lieggi v. United States Imm. and Nat. Serv.* 389 F. Supp. 12 (N.D. Ill. 1975). There are very limited circumstances in which appellate courts will vacate a sentence and remand the case for resentencing. These instances were enumerated in *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971): "[C]ourts have approved of remanding for resentencing in cases where it appeared that a trial judge had improperly considered certain factors in sentencing [citations], improperly relied upon certain false information [citations], or grossly abused his discretion by failing to evaluate the relevant information before him with due regard for the factors appropriate to sen-

Where a sanction is determined to be invalid by reason of either unlawful or patently discriminatory action, there must be a means by which the court can prevent its effectuation. It is submitted that the court should and does have the power to set aside such a penalty and to remand the matter to the agency for reconsideration.<sup>120</sup> In another case<sup>121</sup> arising under a statutory scheme<sup>122</sup> authorizing judicial modification of an administrative order,<sup>123</sup> the Supreme Court found no "power to exercise an essentially administrative function,"<sup>124</sup> and enunciated "the guiding principle . . . that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration."<sup>125</sup> In another instance,<sup>126</sup> where the regulatory agency attempted to transfer to the judiciary the responsibility of formulating a proper disposition upon a judicial finding that the agency's order was defective, the Court held that "the Commission . . . could not . . . shift to the courts . . . issues which Congress has primarily entrusted to the Commission."<sup>127</sup> In section 2020, Congress has entrusted the determination of the period of disqualification to the Secretary of Agriculture. It is the duty, therefore, of the agency, and not of the court, to impose a valid penalty. The power of the court to intervene and prevent arbitrary and capricious action sufficiently protects the merchant; allowing the court to determine an "appropriate" sanction would undermine the integrity of administrative competence.<sup>128</sup> Remand to the agency serves both interests.

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tencing, [citations]." *Id.* at 970-71. But severity alone is not generally grounds for relief. "The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction . . ." *Townsend v. Burke*, 334 U.S. 736, 741 (1948). *See also* *United States v. Malcolm*, 432 F.2d 809, 814 (2d Cir. 1970); *Scott v. United States*, 419 F.2d 264, 266 (D.C. Cir. 1969); *United States ex rel. Jackson v. Myers*, 374 F.2d 707, 711 n.11 (3d Cir. 1967); *United States ex rel. Burgess v. Rundle*, 308 F. Supp. 1338, 1341 (E.D. Pa. 1970). *But see The Rule of Nonreview*, *supra* note 96.

120. *See generally* *Citizens Band of Potawatomi Indians v. United States*, 391 F.2d 614, 624 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 1046 (1968); *Nichols & Co. v. Secretary of Agr.*, 131 F.2d 651 (1st Cir. 1942); *Wright v. SEC*, 112 F.2d 89 (2d Cir. 1940).

121. *FPC v. Idaho Power Co.*, 344 U.S. 17 (1952).

122. Federal Power Act, 16 U.S.C. §§ 791-828(c) (1970).

123. *Id.* § 825(1) (b).

124. 344 U.S. at 21.

125. *Id.* at 20.

126. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

127. *Id.* at 54.

128. As stated in *Great Atl. & Pac. Tea Co. v. United States*, 342 F. Supp. 492 (S.D.N.Y. 1972),

[i]t would . . . be a mischievous practice for a District Court to engage

*Cross v. United States* reaches an unsettling conclusion, and highlights an area of administrative law that lacks definitive resolution. Aside from the Food Stamp Act, there are few statutory schemes which authorize a range of penalties which may be imposed at the administrative level upon offenders. Consequently, court challenges to administrative action based solely on the severity of the penalty chosen, where the penalty fell clearly within the legal range, have been rare. The statutory requirement of review de novo is even more uncommon, and the extent of judicial intrusion allowed by such a provision has not been considered extensively or determined with finality. *Cross* invites critical inquiry into the role of the reviewing court when faced with a challenge to an administratively imposed sanction. Affording review where the application of the penalty is alleged to be arbitrary and capricious is sound. It is maintained, however, that the Court of Appeals for the Fourth Circuit has erred in its application of constitutional due process theory to suspensions imposed under the Food Stamp Act, in finding that a suspension within unlawful limits can be arbitrary and capricious solely on the ground that it is severe, and in determining that the district court has the power to assume the administrative function of selecting a proper period of disqualification.

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in a competition with the administrative tribunal and its hearing officers in the measurement of fair and reasonable periods of disqualification for plain, inexcusable violations. It would lead to a form of chaos for the Courts to compete with the agency representatives on the quantum of disqualification to be meted out.

*Id.* at 493.