Denver Law Review

Volume 73
Issue 3 *Tenth Circuit Surveys*

Article 5

January 1996

Adminstrative Law and Procedure

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ADMINISTRATIVE LAW AND PROCEDURE

INTRODUCTION

Administrative law shields individuals from abuses of power at the hands of administrative agencies.[1] The Federal Administrative Procedures Act (APA)[2] provides a set of standards for reviewing different types of agency action.[3] A court's ability to protect individuals against agency abuses of power relates directly to the scope of review permitted by the APA, which varies depending on the type of agency action at issue.[4] The APA's standard of review for formal agency action is the "substantial evidence" standard.[5] Courts review informal agency action under the "arbitrary and capricious" standard.[6] Due to an agency's specialized knowledge, however, courts grant considerable deference to agency decisions under these standards.[7]

Part I of this Survey discusses two cases in which the Tenth Circuit applied the "arbitrary and capricious" and "substantial evidence" standards of review. In *Olenhouse v. Commodity Credit Corp.*,[8] the Tenth Circuit followed the District of Columbia Circuit Court's reasoning regarding the convergence of the substantial evidence and arbitrary and capricious standards of review.[9] The Tenth Circuit concluded that when determining factual support, both standards require "substantial evidence" to uphold an agency's decision.[10] In *Northwest Pipeline Corp. v. Federal Energy Regulatory Commission*,[11] the Tenth Circuit deferred a question of law involving an agency's contract

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1. BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 1.1 (3d ed. 1991). Administrative law provides the legal principles by which agencies exercise their power. *Id.* Congress exercises control over agencies by establishing standards and procedures in an agency's enabling statute and by policing day-to-day agency action through oversight committees. WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW § 9-9[B] (2d ed. 1992).

2. 5 U.S.C. §§ 551-559, 701-706 (1994).

3. 5 U.S.C. § 706.

4. SCHWARTZ, *supra* note 1, § 10.1, at 624 ("If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts"; conversely, if the scope is too restrictive, review becomes meaningless since "it prevents full inquiry into the question of legality.").

5. 5 U.S.C. § 706(2)(E) (stating that cases subject to §§ 556-557, which govern hearings and initial decisions, or "otherwise reviewed on the record of an agency hearing" are subject to that standard).

6. 5 U.S.C. § 706(2)(A) (providing that the reviewing court shall set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

7. SCHWARTZ, *supra* note 1, § 10.1, at 624-25 (explaining that deference to administrative expertise and calendar pressure have narrowed the scope of review by courts); *see* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984) (finding that agencies have been delegated authority to make policy choices and judges, "who have no constituency," must afford deference to an agency's decisions).

8. 42 F.3d 1560 (10th Cir. 1994).

9. *Olenhouse*, 42 F.3d at 1575 (citing Association of Data Processing Serv. Orgs., Inc. v. Board of Governors, Inc., 745 F.2d 677, 683 (D.C. Cir. 1984)).

10. *Id.*

11. 61 F.3d 1479 (10th Cir. 1995).

interpretation, using the arbitrary and capricious standard.[12] In granting deference to the agency's decision, the Tenth Circuit adopted the D.C. Circuit's conclusion that the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[13] implicitly modified earlier cases that withheld deference on questions involving contract interpretations.[14]

Part II of this Survey examines the Tenth Circuit's interpretation of the social security regulations governing the adjudication of benefit disputes. In *O'Dell v. Shalala*,[15] the Tenth Circuit interpreted the "final decision," which courts review under the social security regulations, as including any new evidence that a complainant presents to the Appeals Council.[16] The court's decision clarified what constitutes the record of review, and resolved two conflicting lower court holdings.[17]

I. REVIEWING AGENCY DECISIONS

A. *Informal Agency Action and the Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review:* Olenhouse v. Commodity Credit Corp.[18]

1. Background

The Federal Administrative Procedures Act[19] (APA) establishes standards for judicial review of federal agency action.[20] The APA standards are designed to provide a check on agency authority while simultaneously ensuring that each agency is able to perform its task within the authority granted to it.[21]

Courts review formal agency action under the substantial evidence standard.[22] The Supreme Court has defined substantial evidence as "such relevant

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12. *Northwest Pipeline*, 61 F.3d at 1485. The Tenth Circuit also reviewed the Federal Energy Regulatory Commission's (FERC's) action under the substantial evidence standard pursuant to 15 U.S.C. § 717r(b) (1994) which applies to the Commission's factual decisions. *Northwest Pipeline*, 61 F.3d at 1485.

13. 467 U.S. 837 (1984).

14. *Northwest Pipeline*, 61 F.3d at 1486.

15. 44 F.3d 855 (10th Cir. 1994).

16. *O'Dell*, 44 F.3d at 859.

17. *Id.* (noting that the two opinions were "diametrically opposed").

18. 42 F.3d 1560 (10th Cir. 1994).

19. 5 U.S.C. §§ 551-559, 701-706 (1994).

20. 5 U.S.C. § 706 (1994). The judicial review provisions of the APA apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)-(a)(2). The APA contains six provisions establishing the scope of review including: (1) substantial evidence, (2) arbitrary and capricious, (3) "contrary to a constitutional right," (4) "in excess of statutory jurisdiction," (5) "failing to observe procedures required by law," and (6) "unwarranted by the facts to the extent that the facts are subject to a trial de novo by the reviewing court." 5 U.S.C. § 706(A)-(F).

21. ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULE MAKING § 9.2.12, at 583 (1986) (explaining that the standards of review reflect the scope of authority granted to an agency). *See generally* Phillip F. Smith, Jr., *Administrative Law Survey of the Tenth Circuit Court of Appeals*, 71 DENV. U. L. REV. 801, 815-16 (1994) (discussing the effect of the different standards of review).

22. 5 U.S.C. §§ 556-557, 706(2)(E); ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW § 9.4, at 625 (1989). Formal agency action consists of hear-

evidence as a reasonable mind might accept as adequate to support a conclusion."[23] When reviewing an agency's decision, a court examines the "record as a whole" to determine if substantial evidence supports the agency's decision.[24] The APA mandates the application of the arbitrary and capricious standard when reviewing informal agency action.[25] In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[26] the Court stated that under the arbitrary and capricious standard,[27] a court must determine whether an agency has articulated a rational basis for its action.[28] Under this "narrow" standard,[29] the court may not substitute its own rationale, but must review an agency's action on the grounds articulated by the agency itself.[30] In doing so, the court must focus on the informal administrative record.[31] The arbitrary and capricious standard further requires an agency to explain how it proceeded from its findings to its subsequent action.[32] However, authorities on administrative law have typically characterized the substantial evidence standard as more demanding than the arbitrary and capricious standard, although the Supreme Court has never explicitly resolved this supposed difference.[33] Since both the arbitrary and capricious and substantial evidence standards require sufficient factual support in the record,[34] courts have referred to the tests as converging, and to any articulated distinction between them as "largely semantic."[35]

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ings subject to the APA "trial-type" provisions of §§ 556-557 of the APA. FOX, *supra* note 1, § 50 (defining a "trial-type" proceeding as an "adversarial process, intended to be similar to, but not identical with, a civil bench trial in federal court"); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (finding that review under the substantial evidence standard is authorized under the APA's rule-making provisions or "when the agency action is based on a public adjudicatory hearing").

23. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); *see* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951) (holding that the Taft-Hartley Act required the same standard of proof as the APA, and finding that the substantial evidence standard required the court to consider evidence that "fairly detracts from [the record's] weight").

24. *Universal Camera*, 340 U.S. at 488 (acknowledging that a "reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial").

25. 5 U.S.C. § 706(2)-(2)(A). *See generally* FOX, *supra* note 1, §§ 58-60 (discussing the lack of a "trial-type" hearing and informal nature of the informal agency action).

26. 401 U.S. 402 (1971).

27. *Overton Park*, 401 U.S. at 416.

28. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983) (citing *Overton Park*, 401 U.S. at 416). Application of the arbitrary and capricious standard requires the court to consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416.

29. *Overton Park*, 401 U.S. at 416.

30. *Motor Vehicle Mfrs.*, 463 U.S. at 50.

31. Smith, *supra* note 21, at 815-16 (discussing review under the arbitrary and capricious standard).

32. *See Motor Vehicle Mfrs.*, 463 U.S. at 50; 2 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.4, at 202-03 (3d ed. 1994) (discussing the "reasoned decision-making" in which the agency must engage).

33. 2 DAVIS & PIERCE, *supra* note 32, § 11.4, at 202. Since both the substantial evidence and arbitrary and capricious standards are extremely deferential, "courts have experienced difficulty applying the distinction the Court continues to draw" regarding the characterization of the arbitrary and capricious standard as the more lenient. *Id.* *See supra* text accompanying notes 26-33 (discussing the arbitrary and capricious standard).

34. BONFIELD & ASIMOW, *supra* note 22, § 9.4, at 625 (noting that courts determine factual support under both standards based on a "reasonableness review" standard).

35. 2 DAVIS & PIERCE, *supra* note 32, § 11.5, at 202-03 (citing cases referring to the tenden-

2. Tenth Circuit Opinion

a. *Facts*

In *Olenhouse v. Commodity Credit Corp.*,[36] a certified class of farmers challenged the Agricultural Stabilization and Conservation Service's (ASCS) decision to reduce wheat crop deficiency payments.[37] Due to flooding, these farmers had been unable to plant their winter wheat during the fall.[38] Concerned with the effect of late planting on deficiency payments, the farmers held a meeting with state officials.[39] The farmers left the meeting with the impression that program wheat could be planted after the designated planting season without reductions in deficiency payments, provided it was planted in a "workmanlike" manner.[40] After having planted their crops, the farmers received notice that the ASCS had reduced deficiency payments for late planted wheat.[41]

ASCS's initial decision was based on the determination that program regulations allowed reductions in deficiency payments for late planting.[42] With the exception of this late planting finding, the ASCS failed to state the rules it applied or the factors it considered in making the initial decision to reduce deficiency benefits.[43] The state ASCS committee, and subsequently the Deputy Administrator of State and County Operations, affirmed the initial ASCS decision in informal hearings.[44] The district court agreed with the administrative committees and affirmed the ASCS's decision under the arbitrary and capricious standard.[45]

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cy of the standards to converge); *see* FOX, *supra* note 1, § 76[C] (explaining then-Judge Scalia's view that there is no difference between the two tests in terms of factual support); *see also* BONFIELD & ASIMOW, *supra* note 22, § 9.4, at 625 ("The prevailing view is that judicial review . . . under a substantial evidence standard is no different than under an arbitrary and capricious standard."). Prior Tenth Circuit case law recognized that "[t]he 'substantial evidence' test has been equated with the 'arbitrary and capricious' standard of review." Colorado Interstate Gas Co. v. Federal Energy Regulatory Comm'n, 904 F.2d 1456, 1459 (10th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991).

36. 42 F.3d 1560 (10th Cir. 1994).

37. *Olenhouse*, 42 F.3d at 1564-65. ASCS reduced the payments for winter wheat as follows: 20% in January, 35% in February, and 100% in March. *Id.* at 1570. Spring wheat planted in March was reduced 30% and spring wheat planted after March was reduced 100%. *Id.* at 1570-71.

38. *Id.* at 1569.

39. *Id.* Class members participated in the 1987 Price Support and Adjustment Program for wheat which guarantees each farmer "the target price for their crop; if the ultimate market price falls below that price, farmers are entitled to'deficiency payments' to make up the difference." *Id.* at 1567. The statutes implementing the Price Support and Adjustment Program are: The Agriculture Act of 1949 §§ 101-356, 7 U.S.C. §§ 1421-1471 (1994) (creating deficiency payments); 7 U.S.C. §§ 1308 to 1308-5 (1994) (limiting deficiency payments); 7 U.S.C. §§ 1445 to 1445-3 (1994) (implementing deficiency payments).

40. *Olenhouse*, 42 F.3d at 1569.

41. *Id.* at 1564.

42. *Id.* at 1564, 1570.

43. *Id.* at 1565.

44. *Id.* at 1571.

45. *Id.* at 1564.

b. *Decision*

The Tenth Circuit held that the district court erred in choosing to apply the arbitrary and capricious standard.[46] In reversing the lower court, the Tenth Circuit noted that the district court had supplied its own rationale for the agency's decision rather than reviewing the record to determine if the agency "articulated a reasoned basis for its conclusions" as the arbitrary and capricious standard requires.[47] To determine the proper application of the arbitrary and capricious standard, the Tenth Circuit adopted then-Judge Scalia's convergence analysis.[48] Under this theory, "informal agency action will be set aside as arbitrary if it is unsupported by 'substantial evidence.'"[49] The factual support required to withstand the arbitrary and capricious analysis does not substantially differ from the factual support required to satisfy the substantial evidence standard.[50] A decision, therefore, unsupported by substantial evidence "in the APA sense" would be arbitrary.[51] Recognizing that courts have characterized the substantial evidence standard as more demanding, the Tenth Circuit stated that adopting the convergence theory did not entail substituting the arbitrary and capricious standard with the "arguably more stringent" substantial evidence standard.[52]

3. Analysis

In the context of analyzing factual support, a dual application of both the arbitrary and capricious and substantial evidence standards[53] results in "convergence theory," the ultimate test of reasonableness.[54] The Tenth Circuit, in *Northwest Pipeline Corp. v. Federal Energy Regulatory Commission*,[55] equated its practice of deferring to agencies on questions of law with a reasonableness test that agencies use to interpret statutes.[56] Because the convergence theory entails both the arbitrary and capricious and the substantial evidence standards, the Tenth Circuit may have implicitly equated all three standards—convergence, reasonableness, and the practice of deference—while applying them to a question of law.[57] Since Judge Scalia's theory was based

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46. *Id.* at 1580.

47. *Id.*; *see* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983) (explaining that the reviewing court may only uphold an agency's decision on its own rationale). For a discussion of the application of the arbitrary and capricious standard, see *supra* notes 26-35 and accompanying text.

48. *Olenhouse*, 42 F.3d at 1575 (citing Association of Data Processing Serv. Orgs., Inc. v. Board of Governors, Inc., 745 F.2d 677, 683 (D.C. Cir. 1984)).

49. *Id.*

50. *Id.* (citing *Data Processing*, 745 F.2d at 683-84); *see* FOX, *supra* note 1, §76[C] (explaining Judge Scalia's view that substantial evidence is a specific application of the arbitrary and capricious standard and does not require more factual support).

51. *Olenhouse*, 42 F.3d at 1575 (quoting *Data Processing*, 745 F.2d at 684).

52. *Id.* at 1575-76.

53. *See supra* notes 48-52 and accompanying text.

54. *Data Processing*, 745 F.2d at 683-84 (citing SCHWARTZ, *supra* note 1, § 10.8); BONFIELD & ASIMOW, *supra* note 22, § 9.4, at 625.

55. 61 F.3d 1479 (10th Cir. 1995).

56. *Northwest Pipeline*, 61 F.3d at 1486 (citing Long Island Lighting Co. v. Federal Energy Regulatory Comm'n, 20 F.3d 494, 497 (D.C. Cir. 1994)).

57. *Id.* at 1487 (holding that the agency decision was "a rationally based, reasonable con-

on the standards' operation when determining questions of factual support, the extension of the convergence theory to at least some questions of law may turn "substantial evidence" into a threshold requirement to support both factual and legal determinations.[58]

Although courts have traditionally described the arbitrary and capricious standard as "more lenient" than the substantial evidence standard, it may only be "less stringent" in regard to the distinction between what evidence a court may or may not rely on when reviewing an agency's decision.[59] When reviewing an agency's informal decision under the arbitrary and capricious standard, a court may consider all of the information that was before the agency when it made its decision.[60] A review of formal agency action, on the other hand, limits the court to the closed record.[61] Consequently, the arbitrary and capricious standard appears to be more lenient only in regard to the nature of the record that a court may review to determine whether an agency's decision was rational. Both standards, however, apparently require the same quantum of evidence to support an agency's decision. Regardless of where the court finds factual support during its review of an informal decision, "substantial evidence" appears to be the minimum amount of evidence required to uphold an agency's decision under the arbitrary and capricious standard.[62]

4. Other Circuits

The Second, Seventh, and D.C. Circuits have adopted the convergence theory, and, therefore, appear to view the distinction between the arbitrary and capricious and substantial evidence standards as "largely semantic" regarding review of the factual bases of agency decisions.[63] The Second Circuit views

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struction, and is, therefore, entitled to . . . deference"). *See generally* discussion *infra* part I.B (discussing *Northwest Pipeline* and judicial review of questions of law). Note, however, that comments made prior to *Northwest Pipeline* question the propriety of equating questions of law with questions of fact. *See* SCHWARTZ, *supra* note 1, § 10.8.

58. *See Data Processing*, 745 F.2d at 683-84 (discussing the convergence of the arbitrary and capricious standard and the substantial evidence standard).

59. 2 DAVIS & PIERCE, *supra* note 32, § 11.4 ("While the Court consistently characterizes the arbitrary and capricious test as less demanding than the substantial evidence test, the Court has never explained the difference between the two."); *see* American Paper Inst. v. American Elec. Power Serv. Corp., 461 U.S. 402, 412 n.7 (1983) (describing arbitrary and capricious as the more lenient standard). The arbitrary and capricious standard does serve a purpose independent of review for factual support. *See* 2 DAVIS & PIERCE, *supra* note 32, § 11.4, at 203. The standard ensures that the agency engaged in "reasoned decision making" and included an explanation of how it reached its decision. *Id.* In a sense, this element is implied in the substantial evidence standard because the formal record will contain the basis for the agency's decision.

60. *E.g., Data Processing*, 745 F.2d at 684.

61. *See id.* This limit did not originate with the arbitrary and capricious standard, but rather in 5 U.S.C. § 553(c) (1994), which requires that "the agency . . . give interested persons an opportunity to participate in the rule making." *Id.*

62. *See supra* note 10 and accompanying text.

63. *E.g.*, Aman v. FAA, 856 F.2d 946, 950 n.3 (7th Cir. 1988) (citing other Seventh Circuit cases which found the distinction to be semantic); Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal, 676 F.2d 1144, 1151 (7th Cir.) (holding that the distinction is largely semantic and that the criteria tend to converge), *cert. denied*, 459 U.S. 907 (1982); Associated Indus. v. United States Dep't of Labor, 487 F.2d 342, 349 (2d Cir. 1973) (stating that the "controversy is semantic in some degree"); *see also* Matthew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal*

the significance of the substantial evidence standard as "limiting the agency to the confines of the public record."[64] Under informal action, however, the D.C. Circuit applies the arbitrary and capricious standard to the evidence before an agency.[65] Under both standards, the quanta of support needed to uphold an agency decision are identical.[66]

Judge Scalia, however, acknowledged in *Data Processing* that there are cases in which the standards do not converge.[67] An agency's action may be arbitrary if it is an "abrupt and unexplained departure from agency precedent," even though it may be supported by substantial evidence.[68] The arbitrary and capricious standard thus operates as a "catchall, picking up administrative misconduct" by enabling courts to strike down agency decisions as arbitrary where the substantial evidence test is not applicable.[69]

B. *Deference to Agencies on Questions of Law:* Northwest Pipeline Corp. v. Federal Energy Regulatory Commission[70]

1. Background

The standard of review for agency decisions has been traditionally dependent upon whether the issue was one of fact or law.[71] As experts in a regulated area, agencies were traditionally responsible for determining facts.[72] Reviewing courts, therefore, accorded substantial deference to an agency's factual decisions.[73] Conversely, courts traditionally reviewed questions of law de novo based upon courts' expertise in applying and interpreting the law.[74]

In 1984, the Court altered the traditional distinction between law and fact in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[75] In

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Rulemaking, 54 GEO. WASH. L. REV. 541, 553 (1986) (listing cases that apply the convergence theory).

64. *Associated Indus.*, 487 F.2d at 349-50.

65. *Data Processing*, 745 F.2d at 684-85; McGrath, *supra* note 63, at 555.

66. *Data Processing*, 745 F.2d at 683-84 ("[I]t is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense.").

67. *Id.* at 684-85; McGrath, *supra* note 63, at 555.

68. *Data Processing*, 745 F.2d at 683.

69. *Id.*

70. 61 F.3d 1479 (10th Cir. 1995).

71. SCHWARTZ, *supra* note 1, § 10.5, at 632; Phillip G. Oldham, *Regulatory Consent Decrees: An Argument for Deference to Agency Interpretations*, 62 U. CHI. L. REV. 393, 396 (1995) ("Traditional common law notions guided the early period in administrative law, dividing the authority of courts and agencies along the lines of law and fact—similar to the roles played by judge (law) and jury (fact).").

72. Oldham, *supra* note 71, at 396.

73. SCHWARTZ, *supra* note 1, § 10.6.

74. *Id.* (describing the "law-fact distinction"). De novo review is defined as reviewing the matter "as if it had not been heard before and as if no decision had been previously rendered." BLACK'S LAW DICTIONARY 721 (6th ed. 1990); *see also* Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 268-70 (1960) (noting that an agency's contract interpretation is subject to de novo review); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("[I]f the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.").

75. 467 U.S. 837 (1984); *see* Oldham, *supra* note 71, at 395 (explaining how *Chevron* "exploded the idea that courts are best situated to interpret statutes"); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*,

Chevron, the Natural Resources Defense Council challenged the EPA's interpretation of the term "stationary source" in the Clean Air Act.[76] The Court determined that the EPA's interpretation reflected a pure policy decision in an area where Congress had delegated authority to the EPA.[77] The Court's decision produced a two-part test for judicial review of an agency's statutory construction.[78]

First, courts must determine if "Congress has directly spoken to the precise question at issue."[79] Both courts and agencies must defer to clear Congressional intent.[80] Once Congress has resolved any policy disputes, any remaining issue becomes one of law.[81] By deferring to the agency's statutory interpretation, as required by *Chevron*, the Court "gives force to the principle of legislative supremacy" by requiring policy decisions to be made by the elected branches of government.[82]

Second, policy issues arise when congressional intent is unclear or ambiguous.[83] As a result, the reviewing court must apply step two of the *Chevron* test which determines "whether the agency's answer is based on a permissible construction of the statute," and thus implements the underlying policy.[84]

Since the Court decided *Chevron* in 1984, the case's impact has been enormous, as courts have applied its test in over 1,000 cases.[85] The widespread application of the *Chevron* analysis, however, has produced an

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73 TEX. L. REV. 83, 87 (1994) ("Prior to *Chevron* . . . the primary and ultimate authority for interpreting statutes resided in the judiciary.").

76. *Chevron*, 467 U.S. at 840-41. The statute at issue in *Chevron* required "permits for the construction and operation of new or modified major stationary sources." 42 U.S.C. § 7502(c)(5) (1994). Congress did not explicitly define "stationary source" in the Clean Air Act or its legislative history, but did provide that the administrator was to take into account both economic and environmental interests. 42 U.S.C. § 7502(a)(1)(A). The EPA defined "stationary source" to include all sources within the same industrial grouping, forming the bubble concept. *Chevron*, 467 U.S. at 840.

77. *Chevron*, 467 U.S. at 862-66.

78. 1 DAVIS & PIERCE, *supra* note 32, § 3.2 (discussing the *Chevron* "two-step").

79. *Chevron*, 467 U.S. at 842. The Court found the legislative history, though unclear on the precise issue, supportive of the EPA's broad discretion to implement the amendments to the Clean Air Act. *Id.* at 862.

80. *Id.* at 842-43.

81. 1 DAVIS & PIERCE, *supra* note 32, § 3.3.

82. *Id.* § 3.3, at 116. *Chevron* allows Congress to check the executive branch by insuring that Congress's intent is carried out and it encourages Congress to resolve policy disputes at the legislative stage. *Id.*; *see* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (reasoning that *Chevron*'s separation of powers rationale allows policy decisions to be determined by political branches rather than the unelected judiciary branch). *But see* Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes? A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275 (arguing that *Chevron's* deference requirement is a self-imposed limit based on justiciability grounds rather than being constitutionally or statutorily required).

83. 1 DAVIS & PIERCE, *supra* note 32, § 3.3; *see* Pauly v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991) (noting that the "resolution of ambiguity in a statutory text is often more a question of policy than of law"); Oldham, *supra* note 71, at 393 (explaining that "*Chevron*'s explicit recognition that statutory interpretation involves significant policy choices has changed the legal landscape").

84. *Chevron*, 467 U.S. at 842-43.

85. 1 DAVIS & PIERCE, *supra* note 32, § 3.2, at 110 (stating that "*Chevron* is one of the most important decisions in the history of administrative law").

expansion beyond the "policy" and "law" distinction that the Court initially made in *Chevron*.[86] One form that this expansion takes is the interpretation of contracts by agencies.

2. Tenth Circuit Opinion

a. *Facts*

In *Northwest Pipeline Corp. v. Federal Energy Regulatory Commission*,[87] the Tenth Circuit reviewed the Federal Energy Regulatory Commission's (FERC) interpretation of a natural gas tariff.[88] The tariff applied to Northwest's "unbundled" customers.[89] In response to FERC's order, Northwest filed its tariff in 1985, initiating "open access" transportation under the Natural Gas Policy Act.[90] Section 14.8 of the Act "required each shipper to pay . . . a fuel reimbursement percentage ["FRP"] rate to compensate Northwest for the shipper's pro rata share of the system fuel."[91] Northwest calculated its unbundled customers' FRP "by dividing the total amount of system fuel by the unbundled customers' total annual transportation volumes."[92] Northwest Natural Gas Company, one of Northwest's unbundled customers, challenged the rate by claiming that Northwest had been incorrect in calculating the FRP based only on unbundled customers' transportation volume instead of the "total annual volume" that the tariff required.[93] Northwest's calculation resulted in a higher FRP rate for unbundled customers.[94] In interpreting section 14.8 of Northwest's tariff, the commission determined that "total annual volume" included both unbundled and bundled customers.[95] The commission therefore ordered Northwest to issue refunds to affected unbundled customers.[96]

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86. *See* Oldham, *supra* note 71, at 399-412 (discussing *Chevron*'s expansion to interpretation of contracts and regulations, and arguing for expansion to agency consent decrees).

87. 61 F.3d 1479 (10th Cir. 1995).

88. *Northwest Pipeline*, 61 F.3d at 1481-85.

89. *Id.* at 1482. Bundled customers are charged a single rate for both transportation and storage costs. *Id.* Unbundled customers "are charged separately for each component of the service." *Id.*

90. *Id.*

91. *Id.* System fuel is the amount of fuel lost through leaks plus the amount used to run the pipeline. *Id.* Section 14.8 of Northwest's tariff states, "Fuel use requirements shall be determined using a factor calculated by dividing the total annual fuel and lost and unaccounted-for gas for Transporter's total transmission system, by the total annual volumes, including gas used for fuel and lost and unaccounted-for gas." *Id.* (quoting Northwest Pipeline Corp., 65 F.E.R.C. ¶ 61,046, 61,428 n.2 (1993)).

92. *Id.* at 1483.

93. *Id.*

94. *Id.*

95. *Id.* at 1484. The commission concluded that "total annual volume" included both bundled and unbundled customers based on the same canons of contract interpretation that a court would employ. *Id.* at 1486.

96. *Id.* at 1484.

b. *Decision*

In reviewing FERC's interpretation of the tariff, the Tenth Circuit adopted the D.C. Circuit's rationale and concluded that *Chevron* entitles FERC's interpretation of contractual language to judicial deference.[97] The Tenth Circuit determined that *Chevron's* emphasis on deference to agency expertise "implicitly modified earlier cases that adhered to the traditional rule of withholding deference on questions of contract interpretation."[98] Because FERC has "vast experience in the interpretation" of tariffs, the principles underlying *Chevron* "clearly dictate[d]" deference to FERC's interpretation.[99] The court concluded that FERC applied the ordinary meaning of the word "total," which allowed it to be read consistently throughout the section.[100] The Tenth Circuit held that under the adopted D.C. Circuit's interpretation of *Chevron*, FERC's interpretation was reasonable and entitled to deference even if it was different than the interpretation the court itself would have reached.[101]

3. Analysis

Although the Tenth Circuit adopted the reasoning of *Williams Natural Gas Co. v. Federal Energy Regulatory Commission*,[102] it remains unclear to what extent the court will extend deferential treatment outside the area of tariffs governed by FERC. The *Chevron* Court reasoned that policy decisions should be made at the agency level since agencies are closer to the directly elected executive and legislative branches.[103] This separation of powers distinction between policy decisions and questions of law may severely limit the courts' role as a check on the elected branches of government. Under the *Chevron* distinction, a court can only refuse to give deference to an agency's decision when that agency has disregarded the express intent of Congress. This interpretation of *Chevron* may limit a court's ability to exercise effective review, or to engage in "judicial policymaking,"[104] to situations where the court perceives a clear attempt to undermine congressional intent, deems it necessary to exercise a check on the executive and legislative branches, and feels justified in applying a heightened level of review.

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97. *Id.* at 1486 (citing Williams Natural Gas Co. v. Federal Energy Regulatory Comm'n, 3 F.3d 1544, 1549 (D.C. Cir. 1993)).

98. *Id.* (quoting *Williams Natural Gas*, 3 F.3d at 1549 and National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n, 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987)).

99. *Id.*

100. *Id.* at 1487. Northwest's interpretation requires the word "total" to take on two different meanings. *Id.* For statutory language of the applicable tariff provision, see *supra* note 91.

101. *Northwest Pipeline*, 61 F.3d at 1487.

102. 3 F.3d 1544 (D.C. Cir. 1993).

103. *Chevron*, 467 U.S. at 865-66.

104. 1 DAVIS & PIERCE, *supra* note 32, § 3.3, at 113 (stating that the courts "engage in policymaking when they decide cases brought under statutes that do not resolve the issues before the court").

4. Other Circuits

The D.C. Circuit has concluded that the Supreme Court's decision in *Chevron* diminished the lower courts' ability to exercise de novo review on questions of law involving contract interpretations.[105] According to the D.C. Circuit, *Chevron* implicitly modifies cases that have withheld deference on contract interpretation questions.[106] In *National Fuel Gas Supply Corp. v. Federal Energy Regulatory Commission*,[107] the D.C. Circuit stated that the agency's greater expertise with the agreement supports deferential review; however, *Chevron* alone was sufficient to compel granting deference.[108]

Even when granting deference to an agency's interpretation of a contract, the reviewing court still must determine if the agency's interpretation is supported both factually and legally.[109] An agency's decision must be the result of reasoned decision-making as ascertained from the record.[110] The D.C. Circuit described three situations in which deference would be inappropriate.[111] First, where an agency's interpretation has vacillated, "granting deference might give the agency license to act arbitrarily by making inconsistent decisions without justification."[112] Second, "if the agency itself were an interested party," deference may be inappropriate.[113] Third, the court would not require deference where Congress intended courts to independently review agency decisions.[114]

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105. National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n, 811 F.2d 1563, 1570 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987). *Chevron* held that unless Congress directly addresses the precise issue, a court may not "impose its own construction on the statute," but must determine if "the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

106. *National Fuel*, 811 F.2d at 1570. The D.C. Circuit cited Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 268-70 (1960), which upheld an agency's de novo review of a contract, as being modified by *Chevron*. *Id.*

107. 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987).

108. *National Fuel*, 811 F.2d at 1570; *see also Williams Natural Gas*, 3 F.3d at 1549-50 (quoting *National Fuel*, 811 F.2d at 1570) (finding that even where a settlement agreement was purely private, FERC approval is only a further factor for granting deference since "*Chevron* principles alone compel this conclusion").

109. Tarpon Transmission Co. v. Federal Energy Regulatory Comm'n, 860 F.2d 439, 442 (D.C. Cir. 1988) (quoting Vermont Dep't of Public Serv. v. Federal Energy Regulatory Comm'n, 817 F.2d 127 (D.C. Cir. 1987)); *see* Consolidated Gas Supply Corp. v. Federal Energy Regulatory Comm'n, 745 F.2d 281, 291 (4th Cir. 1984) (stating that "a court need [not] accept an agency interpretation that black means white"), *cert. denied*, 472 U.S. 1008 (1985).

110. *See* Baltimore Gas & Elec. Co. v. Federal Energy Regulatory Comm'n, 26 F.3d 1129, 1135 (D.C. Cir. 1994) (denying the Commission's interpretation); Long Island Lighting Co. v. Federal Energy Regulatory Comm'n, 20 F.3d 494, 497 (D.C. Cir. 1994) (finding that the Commission's interpretation was unreasonable); *Tarpon Transmission*, 860 F.2d at 442 (concluding that an agency's analysis was inadequate for meaningful review). *But see* Natural Gas Clearinghouse v. Federal Energy Regulatory Comm'n, 965 F.2d 1066, 1070-71 (D.C. Cir. 1992) (stating that the agency engaged in reasoned decisionmaking and upholding the agency's decision by granting it "substantial deference").

111. *National Fuel*, 811 F.2d at 1571.

112. *Id. National Fuel* only suggested a vacillation exception, it did not adopt one. *Williams Natural Gas*, 3 F.3d at 1550.

113. *National Fuel*, 811 F.2d at 1571.

114. *Id.*

In contrast to these opinions, the Fifth Circuit, in *Mid Louisiana Gas Co. v. Federal Energy Regulatory Commission*,[115] held that courts are not required to defer to agency interpretations when reviewing a settlement contract.[116] The court stated that contract construction is a question of law which courts can review "freely."[117] The court noted that when the agency's special understanding of the subject matter enhances its interpretation, there "may be room to defer to the views of the agency," but such interpretations are not conclusive.[118] In *Mid Louisiana Gas*, however, the Commission relied solely on the language of the agreement, so there was no agency interpretation to which the Fifth Circuit could afford deference.[119]

II. DEFINING THE RECORD FOR REVIEW IN SOCIAL SECURITY CASES: *O'DELL V. SHALALA*[120]

A. *Background*

A determination of social security benefits consists of four stages prior to judicial review.[121] An initial determination of a claimant's eligibility for benefits and a request for reconsideration constitute the first two stages.[122] If a claimant seeks reconsideration, the third stage consists of a de novo review of the initial agency decision at a hearing before an Administrative Law Judge (ALJ).[123] The ALJ conducts an informal review and bases her decision on the evidence presented at the hearing.[124] An ALJ's decision is binding unless a claimant proceeds to the fourth stage by requesting review at the Appeals Council (AC).[125] The AC determines, upon review, whether or not the ALJ

115. 780 F.2d 1238 (5th Cir. 1986).

116. *Mid Louisiana Gas*, 780 F.2d at 1243; *see also* Cincinnati Gas & Elec. Co. v. Federal Energy Regulatory Comm'n, 724 F.2d 550, 554 (6th Cir. 1984) (finding that questions of law do not require technical expertise and are freely reviewable by the court).

117. *Mid Louisiana Gas*, 780 F.2d at 1243.

118. *Id.*

119. *Id.*

120. 44 F.3d 855 (10th Cir. 1994).

121. 20 C.F.R. § 404.900 (1995). *See generally* John J. Capowski, *Accuracy and Consistency in Categorical Decision-Making: A Study of Social Security's Medical-Vocational Guidelines—Two Birds with One Stone or Pigeon-Holing Claimants?*, 42 MD. L. REV. 329, 334-35 (1983) (discussing the social security claims process); Wayne A. Kalkwarf, *The Jurisdictional Dilemma in Reopening Social Security Decisions*, 23 CREIGHTON L. REV. 545 (1989-90) (discussing the review and reopening procedures for social security); F. William Hessmer IV, Notes and Comments, *Own Motion Review of Disability Benefit Awards by the Social Security Administration Appeals Council: The Improper Use of an Important Procedure*, 2 ADMIN. L.J. 141, 143 (1988) (discussing the social security adjudication process and levels of agency consideration for disability claims).

122. 20 C.F.R. § 404.900(a)(1)-(a)(2).

123. *Id.* § (a)(3); Kalkwarf, *supra* note 121, at 548.

124. Kalkwarf, *supra* note 121, at 548; *see also* 20 C.F.R. § 404.929 (1995) (describing the ALJ hearing process which allows claimant to "appear in person, submit new evidence, examine the evidence used in making the determination or decision under review, and present and question witnesses").

125. 20 C.F.R. § 404.955 (1995); 20 C.F.R. § 404.900(a)(4); *see also* Larry M. Gropman, *Fifteenth Annual Survey of Sixth Circuit Law, Social Security*, 1994 DET. C.L. REV. 871, 873 (stating that the Appeals Council's purpose is to provide final agency review, ensuring that ALJ decisions are consistent with overall agency policy).

based her decision on substantial evidence, abused her discretion, or erred on a question of law.[126] The AC also reviews decisions involving "broad policy or procedural issue[s]" affecting the public interest.[127]

On review, the AC can consider any new evidence that is both material and relates to the period during which the ALJ made her decision.[128] The AC, however, relies heavily on the ALJ record when reviewing the ALJ's decision.[129] Once the AC reviews a case, considers the new evidence, and renders a decision, that decision is final and the next opportunity for review occurs at the federal district court level.[130] If the AC denies review by determining that the new evidence is not material, the ALJ's decision becomes final and the complainant may then seek judicial review outside of the agency.[131]

Review in federal district court is available only for "final decisions."[132] 42 U.S.C. § 405(g) provides the statutory basis for judicial review.[133] A claimant must, therefore, exhaust all possible administrative remedies prior to seeking judicial review.[134]

Courts review social security decisions under the substantial evidence standard.[135] The reviewing court determines whether substantial evidence supports the record, but it "may neither re-weigh the evidence nor substitute its judgment for that of the agency."[136] The court may also remand the case,

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126. 20 C.F.R. § 404.970(a)-(a)(3) (1995).

127. *Id.* § (a)(4).

128. *Id.* § (b). Section 404.970(b) states:

> If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the *entire record including the new and material evidence* . . . . It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence *currently of record.*

Id. (emphasis added). The new and material evidence must relate to this time period since the evidentiary record is closed after the ALJ decision. Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 250 (1990).

129. Hessmer, *supra* note 121, at 146.

130. 20 C.F.R. § 404.981 (1995); 20 C.F.R. § 404.900(a)(5). A claim must be filed in federal court within sixty days after notice of the Appeals Council decision. 20 C.F.R. § 404.981.

131. 20 C.F.R. § 404.955(b).

132. 42 U.S.C. § 405(g) (1988 & Supp. 1993); Hessmer, *supra* note 121, at 146 (explaining that the Appeals Council decision, or the ALJ's decision if the Appeals Council denies review, constitutes the final stage of the social security adjudication process). Jurisdiction is granted regardless of the amount in controversy. 42 U.S.C. § 405(g).

133. Alan G. Skutt, Annotation, *When Is Claim Sufficiently Presented to Secretary of Health and Human Services to Permit Judicial Review Under § 405(g) of Social Security Act (42 U.S.C. § 405(g))*, 99 A.L.R. FED. 198, § 2[a], at 203 (1990).

134. Alan G. Skutt, Annotation, *Provision of 42 U.S.C. § 405(g) Making the Secretary of Health and Human Services' Findings of Fact Conclusive If Supported by Substantial Evidence As Applying to Administrative Law Judge or Social Security Council*, 90 A.L.R. FED. 280, § 2[b], at 289 (1988) (stating that failure to exhaust administrative remedies will lead to dismissal since section 405(g) only applies to "final decisions").

135. 42 U.S.C. § 405(g). The Supreme Court defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). *See generally* 2 HARVEY L. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURES, §§ 672, 723, 728 (4th ed. 1991 & Supp. 1993) (discussing substantial evidence in social security cases).

136. Skutt, *supra* note 133, § 2[b], at 289. *See generally* 2 MCCORMICK, *supra* note 135, §§

for good cause, to the Commissioner for consideration of new evidence.[137] Because § 405(g) requires a court to review the "final decision," and neither § 405(g) nor the regulations define the record of the "final decision" that the district court must review, the opinions of the circuit courts differ on what constitutes the proper record of review.[138]

Prior to the Tenth Circuit's decision in *O'Dell*, two district courts within the Tenth Circuit were in conflict with regard to what record to review.[139] In *Jones v. Sullivan*,[140] the court held that when the AC denies review, the new evidence submitted to the AC for consideration becomes part of the record for review.[141] The *O'Dell* district court reached a contrary result, holding that new evidence submitted to the AC was not part of the record on review.[142] The Tenth Circuit took the opportunity to resolve the conflict when *O'Dell* came before it on appeal.[143]

B. *Tenth Circuit Opinion*

1. Facts

In *O'Dell v. Shalala*,[144] O'Dell applied for disability benefits alleging an inability to work.[145] The ALJ determined that O'Dell did not suffer from a disabling knee condition during the insured period and denied benefits.[146] On appeal to the AC, O'Dell submitted two new pieces of evidence concerning her condition.[147] The AC determined that O'Dell's "new evidence did not provide a basis for changing the ALJ's decision and declined review."[148]

672, 723, 728 (describing the application of substantial evidence during social security review).

137. 42 U.S.C. § 405(g). Section 405(g) states:

> The court may . . . for good cause shown . . . remand the case to the Secretary . . . , and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding. . . .

Id. Remand may be allowed where there is a combination of an unrepresented claimant, failure of the ALJ to fully explore facts and leads, and brevity of the oral hearing. 2 MCCORMICK, *supra* note 135, § 754, at 331.

138. Keeton v. Department of Health and Human Servs., 21 F.3d 1064, 1066-67 (11th Cir. 1994). For a discussion of circuit court decisions defining the record of review, see *infra* notes 161-71 and accompanying text.

139. *O'Dell*, 44 F.3d at 857-58 (noting that the district court for the Western District of Oklahoma refused to consider new evidence submitted to the Appeals Council); Jones v. Sullivan, 804 F. Supp. 1398, 1404 (D. Kan. 1992) (allowing new evidence to be considered).

140. 804 F. Supp. 1398 (D. Kan. 1992).

141. *Jones*, 804 F. Supp. at 1404 (adopting the Eighth Circuit's analysis in Nelson v. Sullivan, 966 F.2d 363, 366 (8th Cir. 1992)).

142. *O'Dell*, 44 F.3d at 857-58.

143. *Id.*

144. 44 F.3d 855 (10th Cir. 1994).

145. *O'Dell*, 44 F.3d at 857.

146. *Id.*

147. *Id.* O'Dell submitted a report showing degenerative osteoarthritic changes in her knee and a physician's letter stating that O'Dell had difficulty standing and walking due to her knee condition. *Id.*

148. *Id. See generally* 20 C.F.R. § 404.970 (listing the types of cases that the Appeals Council will review and the types in which it will consider new evidence).

2. Decision

The Tenth Circuit held that the record on review includes new evidence presented to the AC where the AC declines further review of an ALJ decision.[149] After discussing other circuit courts' treatments of the issue, the Tenth Circuit based its decision to consider new evidence on several factors.[150] First, relying on 20 C.F.R. § 404.970(b), the court determined that the Secretary's regulation "gives a claimant a last opportunity to demonstrate disability before the decision becomes final."[151] Second, the court noted that the section requires the AC to "evaluate the *entire record* including the new and material evidence submitted."[152] Last, also under § 404.970(b), the AC must review the ALJ's decision if the "decision is contrary to the weight of evidence '*currently of record.*'"[153] In *O'Dell*, the court determined that the regulation appeared to incorporate the new evidence into the final record.[154] The court therefore concluded that, although the AC declined further review and upheld the ALJ's decision, thus completing the final adjudication within the agency, the Secretary's final decision included the new evidence considered by the AC.[155]

C. *Analysis*

Upon review, a court must determine whether the record supports the ALJ's decision and whether the AC's decision that the evidence was not "new and material" was correct, thereby justifying the AC's denial of further review.[156] To make this determination, a court must review both the ALJ's record and the new evidence that the AC relied upon in reaching its conclusion.

Despite the fact that considering "new evidence" on appeal is seemingly inconsistent with the notion of appellate review,[157] such consideration ensures compliance with regulations governing the adjudication process.[158] Only by examining the new evidence presented to the AC may a court determine whether the AC's decision denying review was correct.[159] The regulations

149. *O'Dell*, 44 F.3d at 859.

150. *Id.* at 858-59. The Tenth Circuit noted that the Seventh and Sixth Circuits review the ALJ's decision without considering new evidence while the Fourth, Eight, Ninth, and Eleventh Circuits include the new evidence in the final decision under review. *Id.* For a discussion of other circuit decisions, see *infra* notes 161-71 and accompanying text.

151. *O'Dell*, 44 F.3d at 859; *see* 20 C.F.R. § 404.970(b) (authorizing the Appeals Council to consider new evidence without a showing of good cause).

152. *O'Dell*, 44 F.3d at 859 (quoting 20 C.F.R. § 404.970(b)) (emphasis added). For the text of 20 C.F.R. § 404.970(b), see *supra* note 128.

153. *O'Dell*, 44 F.3d at 859 (emphasis added).

154. *Id.*

155. *Id.* Upon considering the new evidence, the Tenth Circuit affirmed the district court's decision that the Secretary's decision to deny benefits was supported by substantial evidence. *Id.* at 860.

156. *See supra* notes 128-31 and accompanying text.

157. *See infra* notes 161-69 and accompanying text.

158. *See, e.g.*, 20 C.F.R. § 404.955 (discussing the effect of the decision); 20 C.F.R. § 404.970 (describing types of cases the Appeals Council will review). By considering the "new" evidence, which in a sense is no longer "new" once the Appeals Council has considered it, courts ensure agency compliance with the regulations. *See supra* note 128 and accompanying text.

159. *See, e.g.*, 20 C.F.R. § 404.970 ("If new and material evidence is submitted, the Appeals

establish that once a court determines that the AC was correct in denying review, the ALJ's decision becomes final; as a result, a court must examine the merits of the ALJ's decision in order to assess whether that decision was justified.[160] As a result of the division of the process into two distinct segments, the court is not required to reweigh evidence, only to examine each record to ensure compliance with the regulations.

D. *Other Circuits*

Several circuits have held that the record on review must include new evidence submitted to the AC, even where the AC has denied review.[161] The Ninth Circuit argues that since the AC evaluates the new evidence in determining whether to review the ALJ's decision, courts must consider the new evidence to determine if the ALJ's decision remains supported by substantial evidence.[162] The Eleventh Circuit maintains that each appeal within the administrative process contributes to the final record.[163] When the AC denies review, therefore, the new evidence that it considered becomes part of this record.[164]

In contrast, the Sixth and Seventh Circuits have held that new evidence presented when the AC denies review may not automatically be considered by the reviewing court.[165] The Seventh Circuit summarized its position in *Eads v. Secretary of the Department of Health and Human Services*,[166] in an attempt to persuade other circuits who are debating the issue to consider its view.[167] The Seventh Circuit explained that when the AC denies review, this limits the reviewing federal court to a determination of the correctness of the

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Council *shall* consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision.") (emphasis added).

160. 20 C.F.R. § 404.955(b) (providing that an ALJ's decision is binding unless the Appeals Council denies review and a claimant seeks judicial review).

161. *See, e.g.*, Keeton v. Department of Health and Human Servs., 21 F.3d 1064, 1067 (11th Cir. 1994) (stating that new evidence first submitted to the Appeals Council is part of the record on review); Riley v. Shalala, 18 F.3d 619, 622 (8th Cir. 1994) (considering new evidence but noting that weighing evidence is a "peculiar task for a reviewing court"); Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir. 1993) (stating that when the Appeals Council examines new evidence while reviewing the ALJ's decision, the evidence is included in the record); Nelson v. Sullivan, 966 F.2d 363, 366 (8th Cir. 1992) (noting that newly submitted evidence not included in the ALJ record became part of the record when it was submitted to the Appeals Council); Wilkins v. Department of Heath and Human Servs., 953 F.2d 93, 96 (4th Cir. 1991) (holding that the Appeals Council properly incorporated new evidence into the record, which in turn must be considered when reviewing the Secretary's final decision).

162. *Ramirez*, 8 F.3d at 1452.

163. *Keeton*, 21 F.3d at 1067.

164. *Id.*

165. *See, e.g.*, Cotton v. Sullivan, 2 F.3d 692, 696 (6th Cir. 1993) (stating that claimant must demonstrate good cause justifying remand for consideration of new evidence); Micus v. Bowen, 979 F.2d 602, 606 n.1 (7th Cir. 1992) (stating that courts do not consider new evidence presented to the Appeals Council when reviewing the Secretary's final decision because the ALJ did not have access to it); Wyatt v. Secretary of Health and Human Servs., 974 F.2d 680, 685 (6th Cir. 1992) (holding that a court can remand for consideration of new evidence only on a showing that the new evidence is material).

166. 983 F.2d 815 (7th Cir. 1993).

167. *Eads*, 983 F.2d at 818.

ALJ's decision.[168] To determine whether the ALJ's decision was correct, a court may look only to evidence presented to the ALJ, not evidence submitted to the AC.[169]

The Seventh Circuit, in turn, justified its position by emphasizing that considering new evidence requires a court to "sift and weigh evidence," rather than review "evidentiary determinations," thereby altering the court's appellate function.[170] Since weighing evidence is "inconsistent with the fundamental tenets of appellate review," the Seventh Circuit argued that courts must remand pursuant to § 405(g) in order to properly establish an arena for the consideration of new evidence.[171]

CONCLUSION

The Tenth Circuit's continued trend of deference to agency decisions calls into question the ability of administrative law to protect individuals against abuses of an agency's power. Recent decisions have illustrated this trend by expanding deference to agency interpretations of contracts, and by converging the substantial evidence and the arbitrary and capricious standards. By continuing to interpret the standards of review as limiting the court's ability to question agency decisions, the Tenth Circuit has denied adequate protection to individuals.[172] The Tenth Circuit did give more credence to the protections of administrative law in the realm of social security by reviewing all of the evidence presented in the administrative agency review procedures. Since agencies have the authority to promulgate, enforce, and adjudicate rules, the level of scrutiny that courts exercise should reflect the agency's authority, thus ensuring a sufficient check on the administrative branch.

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168. *Id.* at 817.

169. *Id.*

170. *Id.* at 817-18.

171. *Id.* The minority circuits argue that the proper procedure should be to remand pursuant to § 405(g), under which the claimant must prove that her evidence is "new and material." *Cotton*, 2 F.3d at 696. However, the regulations do not require a showing of good cause, as required by § 405(g), for consideration of new evidence. *Compare* 20 C.F.R. § 404.970(b) (lacking a good cause requirement) *with* 42 U.S.C. § 405(g) (stating that a showing of good cause for evidence submitted during the administrative process would undermine the Secretary's regulations specifically allowing evidence to be submitted without such a showing).

172. *See* SCHWARTZ, *supra* note 1, § 10.1, at 624 (arguing that judicial review becomes meaningless when the standards of review are too restrictive).