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OVERVIEW

During the survey period, the Tenth Circuit reviewed several decisions handed down by administrative agencies, following the pattern of recent years.[1] This article will discuss seven of the most important of these cases. The Tenth Circuit concentrated its review of the cases in the following areas: sufficiency of evidence,[2] the duty to follow precedent,[3] the parameters of judicial restraint,[4] and the scope of protection offered by the fifth amendment in an administrative action.[5] While judicial deference remained the general rule in reviewing an administrative decision, it is important to note that the Tenth Circuit reversed the majority of the cases discussed herein.

I. SUBSTANTIALITY OF EVIDENCE

A. *Background*

It is a general rule in administrative law that a "reviewing court shall . . . hold unlawful and set aside agency action findings . . . and conclusions found to be . . . unsupported by substantial evidence . . . ."[6] While this empowers a reviewing court to reverse an agency's decision on the grounds of insubstantial evidence, it leaves to the courts to define exactly where the line between "insubstantial" and "substantial" evidence is to be drawn. Substantial evidence has been defined as more than a mere scintilla.[7] It has also been said to be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[8] Unfortunately, these standards are nothing more than ad hoc definitions. Thus, in order to give them meaning, one must examine a court's ad hoc reviews of substantial evidence issues.

During the survey period, the Tenth Circuit reviewed two cases concerning the substantiality of evidence. Both cases involved decisions by the Social Security Administration ("SSA"), and both cases were

1. *See* Note, *Administrative Law*, 64 DEN. U.L. REV. 105 (1987); Note, *Administrative Law*, 63 DEN. U.L. REV. 165 (1986).

2. Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Weakley v. Heckler, 795 F.2d 64 (10th Cir. 1986).

3. Big Horn Coal Co. v. Temple, 793 F.2d 1165 (10th Cir. 1986).

4. United Transp. Union v. Dole, 797 F.2d 823 (10th Cir. 1986); E.E.O.C. v. Commercial Office Prods. Co., 803 F.2d 581 (10th Cir. 1986) *rev'd.*, 108 S.Ct. 1666 (1988); Rutherford v. United States, 806 F.2d 1455 (10th Cir. 1986).

5. Roach v. National Transp. Safety Bd., 804 F.2d 1147 (10th Cir. 1986), *cert. denied*, 108 S.Ct. 1732 (1988).

6. 5 U.S.C. § 706(2)(e) (1980).

7. Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

8. *Id.*

reversed.[9]

B. Talbot v. Heckler[10]

The claimant, Harley Talbot, applied for social security disability benefits on June 9, 1982, and again on June 13, 1983. Each application was denied by the SSA.[11] Talbot appealed the second denial to an administrative law judge ("ALJ"), who affirmed the SSA's decision. Talbot then sought review in the Appeals Council of the Secretary of Health and Human Services ("Council"), but was again denied benefits.[12] He then brought his case to the federal district court, only to have that court uphold the administrative actions.[13] Talbot then sought review of his case by the Tenth Circuit.

1. The ALJ's Decision

Talbot appeared before the ALJ without the benefit of counsel. After hearing his testimony and allowing him an opportunity to comment on the documentary evidence, the ALJ concluded that Talbot was not disabled as defined by the Social Security Act and therefore not entitled to benefits.[14]

The ALJ based his inquiry on whether or not Talbot was able to either return to his previous occupation or to engage in other work, as required by the SSA regulations.[15] The ALJ determined that Talbot could not return to his past work, which required medium to heavy exertion, because his residual functional capacity ("RFC") would not allow it.[16] However, the ALJ also found that Talbot did retain the RFC for a wide range of light work, restricted only "by inability to work in environments with excessive dust, fumes or gases."[17]

The ALJ's decision recognized no substantial exertional limitations on Talbot's ability to perform the full range of light work. However, the ALJ explicitly recognized the environmental restrictions which are considered non-exertional limitations on the ability to perform work.[18] In the end, the ALJ concluded that the "claimant's capacity for the wide range of light work has not been significantly compromised by his non-exertional limitations."[19] He further concluded that, pursuant to Rule 202.14 of the SSA's Medical Vocational Guidelines concerning residual strength, age, work experience and education, Talbot was not

9. *See supra* note 2.
10. 814 F.2d 1456 (10th Cir. 1987).
11. *Id.* at 1457. The impairments are listed in Appendix 1 of the Social Security Act regulations, 20 C.F.R. § 1.
12. *Talbot*, 814 F.2d at 1457.
13. *Id.*
14. *Id.* at 1459.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* The non-exertional limitations were an "inability to work in environments with excessive dust, fumes, or gases."

disabled.[20]

2. The Tenth Circuit Decision

The primary issue for the Tenth Circuit was whether there was substantial evidence to support the ALJ's finding that Talbot had the exertional capacity to perform a full range of light work.[21] Relying on an analysis of the entire record of the case, the court determined that many of the conclusions upon which the ALJ based his decision lacked substantial evidence.

The ALJ had concluded that the claimant's testimony was "not wholly credible and . . . somewhat probably exaggerated."[22] The court found this conclusion to be unwarranted, noting that the ALJ had failed to give any particular reasons for drawing this conclusion.[23] The ALJ had also made the inference that the claimant had himself showed that he thought he was capable of returning to work by seeking retraining.[24] The ALJ used this inference as support for his ultimate finding that Talbot's respiratory impairments imposed only "an insignificant environmental restriction" on his ability to work.[25] The court found the logic of this conclusion inconsistent, and again ruled there was a lack of substantial evidence.[26]

The ALJ had further concluded that Talbot's combined impairments had not prevented him from performing light and sedentary work "on a regular and continued basis," and used this conclusion to support his finding of insignificant environmental conditions.[27] The court found this conclusion to be in defiance of the record, noting that the uncontradicted information in the record suggested a contrary conclusion, and was not even addressed by the ALJ.[28]

Lastly, the ALJ had concluded that, despite a conflicting series of medical reports on Talbot by various doctors, Talbot was capable of engaging in a full range of light work.[29] The court noted that the ALJ had failed to properly evaluate and explain the conflicting reports of the physicians, and thus based his decision on impressions and mis-

20. *Id.* n.1. *See* 20 C.F.R. pt. 404, subpt. P, app. 2, § 202.00, Table No. 2, Rule 202.14 (where one's age, education, and previous work experience are factors considered in making a decision).

21. 814 F.2d at 1461.

22. *Id.* at 1459.

23. *Id.* at 1461.

24. *Id.* Talbot had applied for rehabilitation training—training which was denied because of his impairments, using different criteria for disability than the SSA criteria.

25. *Id.*

26. *Id.*

27. *Id.* at 1461-62. "Light" and "sedentary" work are defined in C.F.R. §§ 404.1567(a) & (b) (1986). The ALJ determined that Talbot's attempt to do some painting and install a shower was a performance of light and sedentary work on a regular basis. The ALJ failed to consider that Talbot was unable to finish or keep these jobs because of health problems, and was never paid for them.

28. *Id.*

29. *Id.* at 1463.

characterizations.[30] Because of the insubstantial evidence which formed the basis for many of the ALJ's conclusions, the Tenth Circuit reversed the decision, and awarded benefits to Talbot commencing from the date of his second application.[31]

C. Weakley v. Heckler

In *Weakley v. Heckler*,[32] the Tenth Circuit was confronted with the second of the "SSA" cases involving the issue of "substantiality of evidence." George Weakley had appealed the denial of his disability insurance benefits which he had applied for after suffering a back injury at work.[33] The ALJ who conducted the hearing found that Weakley's back impairment met listing 1.05(c) of the Social Security Listing of Impairments.[34] However, the ALJ found that Weakley was not entitled to benefits because he failed to give an acceptable reason for refusing to have the back surgery his physician had prescribed.[35]

The Council denied Weakley's subsequent appeal, forcing Weakley to seek review in federal district court. That court rejected Weakley's claim for benefits, in an opinion which failed to consider the fact that Weakley's back impairment had been found to meet listing 105(c) of the Social Security Listing of Impairments.[36]

1. The Tenth Circuit Decision

Once again, the primary issue on appeal was whether there was substantial evidence to support the administrative decision, as required by 42 U.S.C. section 405(g).[37] In this case, the decision was made by the Secretary of Health and Human Services to deny Weakley his benefits because he refused to submit to prescribed surgery.[38]

The court found that Weakley had met his burden of demonstrating impairment, noting that the Secretary did not dispute that the back injury met listing 105(c).[39] However, the court held that the Secretary had failed to meet its burden of demonstrating why Weakley's refusal to submit to prescribed surgery was unjustified.[40] Because the Secretary did not present substantial evidence that the rejected back surgery was expected to restore Weakley's ability to work, the first element of the four-

30. *Id.* at 1464.

31. *Id.* at 1466. The court decided that it was only at this time that the record contained substantial evidence of Talbot's disability.

32. 795 F.2d 64 (10th Cir. 1986).

33. *Id.* at 65.

34. *Id.* (citing 20 C.F.R., pt. 404 subpt. P, app. 1. listing 1.05(c)).

35. *Id.*

36. *Id.* Apparently, the district court acted as merely a rubber stamp in affirming the ALJ's decision. However, it is not entirely clear upon what exactly the district court based its decision.

37. *Id. See* 42 U.S.C. § 405(g) (Supp. 1985), "The findings of the Secretary . . . if supported by substantial evidence, shall be conclusive . . . ."

38. 795 F.2d at 65. *See* 20 C.F.R. § 404.1530 (1987).

39. *Weakley*, 795 F.2d at 65.

40. *Id.* at 66. The applicable test is as follows: Once the claimant demonstrates that

prong test was not satisfied, and the denial of benefits was in error.[41]

D. Analysis

An analysis of the *Talbot* and *Weakley* decisions must be conducted within the framework of 42 U.S.C. section 405(g), which provides that federal review of an agency's factual findings must be limited to the question of whether substantial evidence supports the factual finding.[42] The analysis must also consider the review standards discussed above.

Of the two cases, the *Talbot* case is the more expansive. The *Talbot* court specifically adopted the Supreme Court's holding that substantial evidence must be "more than a mere scintilla" and of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[43] However, the *Talbot* court also stated that the search for adequate evidence does not include a weighing of the evidence, and a court must refrain from substituting its discretion for that of the agency.[44] Still, the *Talbot* court felt that the reviewing court must consider the record as a whole, and the "substantiality of the evidence must take into account whatever in the record fairly detracts from its weight."[45]

With these basic parameters providing the backdrop, the *Talbot* and *Weakley* decisions appear to be soundly reached. As stated above, the *Talbot* court found the reasoning behind the ALJ's major conclusions to be less than persuasive. The ALJ's conclusion as to the claimant's credibility was rejected, not because it was beyond his authority to make such a judgment, but because he failed to provide any particular reasoning for discounting Talbot's credibility except to observe that there were no witnesses present when Talbot suffered his alleged blackouts.[46]

Concerning the ALJ's second conclusion that Talbot himself believed he could return to work by trying to retrain himself,[47] the court again did not question the authority of the ALJ to make such an inference. However, the court refused to allow the use of the inference to

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he is impaired, the government has the burden of demonstrating each of the four elements:

1. The treatment at issue should be expected to restore the claimant's ability to work;
2. The treatment must have been prescribed;
3. The treatment must have been refused;
4. The refusal must have been without justifiable excuse. *See* Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985). *See also* Jones v. Heckler, 702 F.2d 950, 953 (11th Cir. 1983); Cassiday v. Schweiker, 663 F.2d 745, 749 (7th Cir. 1981).

41. 795 F.2d at 66.

42. *See* 42 U.S.C. § 405(g) (Supp. 1985).

43. *See* Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NRLB, 305 U.S. 197, 229 (1938)).

44. *Talbot*, 814 F.2d at 1461.

45. *Id.* (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)). Similarly, the *Weakley* court felt that its role was to consider the record as a whole, and determine whether that record contained substantial evidence to support the administrative decision.

46. *Id.* at 1461. Talbot had experienced blackouts and dizzy spells over a period of several years prior to his application for benefits.

47. *Id.*

conclude that Talbot thought he could work at a full range of activity rather than a limited range of light or sedentary activity.[48] This particular substantial evidence issue provides a useful illustration of how far an agency's evidentiary finding may go in terms of supporting differing conclusions. The court was willing to allow the fact that Talbot attempted to retrain himself as sufficient to sustain the conclusion that he thought he could work.[49] But the court refused to allow that factual finding to sustain the further conclusion that Talbot thought he could work at a certain activity level.[50] To determine the activity level, more evidence was needed.

Lastly, the court addressed the ALJ's finding of insignificant environmental restrictions,[51] which the ALJ attempted to support with the conclusion that Talbot had been able to perform light and sedentary work on a "regular and continued basis."[52] The court examined this conclusion by comparing the evidentiary record with the requirements of the social security definitions, and found the ALJ's conclusion to be "highly questionable."[53] The information in the record suggested that Talbot did not meet the definitional requirements. However, the court did not reverse the ALJ for making a conclusion in defiance of the record, but did so because the ALJ failed to even address the contradictory information that was contained in the record.[54]

The *Weakley* decision is more straightforward. The court focused on a single issue: whether the Secretary had met his burden of showing that the rejected back surgery was expected to restore Weakley's ability to work.[55] The Secretary presented the testimony of one doctor who stated that Weakley's problem was correctable by surgery, and that following the surgery, Weakley would have an estimated residual disability of 15% to the body as a whole.[56] This testimony was in contradiction to several doctors' testimony on behalf of Weakley that there was a good possibility that there would be no improvement with the surgery.[57]

The court found the ALJ's decision lacked the requisite substantial evidence. The court could not see how one doctor's statement, which itself admitted that a significant residual disability would remain, could somehow outweigh the contrary opinions of several other doctors.[58] Again, the court did not quarrel with the decision. It suggested that the Secretary return with evidence as to whether Weakly was disabled or

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 1462.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Weakley*, 795 F.2d at 66.
56. *Id.* The physician based his estimate on the probable results of the surgery and the postoperative recuperation period.
57. *Id.*
58. *Id.*

not,[59] but it refused to "rubber-stamp" a decision based on insubstantial evidence.

E. Conclusion

The conclusion to be drawn from the *Talbot* and *Weakley* decisions is that judicial deference to agency decisions ends when unsubstantiated conclusions are drawn by administrative judges and panels. From *Talbot*, one may assume that credibility judgments made by an ALJ must be based on more than mere impression or any other single subjective factor. One may also conclude that some factual findings may be sufficient to establish general inferences.[60] From both *Talbot* and *Weakley*, one may assume that conclusions which are drawn in defiance of the record will be reversed. Beyond their illustrative examples, neither *Talbot* nor *Weakley* provides a definite standard as to what constitutes "substantial evidence." Instead, the standard has been, and is likely to long remain, what a court believes would persuade a reasonable mind.

II. The Agency's Duty to Follow Its Own Precedent

A. Background

In *Midwestern Transportation, Inc. v. Interstate Commerce Commission*,[61] the Tenth Circuit held that a court "must require the agency to adhere to its own pronouncements or explain its departure from them; an agency must apply criteria it has announced as controlling or otherwise satisfactorily explain the basis for its departure therefrom."[62] This holding was in line with the Tenth Circuit's earlier holdings as well as previous United States Supreme Court rulings.[63] During the survey period, the Tenth Circuit was again faced with reviewing an agency decision which departed from its own precedent.

B. *Big Horn Coal Company v. Temple*[64]

In *Big Horn*, the Tenth Circuit was petitioned to review the final order of a Department of Labor Benefits Review Board (the "Board") which had upheld a previous ruling by an ALJ. The ALJ had awarded disability benefits to Edward Temple, an employee of Big Horn, under the Black Lung Benefits Act (the "Act").[65] Because the ALJ had failed

59. In doing so, the court limited itself to the record. Since the Secretary had agreed that Weakley was in fact disabled, the court had no choice but to limit its review to the question of whether Weakley's refusal was reasonable. The court thus affirmed that review of an agency decision is confined to the record.

60. For example, Talbot's retraining attempts could sustain a conclusion as to his state of mind, but this same factual finding may be insufficient to sustain a legal conlcusion that Talbot could work at a definite level of activity.

61. 635 F.2d 771 (10th Cir. 1980).

62. *Id.* at 777.

63. Squaw Transit Co. v. United States, 574 F.2d 492 (10th Cir. 1978); *see also* Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973).

64. 793 F.2d 1165 (10th Cir. 1986).

65. 30 U.S.C. §§ 901-945 (1986) (providing in part that "the purpose of this sub-

to consider evidence which the Board, in previous cases, had deemed necessary to a decision,[66] the Tenth Circuit reversed the Board's order and remanded for further proceedings.

1. The ALJ's Decision

Temple had originally filed his claim for benefits under the Act in 1976.[67] In 1977, the claim was informally denied on the basis that neither the x-ray report nor the ventilatory study showed pneumoconiosis under the applicable regulations.[68] In 1978 the Act was amended[69] and Temple's original application was reviewed. The informal denial was reversed, and Temple was ruled eligible for benefits under the Act.[70] Big Horn generally denied Temple's claim and requested a hearing in front of an ALJ.

After the hearing, the ALJ issued a Decision and Order which found that Temple had pneumoconiosis under the interim presumption found in 20 C.F.R. section 727.203(a)(3). This section essentially provides that if a coal miner has been employed as such for at least ten years, he will be presumed to have work-related pneumoconiosis if the blood gas studies reveal an impairment in the transfer of oxygen from the lungs to the blood when the values equal or exceed those in the appropriate table.[71] The ALJ specifically found that the applicable criteria necessary to invoke the presumption was satisfied.[72]

Upon finding the "interim presumption" triggered, the ALJ then turned to the question of whether Big Horn had rebutted the presumption under C.F.R. section 727.203(b). The ALJ ruled that Big Horn failed to rebut the presumption under the enumerated methods in that section.[73] The ALJ stated that there was no medical evidence which

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chapter is to provide benefits. . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease . . . ."

66. *See* Martino v. U.S. Fuel Co., 6 BLACK LUNG REP. 1-33 (1983).

67. *Big Horn Coal Co.*, 793 F.2d at 1166.

68. *Id.*

69. Among the 1978 amendments to the Act was § 902(f), which broadened the term "total disability" in an attempt to liberalize the award of benefits. 30 U.S.C. § 902(f) (1978).

70. *Id.*

71. 20 C.F.R. § 727.203(a)(3) provides:

> (a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis . . . if one of the following requirements is met: . . .
>
> (3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table . . . .

The ALJ specifically found that the values necessary to invoke this presumption were present. *Id.* at 1167.

72. The specific values which triggered the presumption were "a P.CO2 of 31 and P.O2 of 57 at rest and a P.CO2 of 32 and P.O2 of 67 upon exercise." *Id.*

73. 20 C.F.R. § 727.203(b) provides:

> (b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, *all relevant medical evidence* shall be considered. The presumption in paragraph [20 C.F.R. § 727.203(a)] shall be rebutted if: . . .(1) in light of all relevant evidence it

would permit a finding that Temple did not have "any chronic pulmonary disease . . . aggravated . . . by coal mine employment."[74] This ruling was subsequently approved by the Board. Big Horn objected to this ruling, and raised on appeal the issue of whether the Board had erred in approving the ALJ's evaluation of the arterial blood gas tests without considering the effects of altitude and weight.

2. The Tenth Circuit Decision

The Tenth Circuit focused its review on the rebuttal evidence offered by Big Horn. Specifically, the evidence consisted of testimony by Dr. Hoyer, a physician who reviewed and commented on Temple's 1979 Arterial Blood Gas ("ABG") test results. Dr. Hoyer testified that the tests used on Temple "did not establish a pulmonary abnormality in light of the post-exercise results, the age of the miner, and the altitude at which the test was performed."[75] The ALJ ignored this conflicting evidence, and his actions were affirmed by the Director of the Office of Worker's Compensation Programs, Department of Labor.

On appeal, the Director conceded that it was error for the ALJ to have not considered the rebuttal testimony of Dr. Hoyer, but claimed that the omission was harmless error.[76] Big Horn, however, claimed that the omission was reversible error, and relied upon the Board's own decision in *Martino v. United States Fuel Company*.[77]

In *Martino*, the Board rejected a challenge to the validity of C.R.S. section 727.203(a)(3) interim presumption because the table standards were not adjusted for altitude.[78] However, the Board also explained that the ALJ must consider rebuttal evidence regarding the effect of altitude and other factors on the AGB test results.[79] The Board ruled that "if a blood gas study produces abnormal results which can be attributed to altitude rather than pathogenic dysfunction, then this evidence . . . is relevant medical evidence which the fact finder must consider if introduced . . . ."[80]

Because the Director had acknowledged that the ALJ had failed to consider the kind of evidence which *Martino* deemed necessary to a decision, the Tenth Circuit found little difficulty in reversing the Agency's decision. Since no explanation was offered for the divergence from *Martino*, the Tenth Circuit held that the failure to consider the rebuttal evidence was reversible error.[81]

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is established that the individual is in fact doing his usual coal mine work or comparable or gainful work . . . .

Emphasis added.

74. *Big Horn Coal Co.*, 793 F.2d at 1167 (quoting 20 C.F.R. § 727.202).
75. *Id.* at 1168.
76. *Id.*
77. 6 BLACK LUNG REP. 1-33 (1983).
78. *Big Horn Coal Co.*, 793 F.2d at 1168.
79. *Id.*
80. *Id.*
81. *Id.* at 1169.

3. Conclusion

It is important to note the uncompromising posture which the court assumes in *Big Horn*. Although the equities, and certainly the sympathies, of the case point toward an award of benefits to a black lung victim, the court intransigeantly clings to the time-honored rule that an agency shall be bound by its own precedent unless adequate explanation exists for a departure from it.[82] The court, by remanding, is forcing the agency to go through the proper hoops, even if doing so prevents an individual suffering a compensable occupational disease from recovering compensation. The law in this area appears to be etched in stone: An agency will not be allowed to deviate from its own precedent, absent an explanation for doing so.

III. The Agency's Interpretation of Promulgated Rules and Judicial Restraint

A. Background

The standard for federal review of agency decisions is set forth in 5 U.S.C. section 706.[83] Although this section provides broad grounds for such review, historically courts have shown a reluctance to overturn an agency decision. Among the first cases espousing the need for judicial restraint in reviewing agency decisions was *Ford Motor Credit Company v. Milhollin*.[84] There it was held that an agency's construction of its own regulation is entitled to substantial deference from the judiciary.[85] The Tenth Circuit expanded this rule in *Emery Mining Corp. v. Secretary of Labor*,[86] stating that judicial deference is especially appropriate if agency expertise or technical knowledge is involved, or if the agency's construction is contemporaneous with the regulation's promulgation.[87]

Three times during the survey period, the Tenth Circuit was confronted with the difficult issue of whether to replace an agency's interpretation of a regulation with that of its own.[88] In two of the cases, the

82. National Conservative Political Action Comm. v. FEC, 626 F.2d 953 (D.C. Cir. 1979); Midwestern Transp., Inc. v. ICC, 635 F.2d 771 (10th Cir. 1980).

83. 5 U.S.C. § 706(2)(E) (1980). "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence . . . ."

84. 444 U.S. 555 (1980). A group of car buyers whose retail purchase contracts were assigned to a finance company, filed suit against the finance company for violations of the Truth in Lending Act (15 U.S.C. §§ 1601-1700) and Regulation Z of the Federal Reserve Board (12 C.F.R. part 226). The alleged violations centered on undisclosed acceleration clauses. The Supreme Court held that in the absence of a clear expression by either the Act or Regulation Z, a high degree of deference must be shown to the Reserve Board and its staff.

85. *Id.* at 556.

86. 744 F.2d 1411 (10th Cir. 1984) (dealing with the Federal Mine Safety and Health Review Commission's finding that a mine operator had violated the miner retraining requirements of the Federal Mine Safety and Health Act). The court of appeals held that agency's interpretation of its enabling statute and its own regulations is entitled to deference.

87. *Id.* at 1415.

88. United Transp. Union v. Dole, 797 F.2d 823 (10th Cir. 1986); E.E.O.C. v. Com-

court overruled the agency interpretation. However, in each of the two, a vigorous dissent was filed on the issue of whether to defer to agency interpretation and expertise. In the third case, the agency interpretation was upheld by a unanimous panel.

B. *United Transportation Union v. Dole*[89]

1. Background

The Federal Railway Administration ("FRA") and the Secretary of the Department of Transportation ("Secretary") are charged with enforcing the railroad safety laws by the Hours of Service Act (the "Act").[90] Among other things, the Act seeks to improve the safety of sleeping accommodations which railroads provide for their crews, specifically prohibiting the housing of crews in a dorm if the buildings are in the immediate vicinity (within 1/2 mile) of railroad tracks where hazardous materials are switched.[91] However, the Act also establishes a grandfather clause, whereby buildings which were in existence before July 8, 1976, are exempt from the location requirements unless construction or reconstruction is performed on the building.[92] The term "construction" is defined by the Act and its implementing regulations to include acquisition and use of an existing building.[93]

In *United Transportation Union*, the FRA was charged with failure to fulfill its mandatory enforcement obligations against the St. Louis Southwestern Railroad Company ("SSW"). The specific charge was that the FRA failed to issue orders prohibiting SSW from housing its employees in a dormitory located in the Armourdale yard in Kansas City, Kansas.[94]

The Armourdale dormitory had been constructed by the Chicago, Rock Island and Pacific Railroad Company in 1966. In March of 1980, SSW purchased the dormitory along with some trackage and the surrounding railyard. The dormitory was built within 300 feet of tracks where switching operations for hazardous materials took place. During

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mercial Office Prods. Co., 803 F.2d 581 (10th Cir. 1986), *rev'd*, 108 S.Ct. 1666 (1988); Rutherford v. United States, 806 F.2d 1455 (10th Cir. 1986).

89. 797 F.2d 823 (10th Cir. 1986).

90. 45 U.S.C. § 64(b) (1986) (which states in part, "[i]t shall be the duty of the Secretary of Transportation to lodge with the appropriate United States Attorney information of any violation as may come to the knowledge of the Secretary"); 49 C.F.R. § 1.49(d) (1985) (the Federal Railroad Administration is delegated authority to: "(a) investigate and report on safety compliance records of applicants seeking railroad operating authority. . . .")

91. *United Transp.*, 797 F.2d at 825.

92. *Id.* at 826.

93. *See* 49 C.F.R. § 228.101(c) (1985) which provides:

> (c) As used in this subpart-
>
> (1) "Construction" shall refer to the-
>
> (i) Creation of a new facility;
>
> (ii) Expansion of an existing facility;
>
> (iii) Placement of a mobile or modular facility;
>
> (iv) *Acquisition and use of an existing building.*

Emphasis added.

94. *United Transp.*, 797 F.2d at 825.

the period between May 1980 and July 1983, the dormitory was used as a locker facility in lieu of a sleeping facility. At the end of this period, however, the SSW announced plans to refurbish the structure and resume use of it as a sleeping facility. Thus, there arose the situation where a grandfathered facility was transferred from one railroad to another.

For its defense, the FRA asserted that, according to its own interpretation of its regulations, the transfer in question did not fall within the definition of "construction," and was therefore exempt from the location requirements of the Act.[95] Specifically, the FRA claimed that the regulation which provides that "construction refers to acquisition and use of an existing building" did not include within its purview those buildings which were sold from one railroad to another, as in the present case.[96]

The trial court granted FRA's motion for summary judgment on this ground, holding that the rulemakers were not concerned with the transfer of grandfathered facilities from one railroad to another.[97] It further held that "SSW's plan for rehabilitation of the dormitory facility does not meet the definition of construction . . . [contained in] 49 C.F.R. section 228.101(c)(1)."[98] However, the trial court failed to explain why this definition was not met[99] and United Transportation Union ("UTU") appealed, challenging the FRA's interpretation of its own regulations.[100]

2. The Tenth Circuit Decision

After a preliminary determination of waiver,[101] the court focused on the FRA's interpretation of 49 C.F.R. section 228.101(c).[102] FRA maintained that the regulation did not include existing buildings which are transferred from one railroad to another.[103] UTU urged that all acquisitions are subject to the prohibition on construction.[104]

In a split decision, in which each of the three participating judges wrote an opinion, the court ruled that the agency's interpretation was inconsistent with congressional intent, the plain language of the regulation, and its own prior administrative interpretations.[105] Although the court acknowledged the general rule that substantial deference must be

95. *Id.* at 828.
96. *Id.*
97. *Id.* at 827.
98. *Id.*
99. *United Transp.*, 797 F.2d at 826-27.
100. *Id.*
101. The issue of waiver before the court was whether UTU had abandoned the issue because of its failure to adequately develop the issue in its brief. The court held that because the issue was at least superficially discussed in UTU's brief, was adequately discussed in FRA's brief, and was an issue of importance and first impression, the issue was not now waived. *Id.* at 827.
102. *Id.* at 828.
103. *Id.*
104. *Id.*
105. *Id.* at 829.

shown to an agency's interpretation of its own regulation,[106] it refused to allow that deference to become "blind adherence."[107] Because the issue was one involving a question of statutory interpretation, a question of law, the court ruled that it was the final authority.[108] Under that authority, the court reversed the lower rulings, and found SSW's proposed reopening of the Armourdale facility to be within the definition of "construction" as contemplated by 49 C.F.R. section 228.101(c).[109]

Interestingly, the dissent used the same analytical framework as the majority to reach a completely opposite result. In examining the statute and its legislative history, the dissent found nothing which would suggest that existing facilities should lose their statutory exemption and become "new construction" if the ownership of a railroad passed from one railroad to another.[110] It directed the court's attention to the fact that in the face of an economic climate which was conducive to mergers and acquisitions, Congress nowhere provided a caveat that transfer of ownership would trigger the prohibition.[111] Thus, Congress' primary intent was to prevent the abrupt loss of railroad capital assets through an artificial external event, such as legislation or changes in the ownership of railroads.[112]

In examining the regulations, the dissent pleaded for judicial restraint, maintaining that if there was any ambiguity in such a case, a court is compelled to defer to an agency's interpretation, especially when that agency interprets its own regulation.[113] When there is such ambiguity, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[114] In opposition to the majority, the dissent found no such error.

In response to the dissent, a concurring opinion was filed. It disagreed with the dissent's interpretation of the congressional intent behind the statute. The concurrence felt that the intent was for employee safety, not railroad economics.[115] The grandfather clause was added to ameliorate the loss incurred by the railroads, but not to eliminate their obligation to provide safe housing.[116]

The concurrence also took the position that judicial responsibility demands review of agency interpretation when an agency overindulges

106. *Id.*

107. *Id. See also* Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987) (where the court also discusses the limits of judicial deference in area of sufficiency of evidence).

108. *United Transp.*, 797 F.2d at 829. *See also* SEC v. Sloan, 436 U.S. 103 (1943).

109. *Id.* at 829-30.

110. *Id.* at 834 (dissenting opinion).

111. *Id.*

112. *Id.*

113. *Id.* at 835 (citing Udall v. Tallman, 380 U.S. 1, 16-17 (1965)). *See also* Hoover & Bracken Energies, Inc. v. United States Dep't of Interior, 723 F.2d 1488, 1489 (10th Cir. 1983).

114. *United Transp.*, 797 F.2d at 835.

115. *Id.* at 832 (concurring opinion).

116. *Id.*

in "ad hoc" decision making or "after the fact rationalizations."[117] It found dispositive the fact that the FRA itself had stated that the "acquisition of an existing structure for use as sleeping quarters is listed as an event clearly within the purview of the statute and these regulations, and found nothing in the record to suggest that the agency had previously taken the position it was advocating before the court."[118] In light of these facts, the concurrence saw the purpose of the statute and its implementing regulations as the prevention of railroads from making significant additional investments in sleeping quarters near hazardous railroad switching operations after July, 1976.[119]

3. Analysis

The decision in *United Transportation* appears to be soundly reached. The majority opinion found that the interpretation being urged by the FRA was inconsistent with the version set forth when the regulation was promulgated.[120] The majority also found that the agency's interpretation was inconsistent with the statute it was designed to implement.[121] Finally, the majority found that the plain language of the regulation was inapposite to the agency's interpretation.[122] What emerges from this analysis is the groundwork for a tripartite test for judicial review of an agency's interpretations of regulations.[123]

But the foundation which the majority lays for such review is undermined by the dissent's plea for judicial restraint. Fortunately, the dissent's reasons for deferring to the agency interpretation are not as well reasoned as the majority's. The dissent felt that an examination of the legislative history revealed an element of ambiguity in the underlying congressional intent.[124] Such ambiguity would compel the court to defer to the expertise of the agency and accept its interpretation.[125] The dissent was in favor of judicial restraint in this case, citing that the agency's interpretation was not plainly inconsistent with an ambiguous, general regulation.[126]

While sound in concept, the dissent fails to reconcile its principles with the facts of the case. As the majority points out, the case does not involve an area of expertise peculiar to the FRA.[127] It is a case of statutory interpretation, a task for which the court is unquestionably quali-

117. *Id.*
118. *Id.*
119. *Id.* at 832.
120. *Id.* at 829.
121. *Id.*
122. *Id.*
123. The test, although not specifically designated as such by the court, would be as follows: An agency's interpretation of its rules will not be shielded from judicial review when its interpretation is inconsistent with: (1) congressional intent; (2) the plain language of the regulation; and (3) its own prior administrative interpretations.
124. *Id.* at 836.
125. *Id.*
126. *Id.*
127. *Id.* at 829. The court declines to explain what such specialized knowledge would be. However, based on its later decision in Rutherford v. United States (806 F.2d 1455

fied. Secondly, the dissent's assertion that the intent behind the Act was to "prevent the abrupt loss of railroad capital assets" strains credibility. While this was certainly a pragmatic, conciliatory measure taken by Congress in promulgating the Act, there is little doubt that Congress was more concerned with worker safety than railroad economics.[128]

The dissent's analysis of the implementing regulation does appear more persuasive than its interpretation of the Act's intent. The regulation states that the word "construction" includes "acquisition and use of an existing building."[129] The dissent reasoned that since the rulemakers did not explicitly address the issue of whether railroads are prohibited from acquiring or using "grandfathered" sleeping quarters, the court should refrain from imposing its own interpretation.[130] This analysis is hardly compelling. While it is true that such a situation was not specifically addressed, it seems more logical to assume that the overall intent of Congress, that is, that railroads should make no additional investment in hazardous sleeping quarters after 1976, eliminates the ambiguity. To pretend that there is too much ambiguity not to defer, seems to go beyond judicial deference and into the realm of blind adherence.

C. *Equal Employment Opportunity Commission v. Commercial Office Products Co.*[131]

1. Background

On March 26, 1984, Suanne Leerssen filed a charge with the EEOC after being discharged by Commercial Office Products Co. ("Commercial"), alleging violations of Title VII of the 1964 Civil Rights Act.[132] On March 30, the EEOC forwarded a copy of the charge, along with a charge transmittal form, to the Colorado Civil Rights Division ("CCRD") which stated that the EEOC would initially process the charge pursuant to a work-sharing agreement between it and the CCRD.[133] The CCRD returned the charge transmittal form to the EEOC, indicating that the CCRD waived its right to initially process the charge. On April 4, 1984, the CCRD sent a letter to Leerssen explaining that it had waived its right to initially process the charge, but stated that it specifically retained jurisdiction over her case.[134]

The EEOC's investigation began on March 26, 1984, the date that it

(10th Cir. 1986)), such specialized knowledge would involve technical expertise which the court does not possess.

128. *United Transp.*, 797 F.2d at 825. *See also* Atchison, T.& S.F.Ry. Co. v. United States, 244 U.S. 336 (1917); Chicago & Alton R.R. Co. v. United States, 247 U.S. 197 (1918).

129. *United Transp.*, 797 F.2d at 835.

130. *Id.*

131. 803 F.2d 581 (10th Cir. 1986), *rev'd*, 108 S.Ct. 1666 (1988).

132. 42 U.S.C. § 2000e (1985). Section 2000e-2 forbids discrimination in employment opportunities because of race, color, religion, sex or national origin. Section 2000e-5 outlines the procedure for invoking the Act's protections.

133. *Commercial Office Prods.*, 803 F.2d at 584.

134. *Id.*

initially received the complaint.[135] After Commercial refused to cooperate in providing relevant information, the EEOC issued an administrative subpoena.[136] Commercial refused to comply with the subpoena on the grounds that Leerssen's charge was untimely filed.[137] The EEOC sought enforcement of the subpoena at the district court level, but was denied enforcement on the grounds that the filing of the Title VII charge was not timely.[138]

2. The Tenth Circuit Decision

On appeal, the Tenth Circuit was confronted with the issue of whether Leerssen's complaint was timely filed under the 300-day filing requirement of Title VII of the Civil Rights Act.[139] The court's first consideration was whether the state agency had been given its sixty days to act upon the charge.[140] The court looked to the Supreme Court's decision in *Love v. Pullman*,[141] and interpreted it to mean that when a complainant files a charge with the EEOC, the deferral of that charge by the EEOC is an initial filing in the state agency sufficient to commence the 300-day time limitation.[142] The court found that the EEOC had initiated the charge with the CCRD on behalf of Leerssen, and that the 300-day limitation was invoked.[143]

The court then turned to the question of the meaning of the word "filed" as contemplated by section 706(e).[144] The court found that the referral of a charge from the EEOC to the state agency begins a period of "suspended animation" during which the state has a maximum of 60 days to resolve the charge before it can be filed officially with the

135. *Id.*

136. *Id.* The commission issued its subpoena pursuant to the power granted by 42 U.S.C. § 2000e-4(g)(2) (1985).

137. *Id.*

138. *Id.*

139. The statutory scheme adopted in § 706 of Title VII and 42 U.S.C. § 2000e-5 (1985) makes a distinction between states which have an approved state civil rights enforcement agency (deferral states), and those states which do not (non-deferral states), providing different time limitations for each. In non-deferral states, a charge must be filed within 180 days after the alleged unlawful employment practice began. An exception to this 180 day time limit applies in deferral states which effectively grant a 300 day filing limit for claimant in those states. However, this limit is also subject to the requirement that no such charge may be filed with the EEOC until the state agency has had 60 days to file the charge.

140. *Commercial Office Prods.*, 803 F.2d at 585.

141. 404 U.S. 522 (1972). The court dealt with the complaint of a black porter who filed a complaint to the EEOC. The EEOC orally notified the Colorado Civil Rights Commission ("CCRC") of its receipt of the complaint. The CCRC waived its right to action, and the EEOC commenced its own action. The defendant refused to comply on the grounds that the EEOC had failed to properly notify the CCRC of the complaint, and had thus failed to follow proper filing procedure. The district court granted summary judgment and the court of appeals affirmed. The Supreme Court reversed, finding that the "oral filing," by the EEOC had been in full compliance with intent of the act, and the time limits had therefore been properly adhered to.

142. *Commercial Office Prods.*, 803 F.2d at 586.

143. *Id.*

144. *See* 42 U.S.C.§ 2000e-5 (1985).

EEOC.[145] The court found this despite the contrary language of an EEOC Procedural Regulation, holding along with *Love*, that Congress chose to prohibit the filing of any federal charge until after state proceedings had been completed, or until 60 days had passed.[146]

The court agreed with the Supreme Court's *Mohasko*[147] rationale, that the combination of a 300-day filing requirement and a 60-day deferral period means that a complainant must file his charge within 240 days of the alleged discriminatory practice in order to preserve his federal rights.[148] It also means that any charges brought between the 240th and 300th day are timely filed with EEOC only if the state agency happens to complete its proceedings before the expiration of the 60-day deferral period, and prior to the 300th day.[149]

The court found that since the 60-day deferral period did not begin until the 289th day after the alleged unlawful practice, it did not end until the 349th day, well beyond the 300-day limit.[150] Thus, the court reasoned, the charge could only have been timely filed with the EEOC if the CCRD had terminated its proceedings under section 706(c) before expiration of the 300-day limit.[151]

The EEOC had argued that a state agency "terminates" its proceedings under section 706(c) when that agency waives its right to initially process a charge, defers to the EEOC, and retains jurisdiction to act after the EEOC has completed its proceedings.[152] This interpretation was categorically refuted by the Tenth Circuit.

The court chose to adopt the plain and ordinary meaning of the word "terminate" which, in the context of section 706(c), contemplates the moment when the agency completely surrenders its jurisdiction over a complaint.[153] It likewise interpreted the term "proceedings" to mean those actions a state agency must take in resolving a charge under Title VII.[154] The court was thus faced with deciding whether the forwarding by the EEOC of the charge to the CCRD, and the CCRD's subsequent waiver to "initially process" the charge, was a commencement and termination of state proceedings sufficient to shorten the mandatory 60-

145. *Commercial Office Prods.*, 803 F.2d at 586.

146. *Id.*

147. Mohasko Corp. v. Silver, 447 U.S. 807 (1980). The Court decided the question of whether a letter from a discharged employee sent to the EEOC 291 days after alleged discriminatory discharge was "filed" for purposes of Title 7. The Supreme Court held that the statute prohibited the EEOC from allowing the charge to be filed on the date it was received. The Court further held that even if the EEOC were allowed to file the complaint automatically for the employee, it would still be required to wait 60 days or until the state had terminated its proceedings. The state did not terminate its proceedings. Therefore the 60-day period was invoked and added to the 291 days elapsed after discharge, putting complainant well above the 300 day limit.

148. *Id.* at 821.

149. *Commercial Office Prods.*, 803 F.2d at 587.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

day limit.[155] The court was convinced that it was not.

The court found that CCRD merely acknowledged receipt of Leerssen's charge, waived initial processing, and retained jurisdiction reserving the right to act or to adopt the EEOC findings after the EEOC had terminated its proceedings.[156] The court refused to construe this as a commencement and termination of proceedings.[157] Once this was decided, simple mathematics eliminated Leerssen's complaint. The deferral period required by section 706(c) had not concluded until the 349th day, and the CCRD had not terminated its proceedings by the 300th day.[158] The charge was thus ruled not timely filed.

The dissent first contested the majority's interpretation of the legislative history behind Title VII and its implementing legislation.[159] At the heart of this argument was the idea that Congress did not intend the burden of a statutory ambiguity to fall on the victims of discrimination.[160] The ambiguity concerning who is to file when, and to what agency, was admitted even by the majority.[161]

The dissent then made a plea for judicial restraint, claiming that the agency had already interpreted the statute, and the court should defer to that construction, particularly when that statute is ambiguous.[162] It cited the Supreme Court's rationale that when Congress is silent as to a statutory question, the court's sole inquiry is to determine whether the agency's interpretation is a permissible construction of the statute.[163] The dissent maintained that the EEOC's interpretation of the statute was clearly rational and consistent with the statute's purpose, and was thus entitled to judicial deference.[164]

3. Analysis

The *Commercial* decision is surprising, in that the majority opinion admits that the confusion surrounding the filing requirements defeats two important congressional goals: (1) the ease of filing civil rights charges by lay complainants, and (2) timely resolution of civil rights charges.[165] However, in the same breath, the court disqualifies itself from the task of implementing these goals, claiming that it had no choice but to follow the text of the statute, the legislative history, and the relevant judicial interpretations.[166]

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155. *Id.* at 589.
156. *Id.* at 590.
157. *Id.*
158. *Id.* at 591.
159. *Id.* (McKay, J., dissenting).
160. *Id.*
161. *Id.* at 585.
162. *Id.* at 591-92 (citing Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982).
163. *Id.* at 592 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).
164. *Id.*
165. *Id.* at 585.
166. *Id.*

That "choice" turns out to be far less obligatory than the court would have us believe. The decision of the case turned essentially on what constitutes the termination of proceedings.[167] In *Isaac v. Harvard University*,[168] the First Circuit adopted the EEOC's interpretation of section 706(c), meaning that a state agency terminates its proceedings when the agency waives its right to initially process a charge, defers to the EEOC, and retains jurisdiction to act after the EEOC has completed its proceedings. The *Commercial Office Products* opinion expressly refutes this interpretation, claiming it to be contrary to legislative history and judicial interpretation.[169]

In reviewing this "contrary legislative history," the majority seems to have lost sight of the forest because of the trees. While Congress no doubt intended to encourage state and local agencies to resolve civil rights disputes, and to prevent premature federal intervention, it is difficult to see how these intentions would pre-empt the overall purpose of the statute, which is to provide a means of redress for the victims of discrimination.

The dissent is on target in this respect: "One would have to attribute either congressional hostility to discrimination claimants or a lack of congressional concern for the inability of lay people to understand this complex statute to suggest [Congress] intended such a result."[170] For the majority to rule otherwise, shows an almost slavish obsession to the technicalities of the law, and a troublesome neglect of the equities of the case.

This strict constructionist approach is also troublesome in the context of the court's other decisions during this survey period. As in *United Transportation Union*,[171] the court again refuses to defer to an agency's interpretation of its own rules. While this is not surprising, it nonetheless illustrates an incipient antagonism between the court and administrative agencies.

Nowhere is this more clear than in the majority's footnote number 15.[172] There, the court recognized that the time limitations for a Title VII suit in federal court are subject to equitable modification. It even hinted that Leerssen, should she decide to raise such an argument in her own action, would prevail.[173] However, since it was the EEOC who

167. *Id.* at 589.

168. 769 F.2d 817 (1st Cir. 1985) (where a state agency's waiver of its right to initially process a faculty member's employment discrimination charge was held to constitute a "termination" for the purposes of the 60-day deferral provision of Title VII).

169. *Commercial Office Prods.*, 803 F.2d at 587.

170. *Id.* at 592.

171. 797 F.2d 823 (10th Cir. 1986).

172. *Commercial Office Prods.*, 803 F.2d at 590-91 ("We recognize that the time limitations for filing a Title VII suit in federal court are not jurisdictional prerequisites for the court but rather are subject to equitable modification. . . . The EEOC, however, failed to argue to the district court that any equitable circumstances existed in this case that would have justified a departure from the time limitations. . . .").

173. *Id.* ("Leerssen. . . can raise any equitable arguments that she might have in seeking to persuade a court to hear her case despite her failure to file a timely charge with the EEOC.").

raised the issue, and since the EEOC failed to argue it before the district court, the court refused to consider it.[174]

Lastly, the majority opinion throws away an opportunity to clarify a confusing situation. The split among the circuits[175] has led to a confusing state of affairs for both the layman and the lawyer. The Tenth Circuit admitted this problem in *Commercial Office Products*, and refused to act, under the guise of "separation of judicial and legislative functions." Unfortunately, the court's non-action in this case seems less a separation of powers than an act of judicial apathy.

D. *Rutherford v. United States*

1. Background

In *Rutherford v. United States*,[176] the Tenth Circuit was asked to consider an appeal which was the culmination of nearly twelve years of litigation between terminally ill cancer patients and the Food and Drug Administration ("FDA").[177] The litigation centered around the drug Laetrile, a substance which had been classified by the FDA in 1971 as a "new drug" for the purposes of the Federal Food, Drug and Cosmetic Act (the "Act"). Such a classification normally requires the filing of a new drug application and subsequent FDA approval before the drug may be administered.[178]

The introduction of such a "new drug" into interstate commerce is prohibited by the Act unless the FDA has approved a new drug application. In order to be exempt from the new drug requirements, the drug must be generally recognized by qualified experts as safe and effective when used in the prescribed manner.[179] Normally, this means that the proponents of a drug must define its effectiveness by articulating what the drug is supposed to do.[180]

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174. *Id.* ("The EEOC . . . failed to argue to the district court that any equitable circumstances existed in this case that would have justified a departure from the time limitations . . . We adhere to the rule that a party may not raise an issue on appeal that it did not raise before the district court.") *Cf.* United Transp. Union v. Dole, 797 F.2d 823, 827 (10th Cir. 1986) (where the court considered issues on equitable grounds despite the parties' failure to develop the issue in their brief, according to procedure).

175. *See Commercial Office Prods.*, 803 F.2d at 592 (and cases cited therein). The cases in support of the proposition that a state agency's waiver of its right to initially process a charge may constitute a "termination" for the 60 day deferral provision, are in the majority. *See Isaac*, 769 F.2d at 827-28; EEOC v. Ocean City Police Dep't, 617 F. Supp. 1133 (D. Md. 1985), *aff'd on other grounds*, 787 F.2d 955 (4th Cir. 1986), *reh'g granted*, 795 F.2d 368 (4th Cir. 1986), *rev'd on other grounds*, 820 F.2d 1378 (4th Cir. 1987), *vacated*, 108 S.Ct. 1990 (1988); Thompson v. International Ass'n of Machinists, 580 F. Supp. 662 (D.C. 1984). *But see* Klausner v. Southern Oil Co., 533 F. Supp. 1335 (N.D.N.Y. 1982) (waiver of initial processing did not constitute a termination of state proceedings).

176. 806 F.2d 1455 (10th Cir. 1986).

177. *Id.* at 1457. 21 U.S.C. § 355 (Supp. 1985) outlines the procedure and requires that samples be submitted with the proper documentation of the veracity of all statements within 180 days. The application will either be approved, or a hearing on the question of approvability will be held within 90 days.

178. *Id.*

179. *Id.* at 1458.

180. *Id.* at 1458.

In *Rutherford*, the plaintiffs claimed that Laetrile alleviates pain and that pain reduction should be a criterion for effectiveness.[181] This question had been raised in the earlier decisions, as well as in the FDA hearings.[182] However, the FDA determined that there was no general recognition of effectiveness for pain alleviation. This determination was based on both medical studies and physician testimony.[183]

On appeal from the FDA's decision, the district court affirmed the FDA's ruling that Laetrile was not "generally recognized as safe and effective," thus classifying it as a new drug.[184] However, the district court further held that Laetrile was exempt from new drug status because of a 1962 grandfather clause.[185] After two reviews by the Tenth Circuit on the issue of exempt status, and an order to dismiss, the district court instead allowed the plaintiffs to amend their complaint.[186] In their amended complaint, the plaintiffs asserted that a new issue had arisen which would justify reconsideration of their case. The district court agreed and reopened the case.

2. The Tenth Circuit Decision

The crucial issue before the Tenth Circuit in *Rutherford* was whether the district court had erred in reopening the case and allowing the plaintiffs to amend their complaint. The court held in the affirmative. Although acknowledging that a district court generally has discretion to allow an amended complaint when the appellate court reverses and remands, such discretion is not unbounded.[187] The court held that if an appellate court ruling either calls for or precludes amendment, then the district court has no discretion in allowing an amended complaint.[188]

In applying this general principle to the facts in *Rutherford*, the Tenth Circuit found that because it had previously affirmed the district court's ruling regarding laetrile's "lack of effectiveness," the district court was bound by that decision.[189] The court further held that the plaintiffs' assertion of "new evidence"[190] could not overcome the prior

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 1459.
185. *See* 21 U.S.C.S. § 321(p)(1) (1984) ("[A] drug . . . shall not be deemed to be a "new drug" if at any time prior to this chapter it was subject to the Food and Drugs Act of June 30, 1906 . . . ."). *See also* Public Law No. 87-781, § 107(c)(4), 76 sta. 788 ("In the case of any drug which, on the day immediately preceding the enactment date, (A) was commercially used or sold in the United States, (B) was not a new drug as defined by section 201(p) of the basic Act as then in force, and (C) was not covered by an effective application under section 505 of that Act, the amendments to section 201(p). . . shall not apply . . . .").
186. *Rutherford*, 806 F.2d at 1459.
187. *Id.* at 1459-60. *See* R.E.B., Inc. v. Ralston Purina Co., 525 F.2d 749, 751 (10th Cir. 1975). *See also* Beltran v. Myers, 701 F.2d 91, 93 (9th Cir. 1982), *cert. denied*, 462 U.S. 1134 (1983) (lower courts may decide an issue on remand so long as the issue was not expressed or impliedly disposed of on appeal).
188. *Rutherford*, 806 F.2d at 1460.
189. *Id.*
190. *Id.* The Tenth Circuit held that the plaintiff's assertion of a new issue was in fact merely an assertion of newly discovered evidence.

appellate mandate, and justify reconsideration at the district court level. The court held that the district court simply did not have jurisdiction to hear the new evidence, and that the proper forum for such reconsideration was with the body that initially decided the issue—the FDA.[191] Thus, the plaintiffs' remedy lay with the FDA and not the district court.

3. Analysis

The *Rutherford* case presents a new twist in the area of judicial restraint in the review of agency decisions. Unlike *United Transportation* and *Commercial Office Products*, the restraint here imposed is jurisdictional, rather than doctrinal.

The plaintiffs had attempted to introduce a new issue into the case for the purpose of reopening it.[192] They stated the new issue to be "*as of 1984*, Laetrile was an ordinary drug not requiring any 'new drug' approval because [it was] generally recognized as safe and effective to alleviate or reduce pain. . . ."[193] This issue differed only by date, from the one previously disposed of.[194] The Tenth Circuit refused to consider this a new issue, finding that a simple change of date was not a statement of a new issue, but rather an indication of newly developed evidence.[195] As such, the initial jurisdiction to hear that evidence lay with the FDA and not the district court.

The court cited its previous holding in *Trujillo v. General Electric Co.*,[196] stating that "[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."[197] In doing so, the court established jurisdictional parameters on judicial review of agency decisions. Normally, the Tenth Circuit has permitted lower courts almost plenary power in the decision to review or not to review.[198] However, the court was not willing to allow a district court to usurp initial jurisdiction of an administrative case since hearing evidence is not the function of a reviewing court, and in the case of administrative hearings, the district court is a reviewing court.

The Tenth Circuit was very concerned with maintaining the proper separation of the FDA and the district courts as contemplated by the Act.[199] The court cited the provisions of section 355(h) as demonstrat-

191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. 621 F.2d 1084 (10th Cir. 1980) (where the court held that district director of the EEOC had the power to reconsider his earlier determination, and had the power to reverse his finding and rescind his earlier notice of right to sue).
197. *Id.* at 1086.
198. *See supra* note 1.
199. *Rutherford*, 806 F.2d at 1461. *See* 21 U.S.C.S. § 355(h) (1984) (Until the record is filed for appeal, the Secretary may modify his order concerning a new drug application. After the record is filed, the petitioner may apply to the court to present additional evidence. The court of appeals may then grant the application and order the Secretary to reconsider the order.).

ing the intent of Congress to give the FDA primary jurisdiction in determining evidentiary matters concerning new drugs.[200] It is also apparent that the court was uneasy with the district court's failure to defer to agency expertise in a matter which demanded such expertise.[201]

The *Rutherford* case is an unusual example of judicial restraint in the review of agency decisions. The case history of the Tenth Circuit has been in favor of judicial review.[202] However, the court in this instance could not allow the district court to use its right to review an agency decision as a way to "supplant the FDA by making a de novo determination of 'new drug' status after reviewing evidence never considered by the FDA."[203] The Tenth Circuit reaffirmed that the judicial role in agency cases is not to conduct evidentiary hearings, but merely to review the final decisions that result from those hearings.

IV. Regulatory or Punitive? The Characterization Of Administrative Proceedings and the Protections of the Fifth Amendment.

A. Background

The fifth amendment's self-incrimination clause[204] protects not only a defendant's right to refuse to take the witness stand at his own criminal trial, but also the privilege of any witness, in any formal or informal governmental proceeding, to refuse to answer questions when the answers might incriminate him.[205] The witness's privilege against self-incrimination not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.[206] However, this is a privilege to decline to respond to inquiries, not a prohibition against inquiries designed to elicit responses incriminating in nature.[207] To rely on this facet of the amendment's protection, a witness must normally take the stand, be sworn to testify, and assert the privilege in response to each allegedly incriminating question as it is asked.[208]

The defendant's right to refuse to take the stand is the right of an

200. 21 U.S.C.§ 355(h) (1985).

201. *Cf. United Transp. Union*, 797 F.2d at 829.

202. *See, e.g.*, United States v. Brown, 672 F.2d 808 (10th Cir. 1982); Sabin v. Butz, 515 F.2d 1061 (10th Cir. 1975); Bramble v. Kleindienst, 357 F.Supp. 1028 (D.C. Colo. 1973), *aff'd*, Bramble v. Richardson, 498 F.2d 968 (10th Cir. 1974).

203. *Rutherford*, 806 F.2d at 1461.

204. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .").

205. *See, e.g.*, United States v. Housing Found. of Am., 176 F.2d 665 (3rd Cir. 1949); United States v. Gay, 567 F.2d 916 (9th Cir. 1978), *cert. denied*, 435 U.S. 999 (1978).

206. Lefkowitz v. Turley, 414 U.S. 70 (1973).

207. *See* MCCORMICK ON EVIDENCE, § 130 at 315 (3d Ed. 1984).

208. United States v. Malnik, 489 F.2d 682, 685 (5th Cir. 1974), *cert. denied*, 419 U.S. 826 (1974).

accused at his own criminal trial to avoid not only giving incriminating responses to inquiries put to him, but to be free from the inquiries themselves.[209] The defendant may invoke this protection by simply not offering to testify.[210] While this protection is absolute in a criminal proceeding, it does not extend to proceedings which are administrative in nature. In the case of administrative proceedings, the issue centers around the characterization of the sanction being contemplated, and whether that sanction is regulatory or punitive.

The test applied to determine whether a statutorily defined penalty is civil or criminal has traditionally proceeded on two levels.[211] The first level is to determine the intent of Congress in establishing the penalty. Second, where Congress has indicated an intent to establish a civil penalty, is to determine whether the statutory scheme was so punitive in either purpose or effect as to negate that intention.[212]

During the survey period, the Tenth Circuit was asked to consider a case where the defendant in an administrative hearing sought protection under the fifth amendment's witness and defendant clauses.[213] The court granted the review, and held that neither protection was available.

B. *Roach v. National Transportation Safety Board*

1. Facts

In *Roach v. National Transportation Safety Board*,[214] Joseph A. Roach petitioned for review of a final order of the NTSB which suspended Roach's commercial pilot's certificate for thirty days.[215] The suspension was the result of flight violations made by Roach at the La Junta, Colorado, airport. After conducting a sales demonstration flight, Roach took off with a Roach Aircraft Sales Representative, for a return flight to Denver. Before returning to Denver, however, Roach made three passes over the La Junta airport runway at an altitude of approximately 500 feet so that his clients could see the plane in flight. At the end of the third pass, Roach executed an aileron roll and then left for Denver.[216]

As a result of this incident, the Federal Aviation Administration ("FAA") ordered Roach's license suspended for 60 days.[217] Roach sought review of this order with the FAA's regional office. At a de novo hearing, the ALJ ruled that the FAA Administrator failed to prove that Roach had violated any Federal Aviation Regulations because he failed to prove that Roach flew within 500 feet of any building when he made

209. *See supra* note 204.

210. United States *ex rel.* Santana v. Fenton, 570 F. Supp. 752, 759 (D.N.J. 1981), *rev'd. on other grounds*, 685 F.2d 71 (3d Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983).

211. United States v. Ward, 448 U.S. 242 (1980), *reh'g denied*, 448 U.S. 916 (1980).

212. *Id.* at 248.

213. *See* Roach v. National Transp. Safety Bd., 804 F.2d 1147 (10th Cir. 1986).

214. 804 F.2d 1147 (10th Cir. 1986).

215. *Id.* at 1150.

216. *Id.* at 1149 (An aileron roll is an acrobatic manuever accomplished by rolling a plane to one side in a complete somersault.).

217. *Id.* at 1150.

his three passes over the runway.[218] However, the ALJ upheld the remaining charges concerning the aileron roll, finding that the sales representative was not a crew member who was performing crew member duties, and he was not wearing a parachute, which violated FAA regulations.[219] Accordingly, the ALJ reduced the suspension from 60 days to 30 days, a sentence which was subsequently affirmed by the NTSB.[220]

2. The Tenth Circuit Decision

The key issue before the court was whether Roach's fifth amendment rights were violated when the Administrator was allowed to call him as an adverse witness.[221] Essentially, the court was faced with determining exactly which rights under the fifth amendment would support Roach's argument. The answer to this problem centered on whether the protections normally afforded a defendant in a criminal proceeding extend to an administrative hearing as well. The court held that if the suspension was intended as punishment, then it was criminal in character, and the privilege against self-incrimination guaranteed by the fifth amendment would apply.[222]

The character of the sanction was to be determined by the Congressional intent behind the statute.[223] After a lengthy analysis, the court found the Congressional intent behind the enactment of the legislation to be regulatory rather than punitive, and that the "clear proof" necessary to override that intent did not exist.[224] Roach's trial was thus regulatory in nature, and not within the scope of the "self-incrimination" clause of the fifth amendment.[225]

Roach further claimed that the ALJ's interpretation of the applicable FAA rules was unprecedented, and as such, violative of his due process rights.[226] While agreeing that parties have a right to be "informed with reasonable certainty and explicitness of the standards by which a license may be revoked,"[227] the court ruled that the ALJ's findings had followed long-standing NTSB interpretations, and that no violation of due process had occurred.[228]

Roach also claimed that the ALJ had created a novel definition of "crew member" by interpreting the term to include only the persons aboard an aircraft whose presence is required to operate the aircraft.[229]

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218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 1152.
223. *Id.* at 1153.
224. *Id.* (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 (1984); United States v. Ward, 448 U.S. 242, 249, *reh'g denied*, 448 U.S. 916 (1980)) ("only the clearest proof . . . will override Congress' manifest preference for a civil sanction").
225. *Id.*
226. *Id.* at 1155.
227. *Id.* at 1155 (quoting *Sorenson v. National Transp. Safety Bd.*, 684 F.2d 683, 686 (10th Cir. 1982)).
228. *Id.*
229. *Id.* at 1156.

Again, the court found this argument unpersuasive. The court found that the ALJ's interpretation of the word "crew member"[230] was consistent with the FAA's long-standing position on the issue. The court thus found that Roach had fair warning of the scope of the regulation, and its application in the present case was not violative of his due process rights.[231]

3. Analysis

In affirming the decision of the agency on all counts, the court was particularly concerned with the self-incrimination aspect of Roach's fifth amendment argument. Although the court had often dealt with the question of self-incrimination in criminal proceedings, it had little experience in applying the fifth amendment in administrative hearings.[232] The court looked to the Supreme Court's decision in *United States v. One Assortment of 89 Firearms*[233] for the test which would trigger the protection of the fifth amendment. The *Firearms* court had stated that for a party in an administrative hearing to be able to assert a defendant's fifth amendment right not to take the stand, it must be decided whether the sanctions contemplated by the hearing are regulatory or punitive in nature.[234]

The Tenth Circuit then relied upon the standard for the regulatory/punitive distinction as set forth in *United States v. Ward*.[235] The *Ward* court stated that the "inquiry in this regard traditionally proceeds on two levels. The first step inquires as to Congress' intent in establishing the penalizing mechanism. The second step inquires as to whether the statutory scheme was so punitive either in purpose or effect so as to negate that intention."[236]

The Tenth Circuit concentrated its analysis on the list of considerations set forth in *Kennedy v. Mendoza-Martinez*.[237] That court stated those considerations as follows:

> Whether the sanction involves an affirmative disability or restraint, whether it has been historically regarded as punish-

230. *Id.* The FAA does not provide a definition for "crew member." However, the court felt that the student pilot exemption contained in 14 C.F.R. § 91.15(d) (1987) should have placed Roach on notice that mere assistance during the flight would not elevate his passenger to crew member status. The court thus held that the parachute requirements of 14 C.F.R. § 91.15(c)(1987) were reasonably applied to the facts.

231. *Id.*

232. *See, e.g.*, United States v. Nunez, 668 F.2d 1116 (10th Cir. 1981); Enrichi v. United States, 212 F.2d 702 (10th Cir. 1954).

233. 465 U.S. 354 (1984). The Court held that gun owner's acquittal on criminal charges involving firearms does not preclude a subsequent in rem forfeiture proceeding against the same firearms. Neither collateral estoppel nor double jeopardy bars a civil proceeding initiated following an acquittal on criminal charges.

234. *Id.* at 362. If the sanctions contemplated are punitive in nature, then the absolute self-incrimination protections of the fifth amendment may be invoked. If the sanctions are regulatory in nature, then the fifth amendment's protections do not apply.

235. *See supra* note 208.

236. *Roach*, 804 F.2d at 1153.

237. 372 U.S. 144 (1963) (where the Court held that deprivation of citizenship was penal in nature and that draft evaders were entitled to fifth amendment protection).

> ment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .[238]

However, the Tenth Circuit also placed this "test" within the confines of a "showing of only the clearest proof."[239]

The court found that this clear proof did not exist, and hence, Congress' apparent intent that the sanction be regulatory rather than punitive could not be overcome by a theory of overriding effect or purpose.[240] This ruling was consistent with other courts' holdings in other cases.[241] In those cases, the courts generally found that when an act includes a penalty within a civil section, and discusses criminal penalties in an entirely separate section, a strong indication is made that Congress intended the penalty to be civil.[242] The case at bar was precisely of this type; the act in question discussed criminal penalties in a separate section which expressly excluded violations of safety regulations from its purview.[243]

The ruling was also consistent with that line of cases[244] in which courts have found that license suspension or revocation proceedings are not criminal for the purposes of determining the admissibility of previously immunized, compelled testimony.[245] The court acknowledged a contrary line of cases,[246] fostered by Judge Prettyman's dissent in *Lee v. Civil Aeronautics Board*,[247] in which the Civil Aeronautics Board held that a suspension of an airman's certificate was penal in nature.[248] However, the Tenth Circuit ruled that the more recent judicial trend was toward the former rationale.[249] The court thus held that since the suspension did not have a clearly penal purpose or effect, no fifth amendment rights were violated.

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238. *Id.* at 168-69.

239. *Roach*, 804 F.2d at 1153. The *Kennedy* factors are analyzed in the overall framework of the *Ward* "clearest proof" test.

240. *Id.* at 1153-54.

241. *Id.* at 1153.

242. *Id.*

243. *Id.*

244. *Id.* (The court relied on such cases as *In Re* Daley, 549 F.2d 469, 476-77 (7th Cir. 1977), *cert. denied sub. nom* Daley v. Attorney Registration and Disciplinary Comm'n of the Supreme Court of Illinois, 434 U.S. 829 (1977); Burley v. United States Drug Enforcement Agency, 443 F.Supp. 619, 622-23 (M.D. Tenn. 1977).

245. *Id.* at 1154 n.7.

246. Lewis H. Brubaker and Charles E. Olsen, 19 C.A.B. 885, 886-87 (1954); Herbert R. Galloway, INTSB 2104, 2105 (1972); Pike v. Civil Aeronautics Bd., 303 F.2d 353, 357 (8th Cir. 1962).

247. 225 F.2d 950, 953 (D.C. Cir. 1955). Judge Prettyman's dissent maintained that suspension of pilots' certificates was punitive in nature, and therefore the pilots were entitled to fifth amendment protection.

248. *Roach*, 804 F.2d at 1154 n.7.

249. *Id.* at 1154.

4. Conclusion

The *Roach* decision appears to be a soundly reached decision, and is a step forward in clarifying the line which divides regulatory and penal administrative hearings. In reaching its decision, the Tenth Circuit had many additional factors weighing in favor of its ruling. For example, Roach's flight certification was a privilege voluntarily granted, thus its revocation was "characteristically free of the punitive criminal element."[250] However, it is also significant to note that Roach's privilege was also the means by which he earned his living. The argument could have been advanced that he was being deprived of a vested property right, which may have triggered a more independent standard of review.[251]

The court also had public interest on its side. As the NTSB found, there was a substantial public interest in the safety of air commerce and air transportation which Roach violated with his low passes and acrobatic rolls.[252] Lastly, the equities of the case pointed toward an affirmance of the agency/ALJ ruling. The penalty which Roach received was a thirty-day suspension of his pilot certificate,[253] a penalty which could hardly have shocked the conscience of the court. It was thus not difficult for the court to defer to the agency's decision.

The Roach case was an excellent opportunity for the court to clarify a somewhat muddled situation among the circuits concerning the scope of fifth amendment protections in agency proceedings.[254] The court took advantage of this opportunity to provide a framework in which the nature of agency proceedings may be analyzed.[255] Only time will reveal the impact this case will have on the uniformity of such decisions in other circuits.

CONCLUSION

If there were hopes that the "doctrine" of judicial restraint in the review of agency decisions would become a more settled area of law, they were quickly frustrated by the recent survey period. The cases were factually complex, yet among those facts, one struggles to find the keys to what triggers judicial restraint and what does not.

Particularly difficult to reconcile are the *United Transportation* and

250. *See* Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

251. *See* Halaco Eng'g Co. v. South Cent. Coast Regional Comm'n, 720 P.2d 15, 227 Cal. Rptr. 667, 42 Cal. 3d 52 (1986) (where developer claimed he had vested right to continue his development, it was proper for court to apply independent standard of review).

252. *Roach*, 804 F.2d at 1154.

253. *Id.* at 1150. The ALJ had dropped one of the four charges against Roach, because the Administration had failed to prove that Roach had flown within 500 feet of a building in violation of Federal Aviation Regulation 91.57. In view of Roach's long history in aviation, the ALJ reduced the original 60 day suspension to 30 days.

254. *See* 804 F.2d 1147 and cases cited therein.

255. It should be noted that the court was able to decide the issue while deferring to the ALJ's decision—which no doubt made their own decision easier to attain.

Commercial Office Products cases. In the former, the Tenth Circuit interpreted a statutory term based on congressional intent, the plain language of the regulation, and the agency's prior interpretations.[256] In doing so, the court refused to defer to the agency interpretation. In the latter case, the court determined that congressional intent and agency interpretation were outweighed by the plain language of the regulation.[257] The court also refused to defer to agency interpretation. It is a troublesome pattern, with common elements being considered, but with almost irreconcilable results being reached. Between the two cases, the only common denominator it seems, is the court's refusal to defer to "agency expertise."

Fortunately, the *Rutherford* case sheds some light. Despite its pretensions of dealing with jurisdictional limits, one cannot overlook the fact that the case dealt with the scientific issue of what constitutes a new drug.[258] The court was very uneasy about allowing a lower court to wander too far into an unknown realm.[259] In contrast, the court seems much more confident about its ability to decide issues that deal with statutory interpretation, e.g., the *United Transportation Union* and *Commercial Office Products* cases.

In the attempt to reconcile these cases, no true test emerges. What does emerge however, is the somewhat amorphous rule that the limits on judicial pre-emption of an agency ruling are drawn at the point where the court no longer feels more qualified than the agency to adjudicate the issue.

ADDENDUM

On May 16, 1988, the United States Supreme Court reversed the Tenth Circuit's decision in *Equal Employment Opportunity Commission v. Commerical Office Products Company*.[260] In so doing, the Court concentrated on two questions. The primary question considered was whether a state agency's decision to waive its exclusive sixty-day period for initial processing of a discrimination charge, pursuant to a work sharing agreement with the EEOC, "terminates" the agency's proceedings within the meaning of section 706(c) of Title VII, so that the EEOC immediately may deem the charge filed.

The Tenth Circuit had reasoned that a state agency "terminates" its proceedings only when it completely surrenders its jurisdiction over a charge.[261] Since the Colorado Civil Rights Division ("CCRD") had reserved jurisdictional right to review the EEOC's decision in this case, the

256. *United Transp.*, 797 F.2d at 829.
257. *Commercial Office Prods.*, 803 F.2d at 588-89.
258. *Rutherford*, 806 F.2d at 1461.
259. *Id.*
260. 108 S.Ct. 1666 (1988). Justice Marshall wrote the majority opinion. Justice O'Connor filed an opinion in which she concurred in part and with the judgement. Justice Stevens filed a dissenting opinion in which Chief Justice Rehnquist, and Justice Scalia joined. Justice Kennedy did not participate.
261. 803 F.2d at 587.

Tenth Circuit held that the CCRD did not "finally and unequivocally terminate its authority."[262] The Tenth Circuit had expressly rejected the First Circuit's interpretation of the same filing provisions in *Issac v. Howard University*.[263] The Supreme Court granted certiorari to resolve the conflict.

I. THE DECISION

The majority opinion concentrated on the definition of the term "terminated" as contemplated by the statute. The Tenth Circuit had held, in the face of the EEOC's conficting interpretation, that "terminates" meant "completely relinquish[ing] its authority to act on the charge at that point or in the future."[264] The Supreme Court rejected this interpretation and adopted the First Circuit's view that "terminates" includes "cessation in time."[265] This interpretation supported the EEOC's position that a state agency "terminates" its proceedings when it declares that it will not proceed for a specified interval of time.

The basis of the Supreme Court's decision was a finding by the Court that the EEOC's interpretation of ambiguous language in the enabling statute was entitled to judicial deference. The Court found that the EEOC's interpretation was more than amply supported by the legislative history of the deferral provisions of Title VII, the purposes of those provisions, and the language of other sections of the Act.[266] The secondary issue considered by the Court was Commerical Office Products' argument that the extended 300-day federal filing period is inapplicable to this case because the complainant failed to file her discrimination charge with the CCRD within Colorado's 180-day limitations period. The Supreme Court rejected this argument, affirming the decisions of the various circuits which had ruled on the question.[267] The Court reasoned that the imposition of state limitation periods upon section 706(e) would confuse lay complainants and contradict the remedial scheme of Title VII in which lay persons, not lawyers, are expected to initiate the process.[268]

The Court further reasoned that such consideration of state limitation periods would unnecessarily involve issues of state law.[269] The Court was not willing to force the EEOC to decide such issues as whether state limitation periods are waived or equitably tolled. The Court thus affirmed its ruling in *Mohasco Corp. v. Silver*,[270] in which the Court held that a complainant "need only file his charge within 240 days

262. Id. at 590.
263. 769 F.2d 817 (1st Cir. 1985).
264. 803 F.2d at 589 n.13.
265. 108 S.Ct. at 1676.
266. 108 S.Ct. at 1671.
267. *See* Gilardi v. Schroeder, 833 F.2d 1226 (7th Cir. 1987); Mennor v. Fort Hood Nat'l Bank, 829 F.2d 553 (5th Cir. 1987); Maurya v. Peabody Coal Co., 823 F.2d 933 (6th Cir. 1987), *cert. denied*, 108 S.Ct. at 1030 (1988).
268. 108 S.Ct. at 1676.
269. *Id.*
270. 447 U.S. 807 (1980).

of the alleged discriminatory employment practice in order to ensure that his federal rights will be preserved."[271] The Court found that such a holding "establishes a rule that is both easily understood by complainants and easily administered by the EEOC."[272]

In a brief concurring opinion, Justice O'Connor agreed with the majority's opinion that the agency's construction was reasonable and therefore entitled to deference.[273] However, she was careful to point out that the majority's strong language in rejecting the respondant's position,[274] should not be interpreted as a statement by the Court that an agency decision to adopt the respondant's position would be rejected by the Court.[275] This concurrence took a strictly deferential approach, based solely on the "traditional deference accorded the EEOC in the interpretation of the statute."[276]

The dissent simply took the position that the Court's decision "is not faithful to the plain language of the statute, the legislative compromise that made it possible to enact the Civil Rights Act of 1964, or to our prior interpretation of the very provision the Court construes today."[277]

II. ANALYSIS

The Supreme Court's decision is a reaffirmation of the doctrine of judicial deference to agency interpretation of statutes. The Tenth Circuit had refused to accept the EEOC's construction of its own enabling statute, even though the interpretation appeared to be reasonable. The Supreme Court's decision reaffirms the circuit court's obligation to defer to agency interpretation when that interpretation appears reasonable. If the circuit courts had begun to exceed the boundaries of judicial pre-emption of agency decisions, the Supreme Court's holding re-establishes those parameters.

On a more practical level, the decision benefits those for whom Title VII was designed to benefit, lay claimants who are the victims of discrimination. It removes the filing procedures for such claims from the dockets of the courts and returns them to the local agencies and lay claimants where they may be dealt with in a more efficient manner. By clarifying the law on this matter, the Court may have gone a long way toward relieving the antagonism which had manifested itself between the Tenth Circuit and the EEOC in this case.

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271. *Id.* at 814.
272. 108 S.Ct. at 1676.
273. *Id.*
274. The majority had labelled the respondant's position "absurd." *Id.* at 1674.
275. 108 S.Ct. at 1676 (concurring opinion).
276. *Id.* at 1677.
277. 108 S.Ct. at 1677 (dissenting opinion).