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OVERVIEW

A substantial number of cases considered by the Tenth Circuit during the survey period involved judicial review of administrative agency decisions. Such has been the case in the past and is likely to remain the case in the future due to the pervasiveness of the jurisdiction of administrative agencies. The most important of those cases will be discussed here. While judicial deference to an agency's decisions remains the rule, the agency's actions were reversed in most of the significant administrative law cases handed down during the survey period. Of the four cases discussed herein, only one affirmed the agency's decision.

I. EXEMPTIONS TO THE FREEDOM OF INFORMATION ACT UNDER SECTIONS 7(C) AND 7(D): *JOHNSON V. UNITED STATES DEPARTMENT OF JUSTICE*

A. *Background*

In *Johnson v. United States Department of Justice*,[1] the Department of Justice sought reversal of a district court order requiring full disclosure of all files pertaining to the FBI's investigation of the plaintiff, Johnson, for bank fraud and embezzlement.[2] The files were withheld under Freedom of Information Act (FOIA)[3] exemptions pertaining to criminal investigations and unwarranted invasions of personal privacy.

Following Johnson's 1981 FOIA request, the Bureau released four of the thirty-eight file pages in their entirety and eleven with excisions, but withheld the remaining twenty-three pages.[4] The withheld information detailed: 1) the identities of persons interviewed by the Bureau during its investigation of Johnson and the information received from them; 2) the identities of third persons mentioned during the interviews; 3) information received from a local law enforcement agency; and, 4) the identities of FBI agents not publicly known to have participated in the investigation.[5] The Bureau claimed that this information was exempt from disclosure under FOIA exemptions 7(C) and 7(D).[6] After an in

1. 739 F.2d 1514 (10th Cir. 1984).
2. *Id.* at 1515.
3. 5 U.S.C. § 552 (1982).
4. *Johnson*, 739 F.2d at 1515.
5. *Id.* at 1516.
6. 5 U.S.C. § 552(b) (1982) provides in part:
(b) This section does not apply to matters that are — . . .
. . .
(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation . . . confidential information furnished only by a confidential source.

camera review[7] of the entire file, the district court summarily ordered the file to be disclosed. Judge Kerr supported his decision with the conclusory statement that the FOIA "requires that said file be made available for review by plaintiff, and . . . the information in the FBI file in question does not fall within any of the exceptions to the general policy of the Freedom of Information Act requiring disclosure . . . ."[8]

B. *The Tenth Circuit Decision*

1. The 7(D) Exemption

The issue of the scope of a 7(D) exemption was a question of first impression in the Tenth Circuit.[9] The court noted that the circuit courts are divided on the question of what must be shown before information may be categorized as "confidential" within the meaning of subsection 7(D).[10]

The Second, Fourth and Eighth Circuits apply the rule, first set out in the Fourth Circuit case of *Deering Milliken, Inc. v. Irving*,[11] that confidentiality is found under an express assurance or where such assurance could reasonably be inferred.[12] The Fourth Circuit also held that the existence of an express or implied assurance of confidentiality "is ordinarily a question of fact."[13] Although the Second and Eighth Circuits use the "express or reasonably inferred" standard,[14] only the Second Circuit has explicitly adopted the Fourth Circuit's approach that the issue of confidentiality is a question of fact. To date, the Eighth Circuit has been silent on this subject.

The District of Columbia Circuit and Third Circuit have adopted a less rigorous standard by holding that the agency need only state that the information was provided by a confidential source in order for the exemption to apply.[15] The District of Columbia Circuit cited comments in the legislative history of the 1974 FOIA amendments in support of its holding,[16] while the Third Circuit stated that requiring more detail would significantly increase the likelihood that the source and substance

7. In camera review is authorized by 5 U.S.C. § 552(a)(4)(B) (1982).

8. *Johnson*, 739 F.2d at 1516 (quoting Record, vol. I at 110).

9. *Id.* at 1518.

10. *Id. See supra* note 6.

11. 548 F.2d 1131, 1137 (4th Cir. 1977).

12. The language of this rule is directly attributable to a House and Senate Joint Explanatory Statement concerning the 1974 FOIA amendments, which states:

> The substitution of the term "confidential source" [for "informer"] in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.

CONF. REP. NO. 1200, 93d Cong., 2d Sess. 13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6285, 6291.

13. *Deering Milliken*, 548 F.2d at 1137.

14. Parton v. United States Dep't of Justice, 727 F.2d 774 (8th Cir. 1984); Keeney v. FBI, 630 F.2d 114 (2d Cir. 1980).

15. Conoco, Inc. v. United States Dep't of Justice, 687 F.2d 724 (3d Cir. 1982); Lesar v. United States Dep't of Justice, 636 F.2d 472 (D.C. Cir. 1980).

16. *Lesar*, 636 F.2d at 492 n.114 ("remarks of Sen. Hart: the law enforcement agency

of the information would be revealed.[17]

A third approach has been taken by the Sixth and Seventh Circuits. Although the Seventh Circuit initially applied the "express or reasonably inferred" standard,[18] the court in *Scherer v. Kelley*[19] signaled a change in the standard to be applied. In considering the disclosure of information gathered in the course of a law enforcement investigation, the court found it implicit in FBI affidavits that the information was received under an expressed assurance of confidentiality or in circumstances where such an assurance could reasonably be inferred.[20] In *Miller v. Bell*,[21] the court clarified the new standard by holding that, in the absence of record evidence to the contrary, "promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation."[22] The Seventh Circuit stated that the standard, the least rigorous of the three standards currently being applied, was necessary for the protection of confidential sources and the preservation of the efficacy of FBI criminal investigations.[23]

After examining these three standards, the Tenth Circuit, Judge Seymour writing, found that the "inherently implicit" approach of the Sixth and Seventh Circuits "best reconcile[d] the general desirability of broad disclosure under the FOIA with the concern that, absent a robust 7(D) exemption, law enforcement agencies would be faced with a 'drying up' of their sources of information and their investigative work thereby would be seriously impeded."[24] Although the court was correct in emphasizing the goal of the 7(D) exemption with respect to protecting sources and maintaining the efficacy of criminal investigations,[25] it has significantly understated the FOIA goal of disclosure.

The FOIA was passed as a revision of section 3 of the Administrative Procedure Act.[26] Section 3 contained vague language capable of broad interpretation and came to be viewed not as a disclosure statute, but rather as a withholding statute.[27] The FOIA was intended to provide "a workable formula which encompasses, balances and protects all interests yet *places emphasis on the fullest responsible disclosure*."[28] This policy

. . . need only 'state that the information was furnished by a confidential source and it is exempt.' " (quoting from S. REP. No. 1200, 93d Cong., 2d Sess. 13 (1974)).

17. *Conoco*, 687 F.2d at 730.

18. Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977) (the information clearly was acquired either under express assurances of confidentiality or where assurance could reasonably be inferred).

19. 584 F.2d 170 (7th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979).

20. *Id.* at 176.

21. 661 F.2d 623 (7th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982).

22. *Id.* at 627.

23. *Id.*

24. *Johnson*, 739 F.2d at 1518.

25. *See supra* note 6; *see also Lesar*, 636 F.2d at 490 n.108.

26. Pub. L. No. 89-554, § 552, 80 Stat. 378, 383 (1966) (codified as amended at Pub. L. No. 90-23, § 552, 81 Stat. 54-56 (1967)).

27. EPA v. Mink, 410 U.S. 73, 79 (1973) (citing S. REP. No. 813, 89th Cong., 1st Sess. 5 (1965); H.R. REP. No. 1497, 89th Cong. 2d Sess. 5-6 (1966)).

28. *Id.* at 80 (quoting S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965)) (emphasis added).

favoring reasonable disclosure has not changed since the 1974 FOIA amendments.[29] In providing for exemptions from the disclosure requirements of the FOIA, Congress recognized that the executive branch has valid reasons for keeping certain information confidential.[30] The existence of such exemptions does not, however, detract from the FOIA's policy of favoring disclosure because the Act's statutory exemptions "are to be narrowly construed with all doubts resolved in favor of disclosure"[31] and a federal agency that attempts to use one of the nine exemptions has the burden of justifying nondisclosure.[32]

In adopting the "inherently implicit" standard, the Tenth Circuit chose an approach that is not conducive to disclosure. Theoretically, more information would be available for release were an agency required to explicitly assure its sources of confidentiality or conduct interviews under circumstances where confidentiality could be reasonably inferred as opposed to where such an assurance was inherently implicit. Moreover, confidential sources and the efficacy of investigatory techniques would not be jeopardized by a requirement that an agency provide express assurances of confidentiality. This approach would strike a reasonable balance between the competing policies underlying the 7(D) exemption and the FOIA goal of disclosure.

Furthermore, by holding that the presumption of confidentiality can be overcome only by evidence in the record, the court has placed the burden of disclosure on the citizen and greatly reduced the agency's burden of justifying nondisclosure. This approach further conflicts with the overall goal of the FOIA by requiring the party with the least knowledge of the facts and circumstances to submit record evidence sufficient to rebut the presumption of confidentiality before the court will require disclosure.

However, the Tenth Circuit chose to adopt the minority view held by the Sixth and Seventh Circuits and, therefore, searched the record for evidence which would rebut the presumption of confidentiality. Because no such evidence was found, the court held that the information had been provided with the understanding that it would be kept confidential.[33]

The court also addressed another 7(D) exemption issue: whether or not local law enforcement agencies fall within the meaning of "confidential sources."[34] Relying on *Lesar v. United States*[35] and *Church of*

29. *See, e.g.*, New England Apple Council v. Donovan, 725 F.2d 139, 141 (1st Cir. 1984) (citing Federal Bureau of Investigation v. Abramson, 456 U.S. 615, 630-31 (1982)).

30. *See* 5 U.S.C. § 552(b)(1)-(9) (1982).

31. Alirez v. NLRB, 676 F.2d 423, 425 (10th Cir. 1982). *See also* Department of the Air Force v. Rose, 425 U.S. 352, 361-62 (1976) ("[D]isclosure, not secrecy, is the dominant objective of the Act."); *Mink*, 410 U.S. at 79-80 (the Act is intended to permit access to information previously inaccessable).

32. 5 U.S.C. § 552(a)(4)(B) (1982).

33. *Johnson*, 739 F.2d at 1518.

34. *Id.*

35. 636 F.2d 472, 489-91.

Scientology v. United States Department of Justice,[36] the Tenth Circuit concluded that such agencies may be properly characterized as confidential sources.[37] The court also held that the individuals who provided information to the FBI were plainly "confidential sources" within the meaning of exemption 7(D).[38]

The *Johnson* court found it unnecessary to examine the file in camera. Instead, having concluded that the information withheld under the 7(D) exemption was obtained from confidential sources under an inherently implicit assurance of confidentiality, the court held the undisclosed documents to be exempt from disclosure.[39]

2. The 7(C) Exemption

The names of the FBI agents involved in the investigation of Johnson were withheld by the Bureau under subsection 7(C), which authorizes an agency to withhold information gathered in the course of a criminal investigation to the extent that disclosure would constitute an unwarranted invasion of personal privacy.[40] Relying on its own decision in *Alirez v. NLRB*[41] as well as on opinions from the First, Seventh, and District of Columbia Circuits,[42] the Tenth Circuit held that the proper test under subsection 7(C) is to balance the asserted privacy interests against the public interest in disclosure. The privacy interests at stake in *Johnson* were the FBI agents' interest in avoiding both unofficial questioning about the investigation and harassment from individuals angered by the investigation.[43] The public interest asserted in *Johnson* was based on allegations of improper use of law enforcement investigations.[44] After examining the undisclosed material, the court found no evidence that the FBI agents had acted improperly during the investigation.[45]

Although the court did review the undisclosed material for evidence of improper conduct by the FBI agents, the privacy claim was decisively supported by a presumption in favor of the law enforcement agency. Such a presumption has been recognized by the First, Fourth, Seventh, and District of Columbia Circuits[46] and stems from the recognition that the mere possibility of threats or harassment should weigh heavily in the

36. 612 F.2d 417, 420-28 (9th Cir. 1979).
37. *Johnson*, 739 F.2d at 1518.
38. *Id.*
39. *Id.*
40. *See supra* note 6.
41. 676 F.2d 423 (10th Cir. 1982).
42. *New England Apple Council*, 725 F.2d 139; *Miller*, 661 F.2d 623; Baez v. United States Dep't of Justice, 647 F.2d 1328 (D.C. Cir. 1980).
43. *Johnson*, 739 F.2d at 1519.
44. Johnson alleged that an attorney for a third party caused the FBI to initiate its investigation of Johnson in order to aid the third party's position in a separate action. *Id.*
45. For an overview of disclosure of files from unlawful investigations, see Note, *FOIA Exemption 7 and Broader Disclosure of Unlawful FBI Investigations*, 65 MINN. L. REV. 1139 (1981).
46. *New England Apple Council*, 725 F.2d at 142-43; *Miller*, 661 F.2d at 629-30; *Baez*, 647 F.2d at 1339; Nix v. United States, 572 F.2d 998, 1005-06 (4th Cir. 1978).

balancing of public and private interests.[47] Although the District Court for the District of Columbia, in 1981, held that the names of government investigators are not entitled to protection under the 7(C) exemption,[48] that view is not in keeping with precedent in the District of Columbia Circuit[49] nor has it been adopted by any other circuit.

At first blush, the requirement of an actual showing of a furthering of public interest, when considered with the strong presumption in favor of privacy interests, seems contrary to the FOIA policy of favoring disclosure. This, however, is not the case, because although the language of subsection 7(C) [50] is similar to that of subsection 6,[51] which covers files not related to criminal investigations, there is a crucial difference between the scope of these two exemptions. Although 7(C) originally included the "clearly unwarranted" standard of exemption 6, the word "clearly" was deleted during conferences on the 1974 amendments.[52] The purpose of the deletion was to broaden the grounds for nondisclosure under 7(C) because of the inherent differences between investigatory and noninvestigatory files.[53]

After weighing the public interest asserted by Johnson against the privacy interests of the government agents, the Tenth Circuit held that all the material withheld by the Department of Justice under 7(C) was within the scope of the exemption and need not be disclosed.[54] Thus, the court concluded that the Department of Justice had properly invoked FOIA exemptions 7(C) and 7(D), and reversed the district court order requiring disclosure.[55]

II. THE DUTY TO PROMULGATE RULES

A. *Background*

It is a general rule of administrative law than an agency need not promulgate detailed rules concerning each and every aspect of a pro-

47. *See, e.g., New England Apple Council*, 725 F.2d at 142 ("the protection of exemption 7(C) is not limited to cases involving *an actual* showing of harassment or other harm to government officials") (emphasis in original).

48. "The policy reasons for withholding the names of [private] third parties do not apply to government employees involved in the investigation since, (1) there can be no suspicion of wrongdoing on their part and (2) their continued cooperation is not at stake." Iglesias v. CIA, 525 F. Supp. 547, 563 (D.D.C 1981).

49. *See, e.g., Baez*, 647 F.2d 1328.

50. *See supra* note 6.

51. 5 U.S.C. § 552(b)(6) (1982) states that the exemption section shall not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

52. *See* Congressional News Syndicate v. United States Dep't of Justice, 438 F. Supp. 538, 541 (D.D.C. 1977).

53. "[T]hat an individual's name appears in files of the latter kind, without more, will probably not engender comment and speculation, while . . . an individual whose name surfaces in connection with an investigation may, without more, become the subject of rumor and innuendo." *Id.*

54. *Johnson*, 739 F.2d at 1519.

55. *Id.*

gram or course of action.[56] Although prospective rulemaking[57] is the favored procedure,[58] adjudication is an alternative.[59] Despite the usual existence of this alternative, a statute may create a duty to promulgate rules concerning some or all of the subject matter within the purview of the statute.

Twice during the survey period the Tenth Circuit was asked to determine whether particular statutes imposed a duty on the Secretary of the Department of Health and Human Services (HHS) to promulgate rules. In both cases, the subject of the rules was the distribution of financial assistance by HHS and in both cases the court found that such a duty exists.[60]

B. Estate of Smith v. Heckler

Estate of Smith v. Heckler[61] was originally brought as a class action suit on behalf of all Medicaid recipients residing in Colorado nursing homes. The plaintiffs alleged that the Secretary of HHS had a duty to ensure that Medicaid recipients residing in Medicaid-certified homes actually received the level of payments they were entitled to under Title XIX of the Social Security Act[62] (the Act). The plaintiffs also alleged that the Secretary had a duty to promulgate regulations necessary to fulfill the requirements of Title XIX.[63]

Prior to *Estate of Smith*, HHS used a procedure, known as the survey/certification system, to determine whether state plans for medical assistance complied with the federal standards under 42 U.S.C. § 1396a(a) and its implementing regulations.[64] Under this system, the Secretary would review the results of the nursing home surveys taken by the states pursuant to 42 U.S.C. § 1396a(a)(33).[65] Facilities would then

56. SEC v. Chenery Corp., 332 U.S. 194 (1947); American Power & Light Co. v. SEC, 329 U.S. 90 (1946).

57. Administrative Procedure Act § 4, 5 U.S.C. § 553 (1982).

58. *See generally* Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103 (1980) (explaining the aspects of notice and comment rulemaking).

59. 5 U.S.C. § 554 (1982).

60. For a related discussion of the duty imposed by the Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1982), to promulgate rules, see Yamada, *Rulemaking Requirements Related to Federal Financing Assistance Programs*, 39 FED. B.J. 89 (1980).

61. 747 F.2d 583 (10th Cir. 1984).

62. 42 U.S.C. § 1396-1396p (1982).

63. 747 F.2d at 587-88.

64. The implementing regulations referred to are Standards for Payment for Skilled Nursing and Intermediate Care Facility Services, 42 C.F.R. § 442 (1985).

65. Under § 1396a(a)(33)(A) a state plan for medical assistance must provide that the states "be responsible for establishing a plan . . . for the review by appropriate professional health personnel of the appropriateness and quality of care and services furnished to recipients of medical assistance under the plan." Section 1396a(a)(33)(B) requires that a state

> perform . . . the function of determining whether institutions and agencies meet the requirements for participation in the program . . . except that, if the Secretary [of Health and Human Services] has cause to question the adequacy of such determinations, the Secretary is authorized to validate [s]tate determinations and, on that basis, make independent and binding determinations concerning the ex-

be certified by the Secretary for participation in the Medicaid program if the Secretary was satisfied that the facility was in compliance with the implementing regulations. Once certified, the facility then became eligible for Medicaid funds.

In conducting the surveys, states were required to use federal forms.[66] The plaintiffs alleged that the principal form provided for the survey, Form SSA-1569, evaluated only the level of health care theoretically available as opposed to the actual level of care provided by the nursing home. The Secretary admitted that Form SSA-1569, and indeed the whole program, was "facility-oriented rather than patient-oriented," but denied the existence of a duty to reverse the focus of the evaluation process.[67]

In reversing the district court, the Tenth Circuit, Judge McKay writing, held that the Secretary does have a duty to ensure that nursing homes actually provide high quality health care, a duty that does not cease at the time of certification, but instead "is a duty of continued supervision."[68] The court noted that the focus of the Act is not on the physical facilities, but on the actual health care to be provided.[69] The court also noted that, although the district court had correctly pointed out that the state has significant responsibilities under the Act, nothing in the Act indicated that the state's responsibility relieves the Secretary of the duty of ensuring compliance with the purposes of the Act.[70]

In holding that the Secretary has "a duty to ensure more than paper compliance" with the Act,[71] the court stated that "[i]t would be anomolous to hold that the Secretary has a duty to determine whether a state plan meets the standards of the Act while holding that the Secretary can certify facilities without informing herself as to whether the facilities actually perform the functions required by the state plan."[72] The court

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tent to which individual institutions and agencies meet the requirements for participation.

66. 42 C.F.R. § 431.610(f)(1) (1985).

67. The district court concluded that a patient oriented system of review was feasible and probably desirable, but that the Secretary had no duty to establish such a system. The holding was based, in part, on a construction of 42 U.S.C. § 1396(a)(9)(A) requiring the states, rather than the Secretary, to establish and enforce the standards and methods for assuring high quality medical assistance. The district court also concluded that the "look behind" provision of section 1396a(a)(33)(B) granted the Secretary authority to intervene to protect public funds, but did not create a duty to establish a patient oriented system of review. The district court also held that the general rulemaking provision of 42 U.S.C. § 1302 (1982), stating that the Secretary "shall make and publish such rules and regulations . . . as may be necessary," did not, alone, impose any duty on the Secretary. Furthermore, the court held that if a duty were created by section 1302 in conjunction with section 1396a(a)(33)(A), it was satisfied by enacting detailed regulations setting forth the grounds for obtaining federal funds for state Medicaid programs. *See* Estate of Smith v. O'Halloran, 557 F. Supp. 280 (D. Colo. 1983), *rev'd*, 747 F.2d 583 (10th Cir. 1984).

68. 747 F.2d at 589.

69. *Id.* The court relied on 42 U.S.C. § 1396 (1983) in which funds are appropriated "[f]or the purpose of enabling each [s]tate . . . to furnish (1) medical assistance . . . and (2) rehabilitation and other services."

70. 747 F.2d at 589.

71. *Id.* at 589-90.

72. *Id.*

found that this federal responsibility was clearly evidenced by the "look behind" provision and its legislative history.[73]

The court concluded that, in view of the Act's establishment of a patient-oriented system and the accompanying authority to promulgate necessary regulations under section 1302 of the Act,[74] the Secretary's failure to do so was arbitrary and capricious.[75] The case was remanded with directions that a writ of mandamus issue directing the Secretary of Health and Human Services to promulgate regulations enabling her to determine if nursing home facilities receiving Medicaid funds are actually providing the high quality medical and rehabilitative care specified in the Medicaid Act.[76]

C. Pulido v. Heckler

In *Pulido v. Heckler*,[77] the Tenth Circuit reviewed a district court's decision[78] that the Secretary of Health and Human Services was not under a duty to promulgate rules for the payment of certain travel expenses pursuant to 42 U.S.C. §§ 401(j) and 1383(h).[79] The case was originally filed as a class action to compel the Secretary to engage in notice and comment rulemaking on: (1) the criteria for change in locations for both disability benefit hearings under Title II of the Social Se-

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73. *Id.* at 590 (citing H.R. REP. No. 1157, 96th Cong., 2d Sess. 57, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5526, 5570).

74. *See supra* note 67.

75. 747 F.2d at 590.

76. *Id.* at 591-92.

77. 758 F.2d 503 (10th Cir. 1985).

78. Pulido v. Heckler, 568 F. Supp. 627 (D. Colo. 1983).

79. Section 401(j) provides in part:

> There are authorized to be made available for expenditure . . . such amounts as are required to pay travel expenses . . . to individuals for travel incident to medical examinations. . . in connection with disability determinations . . . and to parties, their representatives, and all reasonably necessary witnesses for travel within the United States . . . to attend reconsideration interviews and proceedings before administrative law judges with respect to any determination under the subchapter. The amount available . . . for payment for air travel by any person shall not exceed the coach fare for air travel between the points involved unless the use of first-class accommodations is required (as determined under regulations of the Secretary) because of such person's health condition or the unavailability of alternative accommodations; and the amount available for payment for other travel by any person shall not exceed the cost of travel . . . by the most economical and expeditious means of transportation appropriate to such person's health conditions, as specified in such regulations.

Section 1383(h) provides in part:

> The Secretary shall pay travel expenses . . . to individuals for travel incident to medical examinations . . . in connection with disability determinations under this subchapter, and to parties, their representatives, and all reasonably necessary witnesses for travel within the United States . . . to attend reconsideration interviews and proceedings before administrative law judges with respect to any determination under this subchapter. The amount available . . . for payment for air travel by any person shall not exceed the coach fare for air travel between the points involved unless the use of first-class accommodations is required (as determined under regulations of the Secretary) because of such person's health condition or the unavailability of alternative accommodations; and the amount available for payment for other travel by any person shall not exceed the cost of travel . . . by the most economical and expeditious means of transportation appropriate to such person's health condition, as specified in such regulations.

curity Act[80] and supplemental security income benefits under Title XVI of the Act,[81] and (2) standards for payment of travel expenses to attend the hearing.

The Tenth Circuit began its analysis by noting that the Secretary had conceded that sections 401(j) and 1383(h) imposed a duty to promulgate regulations, but denied the existence of a duty to issue regulations on other aspects of the payment of travel expenses.[82] The court, however, examined the provisions of 42 U.S.C. § 405(a)[83] and agreed with the Eighth Circuit[84] that the language of the section imposed a duty on the Secretary to promulgate rules that " 'regulate and provide for the nature and extent of the proof and evidence' " and which cover " 'the method of taking and furnishing the same.' "[85] The court held that because the availability of payment of travel expenses can determine whether a claimant can attend a hearing to offer proof, regulations about such payments are encompassed by the requirement that the Secretary promulgate rules for "the method of taking and furnishing" proof.[86]

The court also held this duty was not extinguished by subsequent appropriations acts.[87] Instead, those appropriations were characterized as only limiting the Secetary's discretion to reimburse claimants for travel of less than seventy-five miles without affecting her duty to promulgate rules for travel over seventy-five miles.[88]

The court rejected the Secretary's argument that, even if there did exist a duty to promulgate the requested rules, she had the discretion to determine when the regulations would be proposed.[89] The court did not discuss the existence or scope of such discretion, but instead simply held that any discretion that did exist was impermissibly abused by the

80. Federal Old-Age, Survivors and Disability Insurance Benefits, 42 U.S.C. §§ 401-33 (1982).

81. Supplemental Security Income for the Aged, Blind, and Disabled, 42 U.S.C. §§ 1381-1383c (1982).

82. 758 F.2d at 506.

83. 42 U.S.C. § 405(a) (1982) provides:

> The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

84. The Eighth Circuit held that "as to the kinds of rules and regulations mentioned in the second half of § 405(a), the Secretary is not simply *empowered* to make rules, he is *commanded* to do so." McCoy v. Schweiker, 683 F.2d 1138, 1143 (8th Cir. 1982) (emphasis in original).

85. 758 F.2d at 506 (citing *McCoy*, 683 F.2d at 1143).

86. *Id.* at 506-07.

87. The appropriations include Act of Oct. 1, 1981, Pub. L. No. 97-51, 95 Stat. 958; Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183; Act of Mar. 31, 1982, Pub. L. No. 97-161, 96 Stat. 22; Act of Oct. 2, 1982, Pub. L. No. 97-276, 96 Stat. 1186; Act of Dec. 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830, each implementing H.R. RES. 4560, 97th Cong., 1st Sess. (1981) (limiting travel expense payments by providing that payments under 42 U.S.C. § 1383(h) be made only when travel of more than 75 miles is required).

88. 758 F.2d at 507.

89. *Id.*

delay of over four years.[90] The court also held that congressional uncertainty about the desirability of the seventy-five mile threshold for payment[91] could not support the Secretary's position because any issued regulations could, if necessary, be modified to apply to whatever distance Congress might choose.[92]

The court also rejected the Secretary's argument that her intent to publish proposed regulations regarding travel expenses constituted a sufficient basis for not ordering her to promulgate the regulations. The court agreed with the district court's reading of *American Trucking Associations v. Atchison, Topeka and Santa Fe Railway Co.*[93] and held that public notice of an intent to publish proposed regulations was of little significance.[94] The court found that a timetable was necessary to ensure that the regulations would be promulgated. Therefore, the court, in addition to reversing the district court's order, remanded the case for determination of an appropriate timetable.[95]

D. *Analysis*

Although the task of statutory construction is certainly not new to the Tenth Circuit, the examination of statutes to determine whether they create a duty to promulgate rules has been an infrequent endeavor for the court. Prior to this survey period, the Tenth Circuit's last treatment of this issued occurred in *Sanchez v. United States*.[96] *Sanchez* was an action brought under a section of the Federal Tort Claims Act (FTCA).[97] The plaintiffs were passengers in an automobile that was struck from behind by an automobile driven by a student enrolled in a Bureau of Indian Affairs (BIA) school. The complaint alleged that there had been a failure to promulgate rules prohibiting the type of student conduct that had led to the plaintiffs' injuries.

The court held that there was no common law duty owed by the BIA to the general public to promulgate rules governing student conduct.[98] The court also held that "the fact that a school has [statutory] authority to promulgate regulations to govern the conduct of students is not germane."[99] The court, however, failed to cite or examine relevant statutory language[100] in its brief discussion of the absence of a statutory duty to promulgate regulations.

Sanchez may be reconciled with *Estate of Smith* and *Pulido* on two

90. *Id.*
91. *Id. See* H.R. REP. No. 618, 98th Cong., 2d Sess. 19 (1984) (stating that the 75-mile limit should be reconsidered).
92. 758 F.2d at 507-08.
93. 568 F. Supp. 627, 632 (D. Colo. 1983) (citing American Trucking Ass'ns, Inc. v. Atchinson, Topeka & Santa Fe Ry. Corp., 387 U.S. 397 (1967)).
94. 758 F.2d at 508.
95. *Id.*
96. 506 F.2d 702 (10th Cir. 1974).
97. 28 U.S.C. § 1346(b) (1983).
98. 506 F.2d at 704-05.
99. *Id.* at 705.
100. *E.g.*, 25 U.S.C. §§ 1(a), 9, 282, 283 (1983).

grounds. In *Sanchez*, the court held that there was no assurance the BIA's regulatory prohibition of certain conduct would have any effect upon BIA students. The court, therefore, found that there was no "legal causation" between the failure to promulgate such regulations and the plaintiffs' injuries.[101] In *Estate of Smith*, however, the failure to promulgate regulations ensuring state compliance with federal standards for medical care was held to be the cause of substandard care in Medicaid facilities.[102] Similarly, the failure to promulgate regulations concerning payment of travel expenses was held to be the cause of the *Pulido* plaintiffs' uncertainty as to their entitlement to reimbursement.[103] Thus, the existence of a direct causal connection between a failure to act and the purported injury, which was lacking in *Sanchez*, provides one explanation for the disparate outcomes.

Secondly, both *Pulido* and *Estate of Smith* involved the distribution of benefits from the government to members of the general public. *Pulido* involved direct money benefits, while *Estate of Smith* involved high quality medical and rehabilitative care for persons who otherwise could not afford such care. *Sanchez*, on the other hand, was simply an action for damages under the FTCA.

Thus, considerations of public policy seem to provide a basis for reconciling *Sanchez* with *Pulido* and *Estate of Smith*. The plaintiffs in the Social Security Act cases were aided by the apparent presumption that, absent some showing of unreasonableness or congressional intent to the contrary, public policy is best served when the Social Security Act is construed so as to maximize the distribution of benefits to qualified recipients. In *Estate of Smith*, the Tenth Circuit held that the overall purpose of the Medicaid Act and the general rulemaking provisions of 42 U.S.C. § 1302 combined to create an implied duty to promulgate regulations necessary to further the purposes of the Act. In *Pulido* the Tenth Circuit construed a statutory requirement to promulgate regulations concerning "the method of taking and furnishing" proof to include a duty to promulgate regulations dealing with the payment of travel expenses to hearings. In both cases the court seems to have been motivated by a desire to have the Secretary promulgate rules maximizing distribution of benefits. The plaintiffs in *Sanchez*, however, were denied relief due, in part, to the apparent purpose of the FTCA, an Act which was intended to provide only limited exceptions to the doctrine of sovereign immunity.[104] The Tenth Circuit presently seems to be motivated by a desire to further the purpose of the underlying statute in these duty-to-promulgate cases.

101. 506 F.2d at 705.
102. *See supra* notes 61-76 and accompanying text.
103. *See supra* notes 77-95 and accompanying text.
104. *Cf.* PROSSER AND KEETON ON THE LAW OF TORTS,1034 (W. Keeton ed. 1984).

III. *BENDER V. CLARK*: APPEALABILITY OF A REMAND ORDER AND THE APPROPRIATE STANDARD OF PROOF

A. *Facts*

In February of 1977, Jack J. Bender filed a non-competitive oil and gas lease offer with the Bureau of Land Management (BLM). After Bender was awarded first priority, but before the lease was issued, the leasehold was determined by the BLM to be within an undefined addition to the Scanlon Known Geologic Structure.[105] Because public lands within a Known Geologic Structure (KGS)[106] can be leased only by competitive bidding,[107] Bender's lease offer was rejected by the BLM. Bender challenged the BLM's decision before the Interior Board of Land Appeals (IBLA), arguing that the land was not within a KGS. The IBLA held that the inclusion of land within a KGS would not be disturbed absent a "clear and definite" showing of error.[108] The IBLA, however, also found that the data was insufficient to determine whether or not the land was properly included within a KGS and, therefore, granted Bender's request for an evidentiary hearing before an administrative law judge (ALJ).[109] After the hearing, the ALJ held that Bender had failed to make a "clear and definite" showing of error and recommended that Bender's appeal be dismissed.[110] Bender then filed exceptions to the ALJ's entire record. The IBLA, afer reviewing the entire record, found that Bender failed to make a "clear and definite" showing that the BLM decision was in error and therefore affirmed the ALJ's decision.[111]

On review, the district court held that Bender need only have shown by a preponderance of the evidence that the BLM decision was in error to have overcome the government's prima facie case and remanded the case to the BLM.[112] On appeal the Tenth Circuit addressed two issues: (1) whether the remand order was a "final decision" sufficient to vest the court with appellate jurisdiction over the matter;[113] and (2) if so, whether the district court erred in holding that Bender could overcome the government's case by a preponderance of the evidence showing.

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105. Jack J. Bender, 40 I.B.L.A. 26, 28 (1979).

106. A known geologic structure was defined as "the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive." BLM Oil and Gas Leasing Regulations, 43 C.F.R. § 3100.0-5(1) (1985).

107. "If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding. 30 U.S.C. § 226(b) (1982).

108. *Bender*, 40 I.B.L.A. at 27.

109. *Id.* at 29. The IBLA may grant a hearing before an ALJ pursuant to 43 C.F.R. § 4.415 (1985).

110. Jack J. Bender, 54 I.B.L.A. 375, 377 (1981).

111. *Id.* at 389.

112. Bender v. Clark, 744 F.2d 1424, 1426 (10th Cir. 1984).

113. *Id. See* 28 U.S.C. § 1291 (1982) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.")

B. *Appealability of a Remand Order*

Although the Tenth Circuit acknowledged the general rule that a remand to an agency for further proceedings is usually not final and, therefore, not appealable, it noted that the rule is not applicable when the rule would violate "basic judicial principles."[114] The court also noted that the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*[115] held that the finality requirement of section 1291 has long been given a practical rather than a technical interpretation[116] and examined the "collateral order" doctrine, which was established in *Cohen*. The Tenth Circuit noted that for an order to be collateral, and therefore appealable under *Cohen*, "the matter raised on appeal must not be a step toward a final judgment in which it would 'merge,' it must not affect, nor be affected by, the decision on the merits, and it must be so independent of the action that appellate review need not await final disposition of the merits."[117] The court then concluded that the issue of what legal standard to apply, when measured against the *Cohen* standard, was so intertwined with the determination of the existence of a KGS "that it is not collateral to the merits of the dispute."[118]

The court continued its analysis by concluding that when the issue is a "serious and unsettled" question of law, not within a trial court's discretion, an order may be appealable when there exists an urgent need for review of an important question.[119] However, these tests, urgency and importance, were simply threshold tests for the court in determining the order's appealability. The final test applied by the court involved a balancing of competing interests.

The court held that in instances where an issue is not collateral, but justice requires immediate review because of the urgent need to decide an important question, a balancing approach is necessary to determine if an appellate court has jurisdiction. The balancing test used by the Tenth Circuit was "whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review."[120] On balance, the court held that the need for review clearly outweighed the competing concerns. This decision was based in part on the finding that the standard of proof issue is a "serious and unsettled" one in oil

114. *See, e.g.*, Ringsby Truck Lines, Inc. v. United States, 490 F.2d 620, 625 (10th Cir. 1973), *cert. denied*, 419 U.S. 833 (1974), in which the Tenth Circuit found that "basic judicial principles" justified adoption of the general rule that a remand to an agency is not a final decision and therefore not appealable. For the origin of the death knell exception to the finality requirement, see Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

115. 337 U.S. 541 (1949).

116. *Id.* at 546.

117. 744 F.2d at 1427.

118. *Id.*

119. *Id.* (citing *Cohen*, 337 U.S. at 547).

120. *Id.* This balancing test has been used by the Tenth Circuit to determine appealability in other contexts. *See, e.g.*, Paluso v. Mathews, 562 F.2d 33, 35-36 (10th Cir. 1977) (important question of federalism merited appealability), *on reh'g*, 573 F.2d 4 (10th Cir. 1978); Seiffer v. Topsy's Int'l, Inc., 520 F.2d 795 (10th Cir. 1975) (class action by itself did not merit appealability), *cert. denied*, 423 U.S. 1051 (1976).

and gas leasing, thereby making it an important question.[121] The preeminent consideration for the court, however, was the likelihood that the government could be foreclosed from appealing the order in future proceedings, a possibility that amply demonstrated the urgent need for immediate review.[122] Thus, the court used the factors of "urgency" and "importance" both as threshold tests to determine if the application of a balancing test was necessary and also as the factors to be weighed against the inconvenience and cost of piecemeal review.

C. *The Appropriate Standard of Proof*

The Tenth Circuit held that the use of the "clear and definite" standard by the IBLA in informal hearings was based on internal agency policy instead of statutory or judicial authority.[123] The court concluded that, in the absence of a congressional determination of the standard to be applied, it is for a court, and not an agency, to decide the proper standards.[124] The court then examined the issue of whether the district court erred in ordering that the preponderance of the evidence standard be used.

The Tenth Circuit noted that proof by a preponderance of the evidence is the traditional standard used in civil and administrative proceedings. The court rejected the government's argument that the preponderance standard is applicable only in hearings conducted under the Administrative Procedure Act (APA). The court noted that even hearings outside the APA cannot violate basic principles of fairness and, therefore, must use a standard of proof that considers all of the competing interests.[125] The court concluded that the preponderance standard must be applied unless a higher standard is required because of the nature of the case and the sanctions or hardships imposed. The court noted that the clear and definite standard is generally appropriate only in cases involving matters such as deportation, parental rights or loss of livelihood where "particularly important individual interests or rights" are determined.[126]

The government did not offer any reason in support of using the "clear and definite" standard other than its own interests, relying instead on the principle that judicial deference should be shown towards an administrative determination of a technical factual question. The government claimed that such judicial deference should therefore permit an agency to impose a higher standard of proof on individuals challenging agency action. The court noted, however, that the government's argument "confuses the scope of judicial review of factual determinations by an agency with the standard of proof applicable in

121. 744 F.2d at 1428.
122. *Id.*
123. *Id.* at 1429.
124. *Id.*
125. *Id.*
126. *Id.*

administrative hearings conducted to determine such matters" and concluded that judicial deference is required only in the former situation.[127] The Tenth Circuit therefore affirmed the district court's order that the case be remanded to the IBLA for determination under the preponderance of evidence standard.

D. *Analysis*

The Tenth Circuit's characterization of *Bender* as presenting a unique jurisdictional question never previously addressed by any circuit court[128] was based solely on the fact that the order being appealed had remanded the case for the application of a different standard of proof than that normally applied by administrative agencies. The finality of other types of orders has been considered many times by the judiciary without a consensus as to the proper approach.[129] The trend has been to expand the court's jurisdiction to hear appeals by broadening the definition of "final."

An expansive construction was given to the finality requirement of 28 U.S.C. § 1291 in *Cohen v. Beneficial Industrial Loan Corp.*[130] *Cohen* involved a stockholder's derivative suit brought in a federal district court under diversity jurisdiction. When the trial court refused to apply a New Jersey statute requiring that the plaintiffs post a bond, the defendant immediately appealed. Out of that appeal came what is now known as the "collateral order" doctrine.

The doctrine expands the definition of "final decision" to include final determinations by a district court on issues that meet certain requirements even though the action as a whole has not been terminated. The *Cohen* Court read the finality requirement of section 1291,[131] in conjunction with the exceptions for certain interlocutory matters as enumerated in 28 U.S.C. § 2892,[132] as prohibiting only appeals from decisions that are "tentative, informal or incomplete" as well as those

127. *Id.* at 1430.

128. *Id.* at 1426.

129. *See, e.g.*, McGourkey v. Toledo and Ohio Cent. Ry. Co., 146 U.S. 536 (1892). In determining the finality of a court order referring a case to a special master, the *McGourkey* court stated "[p]robably no question in equity practice has been the subject of more frequent discussion in this court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious." *Id.* at 544-45. Nearly 60 years later the Supreme Court quoted the above passage and continued:

> This lamentation is equally fitting to describe the intervening struggle of the courts; sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.

Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

130. 337 U.S. 541 (1949).

131. For the text of the finality requirement, see *supra* note 113.

132. 28 U.S.C. § 1292(a) (1982) states:

> [T]he courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ;

decisions which although "fully consummated . . . are but steps towards [a] final judgment in which they will merge."[133]

The Supreme Court held that decisions are appealable when they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[134] The Court also recognized that appellate review of the issue could not wait until final disposition of the case because "[w]hen that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."[135] Thus, the elements of the "collateral order" doctrine as established in *Cohen* are: (1) that the order completely resolve the issue it addresses without being tentative, informal or incomplete; (2) that the issue addressed be independent and separable from the main dispute; (3) that the issue be "important;" and (4) that a showing be made that effective review will be impossible at the time the dispute is resolved.

Six months after *Cohen*, the Supreme Court decided *Dickinson v. Petroleum Conversion Corp.*[136] There the Court was faced with determining the appealability of an order that settled less than all the claims presented in the action.[137] The Court, in dicta, stated that the most important of the several considerations involved in determing appealability are "inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[138] The Court then went on to make an ad hoc determination based on the facts before it.[139]

The Tenth Circuit decided *Bender v. Clark* by combining the tests ennunciated in *Cohen* and *Dickinson*. The court used two of the four criteria in *Cohen* as the threshold test, following that with the balancing test mentioned in the *Dickinson* dicta. One criterion borrowed from *Cohen* was that effective review will be impossible if the appeal is delayed until

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(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purpose thereof . . . ;

(3) Interlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases . . . .

The Court concluded that these exceptions indicated that the purpose of the statute was "to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties." 337 U.S. at 545.

133. 337 U.S. at 546.

134. *Id.*

135. *Id.*

136. 338 U.S. 507 (1950).

137. A similar problem today would be resolved under FED. R. CIV. P. 54(b), which allows for a final judgment on less than all the claims brought before a trial court and which became effective prior to the court's decision in *Dickinson*. Because that rule was not in effect at the time that the order under review in *Dickinson* was issued, the Court declined to consider it in their decision. *Id.* at 512.

138. *See supra* note 129.

139. After noting that FED. R. CIV. P. 54(b) was inapplicable, *see supra* note 137, the Court stated: "We will not, therefore, try to lay down rules to embrace any case but this." 338 U.S. at 512.

final disposition of the case. It is from this requirement that the "urgent" element of the threshold test was taken. The Tenth Circuit cited a First Circuit decision[140] in support of the proposition that urgency was the dispositive concern,[141] but the Tenth Circuit did not provide an explicit statement of what characteristics make a claim "urgent."

The test relied on by the First Circuit in *In Re Continental Investment Corp.* was "whether irreparable harm would result to appellants, not from the district court order itself, but from a delay in obtaining appellate review of it."[142] The Tenth Circuit appears to have impliedly adopted the First Circuit's test as is evidenced by the court's statement that the most important consideration in allowing the Department of Interior to pursue its appeal was the fact that "because the government in such a case has no avenue for obtaining judicial review of its own administrative decisions, it may well be foreclosed from again appealing the district court's determination at any later stage of this proceeding."[143]

The second criteria adopted from *Cohen* was that the issue must be important. The Tenth Circuit explicitly provided the elements of an "important question" by interpreting *Cohen* as identifying an important issue as one which is "serious and unsettled, and not within the trial court's discretion."[144] Because both parties admitted that the standard of proof used was a serious and unsettled one, the Tenth Circuit had no trouble labeling the issue as important in applying the tests in *Bender*.

After the threshold showing of urgency and importance, the court applied the balancing test from *Dickinson*. In so doing, the Tenth Circuit equated the elements that define "urgent" and "important" with "the danger of denying justice by delay" and then balanced those considerations against the inconvenience and costs of piecemeal review.[145]

Only time will tell whether the test espoused in *Bender* will be widely adopted by other jurisdictions and rise to the level of the collateral order doctrine. It is quite probable, however, that this test is merely another attempt to conclusively define finality.[146]

Bruce McLarty

140. *In Re* Continental Investment Corp., 637 F.2d 1 (1st Cir. 1980). *See infra* text accompanying note 142.
141. 744 F.2d at 1427.
142. 637 F.2d at 5.
143. 744 F.2d at 1428.
144. *Id.* at 1427.
145. *Id.*
146. *See supra* note 129.