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ADMINISTRATIVE LAW

OVERVIEW

Administrative agencies function within statutorily defined parameters. While within these bounds, an agency may perform any or all of the three governmental functions. Given the immense power and pervasiveness of administrative agencies, it is important for practitioner, professor and student to understand the workings of and limitations upon these bodies. Judicial review is the most direct means to check unauthorized agency action. As such, the opinions of the Tenth Circuit Court of Appeals provide an excellent guide for understanding the limitatons placed upon this "fourth branch" of government. Generally, reviewing courts show great deference to agency decisions—be they adjudicatory or rulemaking. The Tenth Circuit during the last survey period has, with few exceptions, followed this trend of deference.

I. ADMINISTRATIVE INTERPRETATION OF LEGISLATION AND REGULATIONS

A. *Interpretation of Federal Legislation*

1. Mayoral v. Jeffco American Baptist Residences, Inc.

Traditionally, reviewing courts are ultimately responsible for construing federal statutes.[1] Administrative applications of statutory terms, however, will be granted persuasive weight if reasonable.[2] This rule was illustrated in *Mayoral v. Jeffco American Baptist Residences, Inc.*[3] in which the

1. *See* the Administrative Procedure Act, 5 U.S.C. 706(2)(A), (C) (1982) (directing reviewing courts to decide questions of law and to interpret statutory provisions). *See also* FTC v. Texaco, Inc., 393 U.S. 223 (1968) (ultimate responsibility for construction of Federal Trade Commission Act, making unfair methods of competition unlawful, rests with courts); IRS v. Federal Labor Relations Auth., 717 F.2d 1174 (7th Cir. 1983) (courts are the final authority on issues of statutory construction); Lubrizol Corp. v. EPA, 562 F.2d 807 (D.C. Cir. 1977) (courts have primary responsibility over questions of statutory interpretation); Grocery Mfrs. of Am., Inc. v. Gerace, 581 F. Supp. 658 (S.D.N.Y. 1984) (statutory interpretation is a question of law which, as a general rule, is freely reviewable); Gaibis v. Werner Continental, Inc., 565 F. Supp. 1538 (W.D. Pa. 1983) (construction of statutory terms is a legal question for the court to decide); Sumlin v. Brown, 420 F. Supp. 78 (N.D. Fla. 1976) (courts have the ultimate responsibility to determine issues of statutory interpretation); Bryant v. American Nat'l Bank & Trust Co. of Chicago, 407 F. Supp. 360 (N.D. Ill. 1976) (construction of a statute is a matter of law to be resolved by the court); Young v. AAA Realty Co. of Greensboro, Inc., 350 F. Supp. 1382 (M.D.N.C. 1972) (the judiciary is ultimate authority on issues of statutory interpretation).

2. Rarely does a term of the Supreme Court expire without a reaffirmation of this principle. *See, e.g.*, E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46 (1977); United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975); Johnson v. Robison, 415 U.S. 361 (1974); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Lewis v. Martin, 397 U.S. 552 (1970); Zemel v. Rusk, 381 U.S. 1 (1965); Massachusetts Trustees of Eastern Gas and Fuel Assoc's v. United States, 377 U.S. 235 (1964); Gray v. Powell, 314 U.S. 402 (1941).

3. 726 F.2d 1361 (10th Cir.), *cert. denied*, 105 S. Ct. 255 (1984).

Tenth Circuit decided whether "mandatory meal charges are rent under the United States Housing Act and whether HUD [Housing and Urban Development] can permit the charges under that Act."[4]

In *Mayoral*, the defendant, Jeffco, operated an apartment complex in Lakewood, Colorado which housed elderly, low-income tenants. The tenants required only minimum support services. The apartment complex included a cafeteria, but every apartment had its own kitchen. In order to prevent the dining facility from closing, the Jeffco operators imposed a mandatory meal program on the tenants.[5] The program included 24 meals a month for sixty dollars.[6]

HUD approved the Jeffco meal plan pursuant to HUD regulations[7] and the residents were given notice and an opportunity to comment on the plan.[8] When Jeffco instituted the plan, the tenants sought to enjoin it.[9]

The district court, per Judge Kane, permanently enjoined Jeffco and HUD from imposing the mandatory meal charges unless such charges were treated as "rent" under 42 U.S.C. § 1437f.[10] By so doing, Judge Kane ensured that any mandatory meal charge imposed on the tenants would be subjected to the same seventy to eighty-five percent subsidy applicable to the tenants' rent.[11] In reaching this decision, Judge Kane reasoned:

> Just like any other mandatory charge, the meal ticket charge is one that a tenant must . . . shoulder if she is to continue to live in the complex. All mandatory charges must therefore be considered rent. It is defendants' choice whether or not to furnish and charge for such services, but if they decide to make the charges mandatory, they must be included in "rent" under § 1437f. To hold otherwise would circumvent Congress's intent in enacting § 1437f to leave low income families with 70-85% of their incomes to spend or save as they deem best.[12]

The Tenth Circuit reversed, holding that the Jeffco mandatory meal plan as approved by HUD fell within the authority granted by the Na-

4. *Id.* at 1363. The United States Housing Act is codified at 12 U.S.C. § 1701-1750 (1982). Rent subsidies are provided for under 42 U.S.C. § 1437f (1982).

5. *Id.* at 1362-63.

6. *Id.* at 1363.

7. *Id. See* 24 C.F.R. § 880.607(d) (1984).

8. 726 F.2d at 1363.

9. *Id.* at 1362.

10. Mayoral v. Jeffco Am. Baptist Residences, Inc., 519 F. Supp. 701 (D. Colo. 1981).

11. *Id.* at 703-04. Under 42 U.S.C. § 1437f the Secretary of HUD and the project owner enter into an assistance contract which specifies the share of rent to be paid by each tenant. The amount paid by each qualified tenant cannot exceed 15-30% of the tenant's income. HUD subsidizes the amount of rent owed to the project owner that the tenant does not pay. *Id.* at 702.

12. *Mayoral*, 519 F. Supp. at 703-4. See S. REP. No. 392, 91st Cong., 1st Sess. 19, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS 1524, 1542, which states: "One of the purposes of this section is to permit improved operating and maintenance services in public housing projects while still permitting occupancy by very low-income tenants. The Secretary would be expected, however, . . . *to insure that excessive operating costs, and consequently higher rentals, are not incurred.*" (emphasis added).

tional Housing Act.[13] In reaching its decision the court relied on three factors. First, the court made clear that it would show deference to HUD's interpretation of the United States Housing Act.[14] Although HUD had approved the meal plan, it argued against including the cost of mandatory meal plans under the Act's definition of rent.[15] Second, the court relied on an unpublished Ohio district court opinion for the proposition that, under the United States Housing Act, a mandatory charge for meals does not constitute rent.[16] Third, finding that section 8 of the Act contains no controlling definition of rent, the court purported to "interpret the word in accordance with its ordinary meaning."[17] The court concluded that "[a] mandatory meal program does not violate the purpose of Section 8,"[18] rejecting plaintiffs' argument that the meal charge contravenes the purpose of section 8, as stated in the Act's declaration of policy.[19]

Given that the United States Housing Act fails to provide an appropriate definition of "rent," it is understandable that the Tenth Circuit reversed the district court; however, in so doing the Tenth Circuit may have deferred too quickly to the agency's position.[20] The Tenth Circuit's opinion can be challenged on at least two grounds.

First, the court's reliance on the plain meaning of the word "rent" is suspect. The court was content to state simply: "Meal charges do not fall within the commonly understood concept of rent. Rent is income that an owner of land receives from a tenant *for the use or occupation of land*."[21]

In *Mayoral*, the meal program was mandatory; the tenants were required to purchase the meal program as a condition of occupancy. Given the mandatory nature of this charge, one can persuasively argue

13. *Mayoral*, 726 F.2d at 1366.

14. *Id.* at 1363 (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)).

15. HUD was a defendant in the action.

16. 726 F.2d at 1363-64. *See* Chambers v. Toledo Jewish Home for the Aged, Inc., No. C 80-575 (N.D. Ohio Oct. 23, 1980) (held that a mandatory meal charge is not rent under 42 U.S.C. § 1437f).

17. 726 F.2d at 1365 (citing S. REP. No. 392, 91st Cong., 1st Sess. 19, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS 1524, 1542, which states: "[T]he 'rental' for such unit would be the proportional share of the total shelter costs to be borne by the low-income tenants. . . .")

18. 726 F.2d at 1366.

19. *Id.* at 1365.

20. The Supreme Court recently held that reviewing courts should not rubberstamp administrative decisions which are inconsistent with a statutory mandate or which frustrate the underlying Congressional policy. *See* Batterton v. Francis, 432 U.S. 416 (1977) (administrative interpretations of statutory terms are given important, but not controlling, significance); Morton v. Ruiz, 415 U.S. 199 (1974) (agency interpretations of federal statutes must be consistent with the congressional purpose); Blackfeet Tribe of Indians v. Montana, 729 F.2d 1192 (9th Cir. 1984) (deference accorded administrative interpretations of statutes is not absolute); Banda v. Office of Personnel Management, Dept. of Air Force, 727 F.2d 471 (5th Cir. 1984) (deference to agency construction of federal statutes is not required where compelling indications exist suggesting that agency interpretation is in error); Public Ser. Co. of Colo. v. Watt, 711 F.2d 913 (10th Cir. 1983) (administrative interpretations of statutes are entitled to deference, not obeisance).

21. 726 F.2d at 1364 (emphases added) (citing Peterson v. Oklahoma City Housing Auth. 545 F.2d 1270, 1274 (10th Cir. 1976)).

that the income Jeffco received from the plan was in fact income received "for the use or occupation of land." Jeffco received sixty dollars per month, per tenant, regardless of whether the tenant actually ate any of the 24 cafeteria meals. Failure to pay the charge would violate the lease; hence, the tenants did not necessarily pay for food so much as they paid for the right to remain in occupancy. Indeed, in this case, it is a very short step from an "ordinary" definition of rent to a definition that reasonably includes the cost of meals as a condition of occupancy.[22]

Second, and perhaps most important, the Tenth Circuit never addressed an important equitable consideration raised by the district court.[23] On one hand, a decision to enjoin the plan would cause Jeffco some lost profits. On the other, by excluding the mandatory meal charge from the definiton of rent, the elderly low-income tenants would be forced to pay sixty dollars a month for meals they might never eat. The Tenth Circuit implicitly gave greater weight to the owner's lost profits than to the tenants' lost income—and loss of choice. The district court, however, reasoned differently:

> Because plaintiffs are all aged people on whom the uncertainty and added burden of suing for damages would take a great toll, I hold that injunctive relief is proper here. Further, this case is not limited to purely financial matters. The quintessential issue is whether these tenants can be deprived of their freedom to choose. Admittedly, the tenants are free to leave, but it must likewise be admitted that the defendants have availed themselves of federal funding which must be used in furtherance of the clear congressional policy to subsidize the freedom of choice and diginity of life for these aged people. Thus, I hold that there is no adequate remedy at law which can compensate these tenants for the daily loss of that freedom to choose which, according to their own poignant testimony, is a matter of the utmost concern to each of them. It is that very loss of choice which is irremediable.[24]

2. Brandon v. Pierce

Another HUD interpretation of federal legislation was upheld in *Brandon v. Pierce*.[25] This case involved an Urban Development Action Grant (UDAG) to expand a city-owned sewage treatment facility onto property owned by plaintiffs. The Brandons sought injunctive and declaratory relief in a suit against the Secretary of HUD.[26] The complaint alleged that HUD had violated the National Environmental Policy Act (NEPA)[27] and the Housing and Community Development Act of 1974

22. The court's reliance on the Senate Report for the proposition that "rent is generally payment for shelter" (*see infra* note 17) is refuted by this same reasoning.

23. *See* 519 F. Supp. at 704 n.6.

24. *Id.*

25. 725 F.2d 555 (10th Cir. 1984.)

26. The city of Stilwell, Oklahoma was a co-defendant.

27. 42 U.S.C. §§ 4321-4370 (1982).

(HCDA)[28] by failing to prepare an Environmental Impact Statement (EIS) prior to approving the UDAG for the City of Stilwell, Oklahoma.

The Tenth Circuit held the HUD regulations, which did not require an independent environmental review by HUD of a UDAG prior to acceptance of the application and release of funds thereunder, were a valid implementation of the agency's authority under NEPA.[29] The court based its conclusion on legislative history which emphasized congressional intent to transfer NEPA responsibilities from the federal agency to the local grant applicant.[30] Because the HUD environmental regulations satisfied this legislative purpose, the regulations were sustained.

3. Matzke v. Block

In *Matzke v. Block*,[31] the Tenth Circuit displayed a distinct lack of deference to what it considered administrative "construction of the statute by silence."[32] The statute in question concerned the Farm and Rural Development Act.[33] Under this Act, payment and principal due on loans made by the Farmers Home Administration (FmHA), could be deferred by the Secretary upon request.[34] More important, under the same statute, the Secretary was permitted to forego foreclosure of any such loan.[35]

Plaintiffs, the class of farmers living in Kansas who had received loans from the FmHA, sued to force the Secretary to promulgate rules under which the Secretary could defer payment and forego foreclosure on FmHA loans. Specifically, the plaintiffs argued that the Secretary had "taken no action to place in operation or implement the remedies provided for them" by section 1981a of the Act.[36]

As a defense, the Secretary argued that the promulgation of regula-

28. 42 U.S.C. §§ 5301-5320 (1982).

29. 725 F.2d at 563-64. In regard to other issues raised by the Brandons on appeal, the court held: (1) Stilwell complied with HUD's procedural requirements; therefore, HUD's approval of the UDAG was not arbitrary and capricious, *id.* at 561; (2) Stilwell's decision not to prepare an EIS was reasonable "in light of the mandatory requirements and high standards set by NEPA," *id.* at 563 (citation omitted); and (3) Stilwell's environmental assessment was not invalid because the private engineering firm hired to prepare the assessment depended on HUD's favorable action on the UDAG grant application to obtain its fee, *id.* at 563-64.

30. *Id.* at 559-61. *See* CONF. REP. No. 1279, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4449-4500. The Housing and Community Development Act of 1974 specifically authorized the assumption by grant applicants of environmental review responsibilities for compliance with NEPA. 42 U.S.C. § 5304(h) (1982). In addition, 1979 amendments to the HCDA added clarifying language which guaranteed that grant applicants could assume other environmental responsibilities. *See* CONF. REP. No. 706, 96th Cong., 1st Sess. 45, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2402-04; *see also* H. REP. No. 154, 96th Cong., 1st Sess. 7-8, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2317, 2323.

31. 732 F.2d 799 (10th Cir. 1984).

32. *Id.* at 800.

33. *Id. See* 7 U.S.C. § 1981(a) (1982).

34. As a condition of the loan, the FmHA took interests in the farmers homes, crops, livestock and equipment. 732 F.2d at 800.

35. 7 U.S.C. § 1981a (1982). *See infra* note 38.

36. 732 F.2d at 800.

tions was discretionary under the Act and that other existing legislation provided adequate remedies; therefore, further regulations were unnecessary.[37]

The Tenth Circuit resolved the case by construing the word "may" as used in the enabling statute. The statute provided that the Secretary "may permit . . . the deferral of principal and interest . . . and may forego the foreclosure of any such loan . . ."[38] Based on this language, the Secretary argued that development of the program was discretionary. The farmers maintained that while the Secretary retained discretion to deny requests for deferrals or to forego foreclosure, development of rules and procedures was mandatory.[39]

The Tenth Circuit, relying upon the repeatedly stated legislative policy of fostering, encouraging and maintaining the family farm,[40] held that the Secretary was required to develop a section 1981a deferral program.[41] Moreover, the court went on to require that the Secretary use the rulemaking procedures of the Administrative Procedure Act.[42]

Unlike the *Mayoral* decision discussed above, [43] the Tenth Circuit in *Matzke* determined that language of the statute and the underlying purpose thereof took precedence over administrative convenience. Also, it is interesting to note that, unlike *Mayoral*, the Tenth Circuit felt free to grant relief to the class of Kansas farmers even though the opinion does not state exactly how the farmers were aggrieved.

B. *Interpretation of Agency Regulations*

The Administrative Procedure Act (APA) provides for judicial reversal of administrative legal conclusions "found to be . . . an abuse of discretion, or otherwise not in accordance with law."[44] Generally,

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37. *Id.* at 801.

38. 7 U.S.C. § 1981a states in pertinent part:

> In addition to any other authority that the Secretary may have to defer principal and interest and forego foreclosure, *the Secretary may permit* at the request of the borrower, the deferral of principal and interest on any outstanding loan made, insured, or held by the Secretary under this chapter, or under the provisions of any other law administered by the Farmers Home Administration, *and may forego* foreclosure of any such loan, for such period as the Secretary deems necessary upon a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payments of such principal and interest when due without unduly impairing the standard of living of the borrower.

(emphasis added).

39. 732 F.2d at 801-02.

40. *Id.* at 801 (citing 7 U.S.C. § 2266(a) (1982) and 7 U.S.C. § 1921 (1982)).

41. 732 F.2d at 803.

42. *Id.* at 802. The Administrative Procedure Act is codified at 5 U.S.C. §§ 551-706 (1982).

43. *See supra* notes 1-24 and accompanying text.

44. 5 U.S.C. § 706(2)(A) (1982). This section of the APA restates the common law rule that administrative officers vested with discretion possess a limited authority to exercise such discretion reasonably. If an abuse of discretion occurs, judicial intervention is appropriate, and the issue becomes whether the challenged act falls within a "zone of reasonableness" allowed agencies upon review. Mobil Oil Corp. v. FPC, 417 U.S. 283, 307 (1974). *See also* Barlow v. Collins, 397 U.S. 159, 166 (1970) (even broad delegations of administrative authority contain an implied condition of reasonable exercise).

courts need not defer to administrative decisions on questions of law".[45] However, an exception arises when the agency interprets and applies its own regulations.[46] During the survey period the Tenth Circuit upheld two such agency decisions scrutinized under the "abuse of discretion" test.[47] In *Missouri Pacific Railroad Co. v. Independent Mills, Inc.*,[48] however, the court overruled an administrative interpretation of an Interstate Commerce Commission (ICC) tariff.

The case involved the application of rail tariffs to wheat shipments. Plaintiff, a common carrier of freight, contended that certain rate increase tables applied to the defendant, Independent Mills.[49] Both the district court and the Tenth Circuit refused to defer to an agency interpretation which was ambiguous on its face.[50] Rather, the courts focused on earlier affirmative acts by both the ICC and the Southern Freight Tariff Bureau which indicated an intent to exclude wheat shipments from rate increases.[51] The lack of deference in this case can be explained by the absence of clear and consistent agency action upon which deference could be founded.

II. ADMINISTRATIVE RULEMAKING

A. *Review of Informal Rulemaking*

Judicial review of informal administrative rulemaking usually employs a "rational relationship" test: the regulations are upheld when rationally related to a proper government interest.[52] This test was applied to uphold contested regulations in *Wyoming Hospital Association v. Harris*.[53] The Association[54] sought declaratory and injunctive relief rel-

45. *See supra* note 1.

46. *See, e.g.*, McClanahan v. Mulcrome, 636 F.2d 1190 (10th Cir. 1980) (reviewing court must look to the administrative construction given to the meaning of the language used in the regulation, as such interpretation is controlling unless plainly erroneous or inconsistent with the regulation).

47. Sotelo v. Hadden, 721 F.2d 700 (10th Cir. 1983) (involving deference to the U.S. Parole Commission's interpretation and application of parole guidelines); Hughes v. Watt, No. 82-1583 (10th Cir. July 10, 1983) (Department of Interior regulations as to reopening of estate matters involving Native Americans).

48. 706 F.2d 1080 (10th Cir. 1983).

49. *Id.* at 1082.

50. *Id.* at 1082-3. The Tenth Circuit stated that the district court "acted properly in intervening and vacating an ICC tariff construction where, as here, the tariff was ambiguous on its face. This condition is especially subject to court review where the interpretation by the ICC is at odds with the interpretation intended by the drafters of the tariff." *Id.* at 1083.

51. 706 F.2d at 1083.

52. *See* 5 U.S.C. § 706(2)(C) (1982). Administrative rules must be reasonably related to the purpose of the agency's enabling legislation. Mourning v. Family Publications Serv. Inc., 411 U.S. 356, 369 (1973). Regulations will be invalidated by a reviewing court if they are determined to be arbitrary or unreasonable. Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936); *In re* Permanent Surface Mining Reg. Litig., 653 F.2d 514, 523 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 822 (1981). *See also* Herweg v. Ray, 455 U.S. 265, 275 (1982) (reviewing courts have the authority to determine whether an agency's regulations are arbitrary).

53. 727 F.2d 936 (10th Cir. 1984).

54. The Wyoming Hospital Association brought suit on behalf of its institutional members, and was joined by twenty-two individual hospitals. *Id.* at 938.

evant to regulations issued under the "Hill-Burton" hospital construction assistance program.[55] Hill-Burton assists in the "construction and modernization of such public or other non-profit community hospitals . . . as may be necessary . . . to furnish adequate hospital . . . services to all . . . people."[56] A prerequisite to obtaining aid under the Act is the submission to the Surgeon General of a state plan furthering the Act's purposes.[57]

Two assurances are required of such a state plan. First, a "community service assurance" must guarantee medical treatment to all persons residing in the territorial area of the hospital.[58] Second, an "uncompensated care assurance" requires that a reasonable volume of medical services be given to persons unable to pay for services.[59]

Subpart F of the disputed regulations deleted a prior presumption of compliance with the volume of care provision where the hospital adopted an "open door" policy.[60] Under the open door policy, the hospital was not held to a minimum service requirement if it certified that it would treat any person regardless of his ability to pay.[61] The new regulations require hospitals to provide a minimum percentage of uncompensated care[62] in order for states to obtain federal assistance under Hill-Burton.[63] Plaintiffs had elected to comply under the previous "open door" policy and thus appealed these changes. Plaintiffs argued that the new regulations exceeded the Secretary's statutory authority.[64]

The Tenth Circuit applied the "rational basis" standard,[65] and found that the contested regulations had a rational basis and thus were within the Secretary's delegated authority.[66] Under Hill-Burton,[67] the Secretary has broad authority to promulgate general regulations which extend to regulation of community service assurances and uncompensated care assurances.[68] The new regulations attempted to develop more specific standards ensuring that hospitals provide a reasonable volume of uncompensated care. The regulations promoted certainty in compliance and fairness; hence, the court held that they were rationally

55. 42 U.S.C. §§ 291 to 291o-1 (1982).
56. *Id.* § 291(a) (1982).
57. *Id.* §§ 291c, 291d (1982).
58. 727 F.2d at 938.
59. *Id. See* 42 U.S.C. § 291c(e) (1982).
60. *See Wyoming Hosp. Ass'n*, 727 F.2d at 938.
61. *Id.*
62. The minimum percentage must be either a level of three percent of its operating costs or a level of ten percent of the amount of the federal assistance. *See* 42 C.F.R. § 124, subpart F (1980).
63. 42 U.S.C. §§ 291 to 291o-1 (1982).
64. 727 F.2d at 938-39.
65. *Id.* at 939 (citing American Hosp. Ass'n v. Schweiker, 721 F.2d 170 (7th Cir. 1983), *appeal pending*; Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976)). To be upheld by a reviewing court, administrative regulations must be both within the agency's authority as delegated by the enabling statute, and must be reasonably related to the purpose of the statute. *See supra* note 52.
66. 727 F.2d at 940. *See* 42 U.S.C. § 291c (1982).
67. 42 U.S.C. §§ 291-291o-1 (1982).
68. 727 F.2d at 939.

related to the purpose of originating legislation and were a valid exercise of the Secretary's discretion.[69]

B. *Rulemaking vs. Adjudication*

One of the most interesting cases decided recently by the Tenth Circuit held that an agency abused its discretion by attempting to propose legislative policy by means of an adjudicative order. In *First Bancorporation v. Board of Governors of the Federal Reserve System*,[70] the Board had approved plaintiff's application concerning acquisition of Beehive Financial Corporation subject to two conditions. First, Beehive could not offer both negotiable order of withdrawal (NOW) accounts and commercial loans. Allegedly, performance of both functions made Beehive a bank rather than an industrial loan company under the Bank Holding Company Act.[71] Second, if Beehive offered NOW accounts instead of commercial loans, these accounts would be subject to Board regulations governing reserves and interest limitations.[72] In addition, the Board ordered that plaintiff's industrial loan company, Foothill Thrift & Loan Co., conform to these conditions.[73] An unrelated company subsequently acquired Beehive, and plaintiff appealed the Board's order concerning Foothill.

The Tenth Circuit set aside this order on the ground that it was, in effect, an announcement of a significant policy change.[74] As such, it was not adjudication but rather substantive rulemaking subject to the rulemaking provisions of the APA.[75] Though the choice between rulemaking and adjudication normally lies within agency discretion,[76] "there may be situations where the agency's reliance on adjudication

69. *Id.*
70. 728 F.2d 434 (10th Cir. 1984).
71. *Id.* at 435. *See* 12 U.S.C. §§ 1841-1850 (1982).
72. 728 F.2d at 435.
73. *Id.*
74. *Id.* at 437.
75. 5 U.S.C. § 553 (1982). Administrative action under the Administrative Procedure Act is classified as either rulemaking or adjudication. Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1160 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Rulemaking can be described as the promulgation of new policy which governs future conduct, while adjudication involves the application of such policy to the facts of a particular case; however, such a distinction may be difficult to draw in actual practice. *Id.* at 1165 (citing United States v. Florida East Coast Ry., 410 U.S. 224, 245 (1973)). "Rules" are characterized under the APA in accordance with their effect on the public. Herron v. Heckler, 576 F. Supp. 218, 230 (N.D. Cal. 1983). Substantive rules have a substantive impact on the rights and duties of the person subject to regulation. Burroughs Wellcome Co. v. Schweiker, 649 F.2d 221, 224 (4th Cir. 1981) (quoting Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 669 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978)).
76. The Supreme Court has been reluctant to specifically require that new agency policy should be formulated through rulemaking rather than adjudication and has left this choice within the agency's discretion. *See* SEC v. Chenery Corp., 332 U.S. 194 (1947); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). The recent judicial trend, however, has been to favor rulemaking over adjudication for the formulation of new policy. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 7:25 (Supp. 1982). This trend is particularly pronounced in the Ninth Circuit, but the future of this trend remains in doubt. For a rare "ghost" opinion dealing with this issue, see Ford Motor Co. v. FTC, 654 F.2d 599 (9th Cir. 1981).

would amount to an abuse of discretion . . . ."[77] The court pointed to the Board's instructions issued to other bank holding companies which stated that Board policy toward NOW accounts was determined in its order to plaintiff. This led the court to conclude that the Board's order was simply a vehicle by which to change general policy. The court stated: "That the Board's order is an attempt to construct policy by adjudication is evident. . . . We must conclude that the Board abused its discretion by improperly attempting to propose legislative policy by an adjudicative order."[78]

In reaching this conclusion, the Tenth Circuit rejected the Board's argument that its order was an interpretative rule and therefore exempt from the rulemaking provisions of the APA.[79] The court stated that an interpretative rule is a mere clarification or explanation of an existing statute or regulation,[80] whereas the Board's order announced a significant policy change. Thus, the order was a substantive rule subject to APA rulemaking provisions.[81] Since these provisions were not complied with, the Tenth Circuit set aside the Board's order.

III. ADMINISTRATIVE ADJUDICATION: REVIEW OF AGENCY FACT-FINDING

The APA provides for judicial review of administrative findings of fact under the "substantial evidence" test.[82] The test requires only that there be enough evidence in the record, viewed as a whole, that a reasonable person could have reached the same conclusion as the agency. The substantial evidence test is most often applied during review of administrative proceedings involving a formal trial-type hearing. By its very nature, the substantial evidence test is highly deferential towards

77. 728 F.2d at 437 (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). *See also* Automobile Club of New York, Inc. v. Cox, 592 F.2d 658 (2d Cir. 1979) (holding that approval of rates for the future constitutes rulemaking, not adjudication, for purposes of application of APA sections); National Small Shipments Traffic Conference, Inc. v. ICC, 725 F.2d 1442 (D.C. Cir. 1984) (holding that trial-like procedures are particularly appropriate for retroactive determination of specific facts about individual parties, and, in certain cases, due process may even require such procedures); Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802 (D.C. Cir. 1983) (holding that any claim of exemption from APA rulemaking requirements will be narrowly construed and only reluctantly countenanced); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).

78. 728 F.2d at 438 (citations omitted).

79. *Id. See* 5 U.S.C. § 553(b)(A), (d)(2) (1982).

80. 728 F.2d at 438 (quoting Guardian Fed. Sav. & Loan v. Federal Sav. & Loan Ins. Corp., 589 F.2d 658, 664 (D.C. Cir. 1978)). Interpretative rules are clarifications or explanations of existing laws or regulations. Continental Oil Co. v. Burns, 317 F. Supp. 194, 197 (D. Del. 1970). APA rulemaking procedures are not applicable to interpretative rules. Cabais v. Egger, 690 F.2d 234, 238 (D.C. Cir. 1982); Production Tool Corp. v. Employment & Training Admin., 688 F.2d 1161, 1165-6 (7th Cir. 1982). However, substantive rules create rather than interpret law. New Jersey v. Dept. of HHS, 670 F.2d 1262, 1282 (3d Cir. 1981). Substantive rules affect existing rights and obligations. Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 482 (2d Cir. 1972). Thus, substantive rules are subject to the APA's rulemaking procedures. Louisiana-Pac. Corp. v. Block, 694 F.2d 1205, 1209 (9th Cir. 1982).

81. 728 F.2d at 438.

82. *See* 5 U.S.C. § 706(2)(E) (1982). *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (defining the "substantial evidence" test as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

the administrative decision. Although the agency must base its decision on something more than a "mere scintilla," the reviewing court can usually find this minimal quantum of evidence upon reviewing the record as a whole. The presence or absence of "substantial evidence" was a key factor in several cases recently decided by the court of appeals. Not surprisingly, out of the seven cases in which the Tenth Circuit applied the substantial evidence test,[83] only one was remanded to the agency for lack of substantial evidence.[84]

In *Winn v. Schweiker*,[85] the Tenth Circuit held that the record did not support a decision by the Department of Health and Human Services to terminate plaintiff's disability insurance benefits under the Social Security Act.[86] The administrative law judge (ALJ) determined that Winn had supervisory experience which was transferable; however, the record was contradictory as to such experience and totally lacking as to details.[87] The case was remanded for reconsideration and development of a more complete record on this factual issue.[88]

IV. JURISDICTION

A. *Exhaustion of Administrative Remedies*

There exist a number of self-imposed restraints on judical review of agency action which allow courts to refuse to consider the merits of a case. Chief among these threshold questions is the doctrine of exhaustion of remedy. In *Romero-Carmona v. Department of Justice*,[89] the Tenth Circuit held the case nonjusticiable because the petitioner failed to exhaust his administrative remedies.[90] Romero-Carmona sought review of a denial of a stay of deportation by a district director of the Immigration and Naturalization Service (INS). An immigration judge originally found petitioner to be deportable on August 25, 1978, following three separate illegal entries into the United States. The judge granted petitioner's request for voluntary departure in lieu of deportation. Petitioner waived his right to appeal the immigration judge's decision but failed to return to Mexico, ignoring a subsequent deportation order. Petitioner was then arrested on February 18, 1983, and again agreed to return to Mexico. Petitioner failed to return and instead requested a

83. The six cases affirming the agency decision included: Wyoming Bancorporation v. Board of Governors, 729 F.2d 687 (10th Cir. 1984); Murdock v. Schweiker, No. 82-1849 (10th Cir. Jan. 6, 1984); Turner Bros. Trucking v. ICC, 709 F.2d 1351 (10th Cir. 1983); Ringer v. Helms, No. 82-1190 (10th Cir. Aug. 24, 1983); Manzanaves v. Heckler, No. 83-1223 (10th Cir. Dec. 15, 1983); Hall v. Heckler, No. 82-2578 (10th Cir. Dec. 15, 1983).

84. Winn v. Schweiker, 711 F.2d 946 (10th Cir. 1983).

85. *Id.*

86. *Id.* at 946.

87. *Id.* at 948.

88. *Id.* at 949.

89. 725 F.2d 104 (10th Cir. 1984).

90. *Id.* at 105-6. *See* 8 U.S.C. § 1105a(c) (1982) (which provides: "An order of deportation . . . shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations . . . .").

stay of deportation.[91]

The Tenth Circuit held that a denial of a stay of deportation can be reviewed only if the deportability issue is reviewable at the same time.[92] Because Romero-Carmona did not contest the original finding of deportability or preserve his right to appeal that decision, he failed to exhaust his administrative remedies.[93] Petitioner also failed to timely appeal the deportation order of August 25, 1978.[94] The court found that the issue of petitioner's deportability was not reviewable and dismissed the petition for review.

As a result of the exhaustion doctrine, the court of appeals also failed to reach the merits in *Bartlett v. Schweiker*.[95] In this case, recipients of social security benefits brought suit in federal district court, claiming that they were totally disabled under the Social Security Act's definitions and that their benefits were wrongfully denied or terminated.[96] District court jurisdiction to review a denial of social security benefits by the Secretary is statutory, permitting an individual to seek judicial review within sixty days after receiving notice of a Secretary's "final decision" following a hearing.[97]

The Supreme Court has held that this "final decision" requirement is "central to the grant of subject matter jurisdiction,"[98] and consists of two elements.[99] One is waivable and the other is not. "The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary."[100] The exhaustion requirement can be waived by the Secretary if further review is unwarranted due to fulfillment of the agency's internal needs or if the relief sought is beyond the Secretary's power.[101] A waiver of the exhaustion requirement may also be found by a reviewing court if a constitutional claim is wholly collateral to the substantive claim of entitlement, and if plaintiff can show irreparable injury not compensable by retroactive payments.[102] None of these arguments were success-

91. 725 F.2d at 104-05.

92. *Id.* at 105 (citing Reyes v. INS, 571 F.2d 505, 507 (9th Cir. 1978)). The rationale for this rule is that review of the denial of a stay of deportation is ancillary to the deportability issue, and therefore both determinations should be made at the same time. Foti v. INS, 375 U.S. 217, 227 (1963). *See also* Antolos v. INS, 402 F.2d 463, 464 (9th Cir. 1968).

93. 725 F.2d at 105. *See* 8 U.S.C. § 1105a(c) (1982).

94. 725 F.2d at 105. *See* 8 U.S.C. § 1105a(a)(1) (1982).

95. 719 F.2d 1059 (10th Cir. 1983).

96. *Id.* at 1060.

97. 42 U.S.C. § 405(g) (1982).

98. *Bartlett*, 719 F.2d at 1060 (citing Weinberger v. Salfi, 422 U.S. 749, 764 (1975)).

99. *Bartlett*, 719 F.2d at 1061.

100. *Id.* (quoting Mathews v. Eldridge, 424 U.S. 319, 328 (1976)).

101. 719 F.2d at 1061 (citing Mathews v. Eldridge, 424 U.S. at 330; Weinberger v. Salfi, 422 U.S. 749, 764 (1975)).

102. 719 F.2d at 1061 (citing Mathews v. Eldridge, 424 U.S. at 330-31 & n.11; Franks v. Nimmo, 683 F.2d 1290, 1295 (10th Cir. 1982); New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 850 (10th Cir. 1982); Martinez v. Richardson, 472 F.2d 1121, 1125 (10th Cir. 1973)).

fully advanced by the plaintiffs. The court held that waiver of the exhaustion requirement was not justified and affirmed dismissal of the case for failure to meet this requirement.[103]

B. *Timeliness*

In *Quivira Mining Co. v. EPA*,[104] the Tenth Circuit affirmed the dismissal of plaintiffs' complaint for lack of jurisdiction. Quivira Mining and other energy-related companies challenged an Environmental Protection Agency (EPA) regulation establishing standards for permissible doses of radiation released from uranium fuel cycle operations.[105] Plaintiffs claimed that EPA lacked the authority to promulgate the regulation. Plaintiffs sought a declaratory judgment that the regulation was invalid and an injunction against its enforcement.[106]

The district court dismissed this action, concluding that the Atomic Energy Act[107] "referred all appeals of such proceedings directly to the Court of Appeals under the Hobbs Act."[108] The Tenth Circuit also dismissed the action, concluding that the Presidential Reorganization Plan of 1970,[109] which transferred regulatory authority over environmental standards regarding radioactive materials from the Atomic Energy Commission (AEC) to the EPA, did not alter the original exclusive review provisions for AEC rulemaking.[110] Plaintiffs therefore had long since missed, under the Hobbs Act,[111] the deadline for appellate review of the challenged regulations[112] and thus were denied review.[113]

In *White v. Schweiker*,[114] the court affirmed the dismissal of plaintiff's complaint for lack of subject matter jurisdiction. Plaintiff sought review of the Social Security Administration's (SSA) denial of her claim for survivor's benefits.[115] White was originally awarded benefits effective as of April 1974 and requested reconsideration on the ground that benefits should have been effective from 1970. Plaintiff did not file a request for a hearing within the sixty-day time limit, but waited two years before making the request. Nevertheless, the ALJ granted the request and affirmed the original award. Plaintiff then sought review of the ALJ's decision by the Appeals Council, which dismissed the case for lack of good cause for late filing of hearing request.[116]

The Tenth Circuit concluded that a decision of the SSA not to reo-

103. 719 F.2d at 1061-63.
104. 728 F.2d 477 (10th Cir. 1984).
105. *Id.* at 478. *See* 40 C.F.R. Part 190.10(a) (1983).
106. 728 F.2d at 478.
107. 42 U.S.C. §§ 2011-2296 (1982).
108. 728 F.2d at 478. The pertinent provision of the Hobbs Act is codified at 28 U.S.C. § 2342 (1982).
109. 5 U.S.C. app. § 2 (1982). *See* 40 C.F.R. § 190 (1984).
110. 728 F.2d at 481.
111. *See* 28 U.S.C. § 2344 (1982).
112. 728 F.2d at 484.
113. *Id.*
114. 725 F.2d 91 (10th Cir. 1984).
115. *Id.* at 92. Judicial review was sought under 42 U.S.C. § 405(g) (1982).
116. 725 F.2d at 92-93.

pen a claim is unreviewable, whether or not the SSA held a hearing on whether good cause for the late filing was shown.[117] The Court also held that the Appeals Council may substitute its judgment for that of the ALJ on any matter committed to the absolute discretion of the SSA,[118] and the federal courts have no jurisdiction to review such an action.[119]

V. Other Limitations on Agency Action

A. *Procedural Due Process*

The constitutional requirement of procedural due process remains a viable source of limitation on agency action. In *Allison v. Heckler*,[120] the Tenth Circuit held that an ALJ's use of a post-hearing medical report constituted a denial of Allison's due process rights. Allison sought review of an ALJ's denial of Social Security benefits.[121] In reversing this decision, the Tenth Circuit, per Judge Seymour, stated that the ALJ erred in adopting a doctor's conclusions made upon post-hearing review of Allison's medical records. When these medical conclusions became the basis of the ALJ's finding of non-disability, plaintiff's right to "a full and fair hearing" was abrogated.[122] The Court remanded the case with instructions to provide plaintiff an opportunity to subpoena and cross-examine the doctor, and to offer rebuttal evidence.[123]

The Tenth Circuit also determined that the plaintiff was entitled to a hearing in *City of Colorado Springs v. United States*.[124] The City sought review of an ICC order authorizing the Denver & Rio Grande Railroad Company (D & RGW) to raise its rates based on the filing of tariffs on intrastate freight. Early in 1980, several Colorado railroads, including the D & RGW, had sought permission from the Public Utilities Commission (PUC) to implement a four percent general rate increase on Colorado intrastate traffic. Colorado Springs protested this increase and PUC rejected the increase. The Colorado railroads then petitioned the

117. *Id.* at 93 (citing Davis v. Schweiker, 665 F.2d 934 (9th Cir. 1982); Giacone v. Schweiker, 656 F.2d 1238 (7th Cir. 1981); Rios v. Secretary of HEW, 614 F.2d 25 (1st Cir. 1980); Hensley v. Califano, 601 F.2d 216 (5th Cir. 1979); Carney v. Califano, 598 F.2d 472 (8th Cir. 1979); Teague v. Califano, 560 F.2d 615 (4th Cir. 1977)).

118. 725 F.2d at 94.

119. *Id.* The Court had no jurisdiction to review the Appeals Council's action under 42 U.S.C. § 405(g) (1984).

Plaintiff also argued that the Appeals Council violated her due process rights because it did not notify her that it would reconsider the ALJ's good cause finding. The court rejected this constitutional claim, stating:

> It would be good practice for the Appeals Council to notify a claimant that it is considering reopening the good cause issue—a practice it apparently now follows—but we cannot say the Due Process Clause requires that a claimant be notified and be given a chance to reargue the good cause issue before the Appeals Council.

725 F.2d at 94 (citing generally Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976)).

120. 711 F.2d 145 (10th Cir. 1983).

121. *Id.* at 146.

122. *Id.* at 147 (citing Cowart v. Schweiker, 662 F.2d 731, 737 (11th Cir. 1981); Gullo v. Califano, 609 F.2d 649, 650 (2d Cir. 1979); Lonzollo v. Weinberger, 534 F.2d 712, 714 (7th Cir. 1976)).

123. 711 F.2d at 147-48.

124. 724 F.2d 857 (10th Cir. 1983).

ICC, requesting that the PUC's rejection of their proposed rate increase be vacated.[125] Shortly afterwards, Congress enacted the Staggers Motor Carrier Act of 1980.[126] Prior to this enactment, the railroads' intrastate transportation services and rates were subject to state regulation under ICC review. The Staggers Act, however, abrogated most state jurisdiction over intrastate rates.[127]

An ICC ALJ accordingly ruled that the Staggers Act nullified the Colorado PUC order, leaving the railroads free to implement their increase.[128] The ICC Review Board affirmed this decison.[129] The Tenth Circuit reversed and remanded to the ICC,[130] holding that a retroactive application of the Staggers Act to all legal issues obviated the right of Colorado Springs to a hearing. To deny such a hearing constituted a denial of due process.[131]

B. *Punitive Sanctions*

In *United States v. Sheshtawy*,[132] the Tenth Circuit clarified the limitation on the goverment's authority to revoke citizenship as a punitive sanction. In this case, the district court revoked plaintiff's citizenship and cancelled his certificate of naturalization because he failed to disclose a prior arrest on his naturalization questionnaire.[133] In reversing, the Tenth Circuit, per Judge McKay, relied on the Supreme Court's decision in *Chaunt v. United States*,[134] which defined the heavy burden of proof the government carries when it attempts to revoke citizenship for the willful misrepresentation or concealment of material fact.[135] In order to demonstrate that a given fact is "material," the government must

125. *Id.* at 858-59.

126. Pub. L. No. 96-448, 94 Stat. 1913 (1980).

127. The purpose of the Staggers Act is "to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States" and in pursuit of this goal, "to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices." 49 U.S.C. § 10101(a)(4) (1982). To achieve its objectives, this Act gave the Interstate Commerce Commission jurisdiction over transportation by rail carrier, as well as other forms of transportation. 49 U.S.C. § 10501 (1982). For more complete discussion of the Staggers Act and its effect on interstate transportation, see Birkholz, *The Staggers Act of 1980, Deregulations and Reregulation: A Railroad Perspective*, 17 FORUM 850 (1982); Dempsey, *Congressional Intent and Agency Discretion — Never the Twain Shall Meet: The Motor Carrier Act of 1980*, 58 CHI. KENT L. REV. 1 (1981); Kretsinger, *The Motor Carrier Act of 1980: Report and Analysis*, 50 U.M.K.C. L. REV. 21 (1981).

128. 724 F.2d at 859.

129. *Id.*

130. *Id.* at 860.

131. *Id.* The court stated:

> Inasmuch as the Commission took it upon itself to apply the Staggers Act (the parties operated under the assumption that the Staggers Act did not apply), and considering that the Commission's decision caused Colorado Springs to lose its right to a hearing under pre-Staggers Act law, we think it constituted manifest injustice for the Commission to deny Colorado Springs a hearing.

Id. at 860 (citing Bradley v. School Bd. of Richmond, 416 U.S. 696, 711 (1974)).

132. 714 F.2d 1038 (10th Cir. 1983).

133. *Id.* at 1039.

134. 364 U.S. 350 (1960).

135. *Id.* at 353.

"show by 'clear, unequivocal, and convincing' evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."[136] Justice Blackmun, in a concurring opinion to *Fedorenko v. United States*,[137] concluded that the *Chaunt* test requires that the government demonstrate the existence of actual disqualifying facts which would themselves warrant denial of petitioner's citizenship.[138]

The Tenth Circuit adopted Justice Blackmun's interpretation of *Chaunt* and outlined a balancing test which weighs the "importance of securing the stability and security of naturalized citizenship against the risk . . . of encouraging lying in connection with applications for citizenship."[139] The court concluded that in this case the danger of unwarranted revocation of naturalized citizenship far outweighs the danger of dishonesty. Serious cases of misrepresentation would still be punishable under the *Chaunt* test,[140] but since the government had not established facts warranting denial of plaintiff's citizenship, the court concluded that revocation under section 1451(a) was not justified.[141]

The Tenth Circuit also rejected the government's alternative argument that revocation was justified because the plaintiff failed to meet all of the statutory prerequisites to naturalization.[142] The government contended that plaintiff, as a liar, was not of good moral character and therefore ineligible for citizenship.[143] The court held that such ineligibility can only result from false testimony concerning *material* facts,[144] and that plaintiff's statements were not made in regard to any material facts. The Tenth Circuit reinstated plaintiff's citizenship.[145]

Susan J. Tyburski

136. *Id.* at 355.
137. 449 U.S. 490, 518-26 (1981) (Blackmun, J., concurring).
138. *Id.* at 524.
139. 714 F.2d at 1040.
140. *Id.* at 1040-41.
141. *Id.* at 1041. *See* 8 U.S.C. § 1451(a) (1982).
142. 714 F.2d at 1041.
143. *See* 8 U.S.C. §§ 1101(f)(6), 1427(a)(3) (1976).
144. 714 F.2d at 1041 (citing Fedorenko v. United States, 449 U.S. 490, 507 (1981)).
145. *Id.* Judge McWilliams dissented, arguing that if Sheshtawy had answered the questionnaire truthfully, the authorities may have started an investigation *"possibly leading* to other facts warranting denial of citizenship." *Id.* at 1042 (emphasis in original). Without explanation, Judge McWilliams asserted that this meets the second test in *Chaunt*. *Id.*