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# Administrative Law

# ADMINISTRATIVE LAW

## OVERVIEW

Just after the close of the survey period, the United States Supreme Court decided *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*.[1] *Baltimore Gas & Electric* is significant for two reasons. First, it is the final pronouncement by the Supreme Court in the litigation concerning the validity of the Nuclear Regulatory Commission (NRC) rule that was the subject of the landmark administrative law case *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.[2] Second, while *Baltimore Gas & Electric* did not make any profound change in administrative jurisprudence, it is a contemporary Supreme Court reaffirmation of the philosophy announced in *Vermont Yankee*: the fundamental principle guiding judicial review of administrative action must be one of deference. As long as a federal agency complies with substantive and procedural statutory requirements, a reviewing court must defer to agency decisionmaking even when "the court is unhappy with the result reached."[3]

The Tenth Circuit did not deviate from this general rule of judicial deference during the survey period. The court decided thirty cases involving review of agency decisionmaking, and in only three of these cases did the Tenth Circuit directly reverse an agency decision.[4] One of these three cases was especially important because the Tenth Circuit, apparently for the first time, permitted the estoppel doctrine to be used against the federal government.[5]

This survey considers the estoppel case in some detail because of its novelty. Another Tenth Circuit decision, which considers the propriety of generic rulemaking, is also given considerable treatment. The case, *United States v. Thompson*,[6] concerned the attempt of antinuclear demonstrators to use an administrative law defense to avoid criminal prosecution under a federal antitrespassing statute. The third case given in-depth treatment involved the creation of an exception to the primary jurisdiction doctrine.[7] Other administrative law cases reviewed for this survey deal primarily with judicial review of agency action, and are given less extensive treatment. Un-

1. 103 S. Ct. 2246 (1983).

2. 435 U.S. 519 (1978).

3. 103 S. Ct. at 2252 (quoting *Vermont Yankee*, 435 U.S. at 555).

4. *See* Home Savings & Loan Ass'n v. Nimmo, 695 F.2d 1251 (10th Cir. 1982) (for discussion *see infra* notes 75-157 and accompanying text); Broadbent v. Harris, 698 F.2d 407 (10th Cir. 1983) (per curiam) (for discussion *see infra* notes 158-66 and accompanying text); Cavitt v. Schweiker, 704 F.2d 1193 (10th Cir. 1983) (for discussion *see infra* notes 167-71 and accompanying text).

5. Home Savings & Loan Ass'n v. Nimmo, 695 F.2d 1251 (10th Cir. 1982).

6. 687 F.2d 1279 (10th Cir. 1982). For discussion of this case *see infra* notes 8-75 and accompanying text.

7. Mountain States Natural Gas Corp. v. Petroleum Corp. of Texas, 693 F.2d 1015 (10th Cir. 1983). For discussion of this case see *infra* notes 198-236 and accompanying text.

published decisions, and published decisions of little precedential impact, are omitted from this article.

## I. GENERIC RULEMAKING AND JUDICIAL DEFERENCE: *UNITED STATES V. THOMPSON*

### A. *The Case in Context*

Probably the most notable administrative law case decided by the Tenth Circuit during this survey period was *United States v. Thompson*,[8] a four to three en banc decision. *Thompson* upheld federal trespassing convictions against antinuclear demonstrators at Rocky Flats (a nuclear weapons manufacturing facility),[9] rejecting the demonstrators' assertion that their convictions were invalid because the Department of Energy (DOE) did not conduct rulemaking proceedings prior to designating the trespass area off-limits.[10] In so doing, the Tenth Circuit en banc reversed a previous Tenth Circuit which had found the convictions invalid.[11]

The issue in *Thompson* was whether DOE could rely upon a generic rulemaking,[12] promulgated two decades earlier pursuant to 42 U.S.C. § 2278a,[13] as a sufficient basis for designating the area where the demonstrators were arrested as off-limits. Important to this article's analysis, generic rulemaking issues were also treated in the landmark *Vermont Yankee* decision and its sequel, *Baltimore Gas & Electric*.[14]

*Vermont Yankee* established a judicial policy against imposing procedural requirements on agencies[15] in addition to the bare minimum prescribed by either the organic statute[16] or the Administrative Procedure Act (APA).[17] This policy has been criticized as a major setback in the development of administrative jurisprudence because it potentially destroys an entire body

8. 687 F.2d 1279 (10th Cir. 1982).

9. *Id.* at 1286.

10. *Id.*

11. *See* United States v. Seward, No. 79-1711 (10th Cir. Jan. 5, 1981), *rev'd sub nom.* United States v. Thompson, 687 F.2d 1279 (10th Cir. 1982)(en banc).

12. A generic rulemaking sets out the regulatory principles or procedures which will control a class of subsequent administrative actions.

13. 42 U.S.C. § 2278a (1976). Relevant section 2278a regulations are found at 10 C.F.R. §§ 860.1-.8 (1983).

At the time the regulations were promulgated, the Atomic Energy Commission was the agency authorized to implement section 2278a. This authority is now vested in DOE. *See* 42 U.S.C. § 7151 (Supp. V 1981) (listing powers assumed by DOE). *See also* 687 F.2d at 1286 n.2 (McKay, J., dissenting) (tracing source of DOE power under section 2278a).

14. The issue in *Thompson*, in essence, was whether a generic rulemaking could be used to implement the provisions of section 2278a. In *Vermont Yankee* and *Baltimore Gas & Elec.* the issue was whether adoption of the generic rulemaking approach constituted an abuse of discretion. As discussed below, the majority in *Thompson* should have decided the case by evaluating the validity of the initial generic rulemaking as was done in *Vermont Yankee* and *Baltimore Gas & Elec.* *See infra* notes 37-64 and accompanying text.

15. Justice Rehnquist, writing for the majority, stated: "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." 435 U.S. at 524.

16. "Organic statute," when referred to in this article, means the statute authorizing agency action.

17. 5 U.S.C. §§ 551-706 (1982).

of judge-made administrative common law.[18] Nonetheless, *Baltimore Gas & Electric* sustains the policy of deference established by *Vermont Yankee*.[19] Accordingly, the Tenth Circuit's *Thompson* decision (which rejects an attempt to require DOE to engage in rulemaking not specifically required by organic statute or APA) is in harmony with the policy of deference established by the Supreme Court.

The Tenth Circuit did not, however, resolve the rulemaking issue in *Thompson* by employing an analysis similar to that used in *Vermont Yankee* and *Baltimore Gas & Electric*, where the Court focused on whether the generic implementing regulation conformed with the controlling statute.[20] The Tenth Circuit instead became embroiled in a debate over the significance of designating the additional property as off-limits, and accordingly failed to focus on whether DOE's actions were taken pursuant to a valid generic rule.[21] As a result, Judge McKay's forcefully stated dissent[22] is more persuasive than it should have been. The remainder of this comment analyzes the *Thompson* opinions based upon a generic rulemaking approach.

### B. *Statement of the Case*

The dispute in *Thompson* stemmed from an attempt by antinuclear demonstrators to use a technical administrative law defense to overturn their criminal convictions for trespassing at Rocky Flats.[23] The demonstrators were arrested for violating 42 U.S.C. § 2278a,[24] a federal statute prohibiting

18. *See, e.g.*, 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 6:36-:37 (2d ed. 1979).

19. *Baltimore Gas & Elec.*, 103 S. Ct. at 2252. The trend towards greater judicial deference to the executive branch in the area of administrative law, beginning with *Vermont Yankee*, is reinforced by the recent Supreme Court decision holding that the legislative veto is unconstitutional. *See* INS v. Chadha, 103 S. Ct. 2764 (1983).

20. *Baltimore Gas & Elec.*, 103 S. Ct. at 2251-52; *Vermont Yankee*, 435 U.S. at 524.

21. *See infra* notes 25-30 and accompanying text.

22. United States v. Thompson, 687 F.2d at 1286 (McKay, J., dissenting).

23. The Rocky Flats Nuclear Plant Site, located in Jefferson County, Colorado, is owned by the Department of Energy and operated by Rockwell International, a private contractor. United States v. Seward, 687 F.2d 1270 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 789 (1983) (companion case to *Thompson* dealing with another group of Rocky Flats demonstrators arrested the same day). A number of other cases dealing with the same illegal demonstration were disposed of by the *Seward* and *Thompson* decisions. *See* United States v. Adams, 687 F.2d 1318 (10th Cir. 1982); United States v. Grodsky, 687 F.2d 1317 (10th Cir. 1982); United States v. Ellsberg, 687 F.2d 1316 (10th Cir. 1982) United States v. Rolfe, 687 F.2d 1315 (10th Cir. 1982) *cert. denied*, 103 S. Ct. 790 (1983); United States v. Ficurra, 687 F.2d 1314 (10th Cir. 1982); United States v. Gruber, 687 F.2d 1313 (10th Cir. 1982); United States v. Stewart, 687 F.2d 1312 (10th Cir. 1982); United States v. Hueftle, 687 F.2d 1305 (10th Cir. 1982); United States v. Dukehart, 687 F.2d 1301 (10th Cir. 1982); United States v. Grose, 687 F.2d 1298 (10th Cir. 1982); United States v. Peters, 687 F.2d 1295 (10th Cir. 1982).

24. 42 U.S.C. § 2278a (1976) provides:

> (a) The Commission is authorized to issue regulations relating to the entry upon or carrying, transporting, or otherwise introducing or causing to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon any facility, installation, or real property subject to the jurisdiction, administration, or in the custody of the Commission. Every such regulation of the Commission shall be posted conspicuously at the location involved.
>
> (b) Whoever shall willfully violate any regulation of the Commission issued pursuant to subsection (a) of this section shall, upon conviction thereof, be punishable by a fine of not more than $1,000.
>
> (c) Whoever shall willfully violate any regulation of the Commission issued pur-

unlawful entry onto federal, nuclear-related facilities.[25] Several of the demonstrators were arrested in an area designated off-limits pursuant to this federal statute only sixteen days prior to the arrests.[26] These demonstrators claimed their arrests were invalid because no rulemaking proceeding was conducted prior to the designation,[27] as allegedly required by the APA.[28]

DOE apparently argued that an additional rulemaking proceeding was unnecessary because the designation was proper based upon earlier generic regulations implementing section 2278a.[29] These regulations, properly adopted in 1963 pursuant to the APA,[30] require only two acts in order to designate an area as off-limits: 1) publishing notice of the designation in the Federal Register,[31] and 2) posting the affected area with notices setting forth the prohibitions.[32] Because DOE's designation of the arrest area satisfied both of these requirements, the majority held that section 2278a was validly applied to the demonstrators.[33]

The dissent, written by Judge McKay and joined by Judges Seymour and Logan, essentially characterized DOE's argument as an agency's attempt to use its own regulations to circumvent the public protections provided by the notice and comment provisions of the APA.[34] The dissent's position was that the designation of the additional property was a "rule" as defined by the APA.[35] DOE was therefore required to follow the notice and comment procedures of the APA prior to the designation; having failed to do so, the off-limits designation was null and void, with the result that the convictions were similarly invalid.[36]

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suant to subsection (a) of this section with respect to any installation or other property which is enclosed by a fence, wall, floor, roof, or other structural barrier shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both.

Power to act pursuant to this statute is now vested in DOE. *See supra* note 13.

25. *Id. See also* S. REP. NO. 2530, 84th Cong., 2d Sess. 5, *reprinted in* 1956 U.S. CODE CONG. & AD. NEWS 4426, 4430.

26. *Thompson*, 687 F.2d at 1281-83. The designation was made on April 13, 1979. 44 Fed. Reg. 22,145 (1979). The demonstrators were arrested on April 29, 1979. 687 F.2d at 1281.

27. *See* United States v. Seward, No. 79-1711 (10th Cir. Jan. 5, 1981), *rev'd sub nom*. United States v. Thompson, 687 F.2d 1279 (10th Cir. 1982) (en banc).

28. *Id.* Section 4 of the APA (codified as amended at 5 U.S.C. § 553 (1982)), requires an agency proposing to adopt substantive rules to publish notice of the proposed rule in the Federal Register at least 30 days prior to the rule's proposed effective date. 5 U.S.C. § 553(b)-(d) (1982). Exemptions are found when the rule involves military affairs or the management of public property, *id.* § 553(a), or when exigencies justify circumventing the notice and comment requirements. *Id.* § 553(b)(B).

For more background on the defendant's original administrative challenges of their conviction and the initial decision by the Tenth Circuit, see *Administrative Law, Eighth Annual Tenth Circuit Survey*, 59 DEN. L.J. 174-76 (1982).

29. 687 F.2d at 1281-82. The regulations implementing section 2278a are codified at 10 C.F.R. §§ 860.1-.8 (1983).

30. 687 F.2d at 1282.

31. 10 C.F.R. § 860.7 (1983).

32. *Id.*

33. 687 F.2d at 1281-83.

34. According to the dissent: "An agency should not be permitted to exempt itself from the congressionally mandated requirements of the APA through its own regulation." *Id.* at 1291 (McKay, J., dissenting).

35. *Id. See also* 5 U.S.C. § 551(4) (1982) (defining rule to include agency statements designed to interpret or prescribe law).

36. 687 F.2d at 1291-95 (McKay, J., dissenting).

C. *The Majority Opinion: A Critique*

The majority opinion failed to show persuasively why the designation of the additional land as off-limits was proper. While the majority initially recognized the generic nature of the section 2278a regulations,[37] the majority's analysis consisted primarily of attempts to minimize the importance of the additional designation.[38] The majority did not clearly state that the generic implementing regulation was a legislative rule, nor did the majority articulate that because the regulation was a legislative rule the scope of the court's review was narrow, limited to determining whether the rule was arbitrary or capricious.[39] Only in one short paragraph did the majority address whether the generic implementing regulation was legislative or interpretative.[40] The majority cited *Skidmore v. Swift & Co.*[41] for the proposition that the generic regulation was the only rulemaking necessary to implement the statute.[42] Reliance upon *Skidmore* is difficult to understand, however, because *Skidmore* stands for the proposition that interpretative rules, although not controlling upon the courts, nonetheless provide guidance that a reviewing court may follow.[43] The generic implementing regulation at issue in *Thompson*, however, is clearly legislative in character.[44] If the majority had focused on characterizing the generic implementing regulation as a legislative rule subject to limited review, the conclusion that DOE's designation was proper would have been more persuasive.

In the same short paragraph where the *Skidmore* citation appears the Tenth Circuit cites *Batterton v. Francis*[45] which, unlike *Skidmore*, deals specifically with the legal significance of legislative rules. *Batterton* stands for the proposition that if Congress delegates legislative rulemaking authority to an agency, judicial review of the agency's legislative rules is limited to an investigation of whether the rules are arbitrary or capricious and are therefore in excess of delegated authority,[46] or whether the agency has arbitrarily ap-

37. *Id.* at 1282-83.

38. For example, the majority characterized the designation as being merely ministerial, *id.* at 1285, and argued that the regulations had been promulgated under the "management of government property" exception to the APA's rulemaking requirements. *Id. See* 5 U.S.C. § 553(a)(2) (1982).

39. *Cf.* Batterton v. Francis, 432 U.S. 416, 425-26 (1977) (review of legislative regulations duly promulgated pursuant to APA limited to inquiry into whether regulations are arbitrary or capricious and therefore in excess of delegated authority).

40. 687 F.2d at 1284. For an overview of the significance of the legislative-interpretative distinction, see 2 K. DAVIS, *supra* note 18, at § 7:8.

41. 323 U.S. 134 (1944).

42. 687 F.2d at 1284.

43. 323 U.S. at 140. *See also* 2 K. DAVIS, *supra* note 18, at § 7:10.

44. Section 2278a specifically authorized the Atomic Energy Commission to promulgate regulations to implement the statute. (Authority to act pursuant to those regulations was later transferred to DOE. *See supra* note 13). Specific statutory authorization to promulgate regulations is generally treated as a delegation of authority to promulgate legislative regulations. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 301-03 (1979); 2 K. DAVIS, *supra* note 18, at § 7:8. Additionally, section 2278a(b) provides that violations of regulations issued pursuant to section 2278a will be punishable, clearly indicating congressional delegation of lawmaking power. *See supra* note 24.

45. 432 U.S. 416 (1977).

46. *Id.* at 425-26.

plied the rule.[47] Accordingly, DOE's action could only be set aside upon a showing that use of a generic implementing regulation was an arbitrary or capricious interpretion of section 2278a, or upon a showing that the regulations had been arbitrarily applied.

Section 2278a was enacted to assist in protecting nuclear facilities against security dangers created by unauthorized entry.[48] The Senate report accompanying the statute plainly stated that the authority conferred would be standby authority.[49] Section 2278a manifests this congressional intent to create agency discretion in controlling application of the antitrespassing law: the only limitation section 2278a places on agency discretion in promulgating regulations is the requirement that notice of designation be posted.[50] Given the scope of agency discretion and the standby nature of agency authority, use of a generic implementing regulation does not appear to be an "arbitrary and capricious" interpretation of the statute. Given the absence of any allegation that the section 2278a regulations were arbitrarily applied to the Rocky Flats demonstrators, and in light of the limited scope of judicial review, the agency's designation was clearly lawful.

Perhaps the reason the Tenth Circuit majority chose to focus its analysis on the designation rather than the validity of the implementing regulation was to refute the demonstrators' argument based upon *Joseph v. United States Civil Service Commission*.[51] At issue in *Joseph* was a regulation,[52] promulgated by the United States Civil Service Commission (Commission), which exempted government employees in certain cities from the Hatch Act.[53] The Commission attempted to add the District of Columbia to the list of exempt cities without engaging in the notice and comment rulemaking procedures mandated by the APA.[54] When this action was challenged, the Commission argued that the amendment was an "interpretative" rule and that rulemaking proceedings were therefore not required to add the District of Columbia to the list.[55] The District of Columbia Circuit disagreed, finding that because the Commission's actions involved promulgation of legislative rules, rulemaking proceedings were required prior to adding a city to the list.[56]

The majority in *Thompson* attempted to distinguish *Joseph* on its facts.[57] The dissent, on the other hand, considered the situation in *Thompson* a "close

47. *See* 5 U.S.C. § 702 (1982) (providing for judicial review of wrongful agency action).

48. S. REP. NO. 2530, 84th Cong., 2d Sess. 5, *reprinted in* 1956 U.S. CODE CONG. & AD. NEWS 4426, 4430.

49. *Id.*

50. *See* 42 U.S.C. § 2278a(a) (1976).

51. 554 F.2d 1140 (D.C. Cir. 1977).

52. 5 C.F.R. § 733.124(c) (1984).

53. 5 U.S.C. §§ 7321-7328 (1982). The Hatch Act is designed to prevent federal employees from actively engaging in political campaigns. *See* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). The Civil Service Commission is authorized to create specified exemptions to the Hatch Act. 5 U.S.C. § 7327(b) (1982) (as amended).

54. 554 F.2d at 1152.

55. *Id.* at 1152-53.

56. *Id.*

57. The majority stated: "The point is, of course, that something entirely new, a new city, was added in *Joseph* which had not been considered before. This is quite different from the case before us where all [facilities subject to designation] had been considered before . . . and the regulation applied to all." 687 F.2d at 1284.

comparison"[58] to the situation in *Joseph* and found the reasoning applied in *Joseph* to be "directly applicable" to *Thompson*.[59] Noticeably absent in either the majority's or the dissent's treatment of *Joseph* was a comparison between the statutes at issue in *Joseph* and *Thompson*. Comparison of the two statutes shows that the analysis used in *Joseph* was not appropriate for *Thompson*, making *Joseph* inapposite.

The statute at issue in *Joseph* gave discretionary rulemaking authority to the Commission to promulgate rules exempting government employees in certain cities from restrictions imposed by the Hatch Act.[60] Before the Commission could make such an exemption, however, the statute required the Commission to make two findings vital to the statutory purpose: 1) the municipality was in either Maryland or Virginia or a "majority of the voters are employed by the Government of the United States";[61] *and* 2) special or unusual circumstances existed making an exemption in the "domestic interest" of the employees or individuals in the particular municipality.[62] These two statutorily required findings must be made for each municipality to be exempted from the Hatch Act. Therefore, given the statutory requirements, an individual rulemaking proceeding was necessary to create the record necessary to ensure that the Commission had not exceeded its authority, abused its discretion, or acted arbitrarily or capriciously in granting an exemption.

The statute in *Thompson* presents a different situation because there are no such statutorily prescribed preconditions which must be evaluated in order to effectuate the statute. All that is *required* of an agency enforcing section 2278a is to provide the detail on where and how the statute will be enforced.[63] Given this much authorized agency discretion, a generic rulemaking that provides this detail satisfies the requirements of the APA. The majority missed an important point by failing to analyze the very different statutory requirements imposed in each case. In *Joseph*, a rulemaking proceeding was needed to make a record sufficient to substantiate important statutorily required findings.[64] In *Thompson*, however, the generic regulation

58. *Id.* at 1292 (McKay, J., dissenting).

59. *Id.* The *Joseph* court reasoned that because a declaration of exemption was binding on a court, and because only legislative regulations can bind courts, the declaration of exemption was a legislative rule subject to the APA's notice and comment requirements. 554 F.2d at 1152-53. Judge McKay reasoned that because an off-limits designation was binding on a court, *Joseph*'s legislative rule rationale required notice and comment proceedings for all designations. 687 F.2d at 1293-93 (McKay, J., dissenting).

60. The statute interpreted in *Joseph* reads: "The Office of Personnel Management [formerly the Civil Service Commission] . . . may prescribe regulations permitting employees and individuals [covered by the Hatch Act] . . . to take an active part in political management and political campaigns involving the municipality or other political subdivisions in which they reside." 5 U.S.C. § 7327(b) (1982).

61. 5 U.S.C. § 7327(b)(1) (1982). In *Joseph*, the Court determined that the first part of the regulation applied to the geographical areas adjacent to Washington, D.C., but not to Washington, D.C. itself. 554 F.2d at 1154-55. A regulation which exempted the District of Columbia from the Hatch Act could therefore only be valid if a majority of the voters within the District of Columbia worked for the government of the United States. *Id.* at 1155.

62. 5 U.S.C. § 7327(b)(2) (1982).

63. *See supra* note 25 (full text of section 2278a).

64. The importance of a rulemaking record to support an exemption is shown by the District of Columbia Circuit's conclusion that the then-existing record was inadequate to sustain a

detailing how the statute was going to be implemented satisfied the statutory mandate.

D. *The Dissent*

By concentrating on the designation itself rather than the nature of the implementing regulation and the proper scope of review, the majority unnecessarily provided the dissent with a basis for its analysis. The dissent highlighed the significant impact the designation had upon the demonstrators, turning a political protest previously free from federal strictures into a federal crime.[65] The majority's brief generic regulation discussion was criticized as allowing an agency to circumvent the APA's procedural protections.[66] Given the more than interpretative nature of these regulations and the significant power they conferred, policy considerations required application of the APA absent a specific statutory exemption.[67] Essentially, the dissenter believed that permitting the agency to rely upon the earlier generic rulemaking provided the agency with an opportunity to abuse its authority.[68]

E. *Summation*

The antitrespassing statute in *Thompson* gave DOE the authority to promugate legislative rules.[69] Judicial review of those rules and any action taken pursuant thereto is limited to investigating whether the agency has acted arbitrarily or capriciously.[70] Section 2278a required only that agency rules detail how the statute would be administered. The generic implementing regulation promulgated by DOE appears to satisfy this statutory concern. Accordingly, the generic implementing regulation is a valid legislative rule. As such, use of a generic implementing regulation which allows additional land to be made off-limits merely by posting the appropriate signs and publishing a notice in the Federal Register,[71] is a sound exercise of the

finding that the majority of the voters in the District of Columbia were employees of the United States government. 554 F.2d at 1157.

65. Probably the best summary of the dissent's position is the following:

> [S]ince we deal with a difficult question in the murky field of administrative lawmaking, interpretation, and administration, I believe that any doubt about the APA's applicability ought to be resolved in favor of requiring the debate and justification procedures of APA § 553. This canon of construction is all the more urgent in the context of this case where the inevitable consequence of the DOE's hasty actions is to turn otherwise innocent behavior into criminal behavior. A further reason to follow this canon of construction in this case is the real, and not fancied, ambient presence of first amendment values.

687 F.2d at 1288 (McKay, J., dissenting).

66. *Id.* at 1291.

67. *Id.* The policy basis of the dissent's position is revealed by the statement that an agency "*should not be* permitted to exempt itself" from the APA. *Id.* (emphasis supplied).

68. The dissent appears to have taken the following admonition of Kenneth Davis to heart: "Probably every court should be alert to miss no opportunity to contribute to achievement of the ideal that every affected person should have opportunity to participate in administrative policy making." 2 K. DAVIS, *supra* note 18, at § 7:6. *See* 687 F.2d at 1293-94 (McKay, J., dissenting).

69. *See supra* note 44.

70. *See supra* notes 45-47 and accompanying text.

71. 10 C.F.R. §§ 860.1-.8 (1983).

agency's discretion.[72]

The majority's opinion in *Thompson* was confusing and unpersuasive because it focused on the designation of the additional land as off-limits, rather than classifying the implementing regulation and delineating the proper scope of review. The dissent, although raising valid concerns about the potential abuse of generic rulemaking, is incorrect in light of the relevant authorizing statute and its legislative history.[73] The Supreme Court's pronouncements in *Vermont Yankee* and *Baltimore Gas & Electric* effectively ended the era in which the courts could subject agency rulemaking to procedural requirements not imposed by the applicable organic statute or by the APA. *Thompson*, even though its analysis can be faulted, demonstrates that the Tenth Circuit's approach to administrative rulemaking follows that of the Supreme Court.

## II. ESTOPPEL AGAINST THE GOVERNMENT IN COMMERCIAL TRANSACTIONS

### A. *Overview of Estoppel Against the Government*

In 1961, the Tenth Circuit for the first time recognized, in dictum, that estoppel might lie against the federal government.[74] Chief Judge Murrah, writing for the court, stated that despite the strong policy against allowing estoppel to be asserted against the government, "we will not allow the government to deal dishonestly or capriciously with its citizens. It must not play an ignoble part or do a shabby thing."[75] It has taken over two decades, however, for the Tenth Circuit to use the estoppel doctrine against the government. In *Home Savings & Loan Association v. Nimmo*,[76] a 1982 case, the Tenth Circuit held that the federal government was estopped. Even then, the decision was not unanimous.[77]

The issue of whether equitable estoppel can be invoked against the government has caused considerable controversy.[78] The issue appeared to have been put to rest in 1947 when Justice Frankfurter, in *Federal Crop Insurance Corp. v. Merrill*,[79] roundly rejected the notion that the federal government could be equitably estopped.[80] Since *Merrill*, however, the concept has refused to die.[81] The Ninth Circuit, for example, has taken a leading role in

72. This conclusion is supported by Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 103 S. Ct. 2246 (1983), which approved the use of a generic regulation by the Nuclear Regulatory Commission.

73. *See supra* notes 48-64 and accompanying text.

74. Massaglia v. Commissioner, 286 F.2d 258, 262 (10th Cir. 1961).

75. *Id.*

76. 695 F.2d 1251 (10th Cir. 1982).

77. *See id.* at 1255 (McKay, J., dissenting).

78. *See, e.g.*, Hansen v. Harris, 619 F.2d 942 (2d Cir. 1980), *rev'd sub nom.* Schweiker v. Hansen, 450 U.S. 785 (1981) (issue discussed by both Judge Oakes, writing for the majority, and by Judge Newman, in a concurrence).

79. 332 U.S. 380 (1947).

80. Justice Frankfurter stated: "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Id.* at 384.

81. An article discussing collateral estoppel in administrative proceedings quotes a passage

recognizing the estoppel doctrine in cases involving the government.[82] Regardless of how strongly the Supreme Court has disapproved of the use of equitable estoppel against the government,[83] the doctrine survives, although it by no means flourishes.[84]

In light of the Court's recent rejection of government estoppel in *Schweiker v. Hansen*,[85] the *Home Savings* decision, which recognizes a claim of estoppel against the government, is a major development and a major step within the Tenth Circuit.[86] Further, because of the analysis used by the Tenth Circuit, *Home Savings* appears to be at the cutting edge of a post-*Hansen* trend. The majority ruled that the government could be estopped in this case because the dispute involved a "commercial transaction."[87] In so doing, the Tenth Circuit joined the Seventh Circuit[88] and the Ninth Circuit[89] in relying on the private/commercial or proprietary/sovereign distinction to avoid the prohibition against using estoppel against the government.[90]

B. *Statement of the Case*

A lending institution loaned a couple $34,000 to buy a house. The loan

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from Shakespeare's *Measure For Measure* in order to characterize the state of the equitable estoppel doctrine as it relates to the government: "The law hath not been dead, though it hath slept." Mogel, *Res Judicata and Collateral Estoppel in Administrative Proceedings*, 30 BAYLOR L. REV. 463, 463 (1978) (quoting W. SHAKESPEARE, MEASURE FOR MEASURE, Act II, Scene 2, line 90).

82. *See, e.g.*, Villena v. INS, 622 F.2d 1352 (9th Cir. 1980); Oki v. INS, 598 F.2d 1160 (9th Cir. 1979); Santiago v. INS, 526 F.2d 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

83. The Court recently rejected an opportunity to resolve the issues raised by circuit court recognition that estoppel may be available against the federal government. *See* Schweiker v. Hansen, 450 U.S. 785 (1981).

84. *See* Parcel, *Making the Government Fight Fairly: Estopping the United States*, 27A ROCKY MTN. MIN. L. INST. 41 (1982); Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979); *see also* 4 K. DAVIS, *supra* note 18, at § 20:6 (2d ed. 1983).

85. 450 U.S. 785 (1981). *Hansen* rejected a claim of estoppel, but did not categorically reject estopping the government. *See id.* at 790.

86. The Tenth Circuit has reviewed several cases dealing with the issue of estoppel against the government, rejecting the estoppel claim in each. *See* Sweeten v. USDA, 684 F.2d 679 (10th Cir. 1982); United States v. Browning, 630 F.2d 694 (10th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); Albrechtsen v. Andrus, 570 F.2d 906 (10th Cir. 1978), *cert. denied*, 439 U.S. 818 (1979); Enfield v. Kleppe, 566 F.2d 1139 (10th Cir. 1977); Atlantic Richfield Co. v. Hickel, 432 F.2d 587 (10th Cir. 1970); Massaglia v. Commissioner, 286 F.2d 258 (10th Cir. 1961); Sanders v. Commissioner, 225 F.2d 629 (1955); United States v. Carter, 197 F.2d 903 (10th Cir. 1952); and United States v. Fitch, 185 F.2d 471 (10th Cir. 1950).

87. 695 F.2d at 1254.

88. *See* Meister Bros. v. Macy, 674 F.2d 1174 (7th Cir. 1982) (estopping administrator of Federal Emergency Management Agency (FEMA) from asserting failure to file a form as a defense to a settlement claim when FEMA had indicated it intended to pay the claim); Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982) (estopping the federal government from disclaiming representations made by a postal worker).

89. *See* Laguna Hermosa Corp. v. Martin, 643 F.2d 1376 (9th Cir. 1981). *Laguna Hermosa* was decided three weeks after *Hansen*. It did not mention *Hansen*, but nonetheless it held that the United States was estopped from denying an extension for a concession contract. *Id.* at 1380.

90. Although the court did not refer to the concession contract in *Laguna Hermosa* as a "commercial transaction," this characterization appears to be accurate in light of the fact that the case involved a contract between a concessionaire and the United States for operating a concession on federal land. *Laguna Hermosa*, 643 F.2d at 1377. In both *Portmann* and *Meister Bros.*, however, the Seventh Circuit expressly relied on the fact the subject matter of the dispute giving rise to the issue of estoppel was a "commercial transaction." *Meister Bros.*, 674 F.2d at 1177; *Portmann*, 674 F.2d at 1169.

was secured by a note and a mortgage, and guaranteed by the Veterans Administration (VA).[91] The lending institution subsequently assigned the note, mortgage, and guaranty to Home Savings & Loan, the plaintiff in *Home Savings*.[92] Some years later, the couple defaulted on their loan, a foreclosure sale was held, and Home Savings & Loan, with VA approval,[93] purchased the house.[94] Home Savings & Loan, exercising an option granted by federal regulation,[95] then conveyed the property to the VA and demanded both reimbursement for the amount paid at foreclosure and payment under the loan guaranty certificate for losses incurred on the loan.[96]

The significant event giving rise to the estoppel controversy occurred when Home Savings transferred the house to the VA. At approximately the same time as the transfer, the original lending institution, by coincidence, informed the VA that the wife's signatures on both the note and the mortgage might be forgeries.[97] Instead of informing Home Savings & Loan of this fact, the VA investigated the possible forgery, in the meantime selling the house and processing and paying Home Savings' loan guaranty claim.[98] Twelve days after paying the loan guaranty claim the VA demanded return of the payment, based upon regulations[99] and a statute[100] which permit the Administrator of the VA to deny liability under a loan guaranty if a signature on the loan is forged. Home Savings returned the money to the VA, but refused to pay an additional sum for expenses demanded by the VA, which amount the VA subsequently offset against other amounts due Home Savings.[101]

Home Savings brought suit to recover amounts claimed under the loan guaranty, and the trial court held that the VA was estopped from asserting the forgery defense because of its acceptance of the deed with knowledge of the potential forgery.[102] The Tenth Circuit ruled that although the failure to disclose the potential forgery to Home Savings & Loan was inaction and therefore not grounds for estoppel,[103] the VA's acceptance of the deed from Home Savings and its subsequent sale of the house constituted "affirmative acts" in a "commercial transaction" which would justify estopping the VA from denying the Home Savings claim.[104]

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91. *Home Sav.*, 695 F.2d at 1252.

92. *Id.*

93. Lenders holding VA guaranteed mortgages can recover (with some exceptions) the amount paid at a foreclosure sale if the VA has previously authorized the bid. 10 C.F.R. § 36.4320 (1983). This recovery does not affect the lender's right to recoup any losses under the VA loan guarantee. *Id.*

94. 695 F.2d at 1252.

95. 38 C.F.R. § 36.4320(a)(1) (1983).

96. 695 F.2d at 1252. The guaranty certificate, which guarantees a lender reimbursement for its loan losses, was authorized by 38 U.S.C. § 1810 (1982). 695 F.2d at 1252.

97. 695 F.2d at 1252.

98. *Id.*

99. 38 C.F.R. § 36.4325(a) (1983).

100. 38 U.S.C. § 1821 (1982).

101. 695 F.2d at 1252.

102. *Id.* at 1253.

103. Inaction, by itself, is generally not sufficient to establish estoppel against the government. *See* Sweeten v. USDA, 684 F.2d 679 (10th Cir. 1982).

104. 695 F.2d at 1254.

C. *Analysis of the Decision*

The majority's analysis was relatively brief. Pointing to language in Supreme Court cases which indicated that estoppel against the government might be proper in some circumstances,[105] the court proceeded to distinguish the Court's decisions rejecting estoppel on the basis that none of those cases had involved a commercial transaction.[106] No reasoning was given to support the commercial transaction distinction. The court merely held the distinction existed, and that Home Savings was entitled to an estoppel based on the VA's acceptance of the deed without giving notice of the potential forgery.[107]

Judge McKay wrote a lengthy and forceful dissent, criticizing the majority's commercial transaction distinction as being "chimerical rather than precedential."[108] Estoppel against the government was not rejected out-of-hand.[109] Instead, the dissent criticized the majority's "commercial transaction" distinction and urged that a different test be used to determine if estoppel should lie against the government. The dissent's test contained two questions: "(1) did misleading conduct induce reasonable detrimental reliance? and (2) are there nevertheless circumstances that caution the court to withhold the exercise of equitable powers?"[110] According to the dissent, the Supreme Court's government estoppel cases could be explained as involving a failure to satisfy these requirements: either the plaintiff had failed to establish the elements of an estoppel,[111] or "circumstances"—particularly separation of powers concerns—made exercise of equitable power inappropriate.[112] Judge McKay disagreed with the majority's conclusion that the VA had engaged in detrimentally misleading conduct, the first part of his test, and therefore found estoppel unavailable without ever reaching the second prong of his test.[113]

105. *Id.* at 1253.

106. *Id.* at 1254.

107. *Id.* at 1254-55. The estoppel arose because once the VA received the deed, Home Savings had no way to collect its deficiency except through the guaranty. In the majority view, the VA caused Home Savings to lock itself into a situation where it was effectively at the mercy of the VA. Hence, the VA should have disclosed the potential fraud, thereby giving Home Savings an opportunity to consider whether to take a chance with the VA (knowing the possibility the guaranty might be avoided) or to dispose of the deed independently. The majority felt that the VA's routine acceptance of the deed in the above circumstances justified estopping a fraud defense to payment of the guaranty. *Id.*

108. *Id.* at 1255 (McKay, J., dissenting). In speaking of the commercial transaction distinction, the dissent noted its concern that the majority's standard would inaugurate "a procession of future cases that will be distinguished on the basis of 'finespun and capricious' characterizations." *Id.* at 1258. *Cf.* Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955) (noting that state court decisions on the governmental/proprietary distinction are confused and irreconcilable).

109. 695 F.2d at 1261 (McKay, J., dissenting).

110. *Id.* at 1259.

111. *Id.* at 1260.

112. *Id.* at 1260-61. Judge McKay's analysis is provocative, as it harmonizes the equitable policy considerations militating towards an estoppel (*e.g.* the inequity of permiting a party to profit through deceptive acts) with the policy considerations militating against holding the government estopped (*e.g.* vast demands on the public fisc). By balancing the two policy factors against each other once the elements of estoppel have been established, the dissent's test protects the government while preventing abuse of citizens.

113. *Id.* at 1261-63. The dissent rejected the majority's treatment of the events leading up

D. *Summation*

Despite what appears to be a blanket refusal by the Supreme Court to recognize estoppel against the government, the Court has not eliminated the possibility of governmental estoppel.[114] The Tenth Circuit, in *Home Savings*, has ventured into the uncertain area of estopping the government. In so doing, it has joined several sister circuits in trying to find a formula that will escape repudiation by the Supreme Court. As long as estopping the government remains a tool of last resort, to be used only when it would be extremely unfair to do otherwise, the Supreme Court will continue to tolerate the infrequent recognition of estoppel exemplified by the Tenth Circuit's decision in *Home Savings*. The potentially broad reach of the Tenth Circuit's "commercial transaction" estoppel doctrine, however, along with the difficulties inherent in distinguishing commercial from proprietary transactions, promise that estoppel issues will continue to be a lively subject within the Tenth Circuit.

## III. JUDICIAL REVIEW OF AGENCY ACTION

A. *Introduction*

Determining the scope of judicial review is crucial for determining the proper role of the courts in reviewing administrative action. If the scope is too limited, the function of judicial review is meaningless.[115] Conversely, the constitutional scheme of separation of powers is violated when courts substitute their judgment for that of the agency.[116] To strike a balance, section 10 of the Administrative Procedure Act (APA)[117] delineates six separate standards for determining the scope of judicial review of agency action, although only two of these standards are frequently used by the courts. Under the first, administrative action is illegal if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[118] In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[119] the Supreme Court held that judicial review under this standard entails determining whether all factors relevant to an administrative decision were considered or whether decision reflects a clear error of judgment.[120] This standard creates a narrow scope of review because

to the litigation, pointing out that Home Savings had made its election prior to the VA's receipt of any information concerning potential fraud. Given Home Savings' independent decision, the dissent found no evidence of the VA induced detrimental reliance. Absent such reliance, all of the elements for estoppel were not present. *Id.* at 1262. Judge McKay's analysis is weakened, however, by his failure to establish that Home Savings' election was binding.

114. Since *Merrill* the Supreme Court has not ruled that the government can never be estopped. In fact, decisions by the Supreme Court suggest that some as yet undefined government actions *may* justify estoppel. For example, the Supreme Court recently stated "[t]his Court has never decided *what type of conduct by a Government employee will estop* the Government . . . ," *Hansen*, 450 U.S. at 788 (emphasis supplied), thereby implying that some foundation for estoppel does exist.

115. *See* Schwartz, *Some Recent Administrative Law Trends: Delegations and Judicial Review*, 1982 WIS. L. REV. 208, 227 (1982).

116. *See generally* United States v. Western Pac. R. Co., 352 U.S. 59, 63-64 (1956).

117. 5 U.S.C. § 706 (1982).

118. 5 U.S.C. § 706(2)(A) (1982).

119. 401 U.S. 402 (1971).

120. *Id.* at 416.

a reviewing court is not permitted to substitute its judgment for that of the agency.[121]

Under the second often applied standard of review, agency action is improper if it is "unsupported by substantial evidence."[122] Unlike the arbitrary or capricious standard, which is applicable to all agency action,[123] the substantial evidence standard is applicable in only two situations: 1) when the administrative action being reviewed is formal rulemaking conducted under the APA;[124] or 2) when the reviewed administrative action is an adjudication.[125] Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[126]

Although these general guidelines are useful, one must look to individual cases to discern which standard will be applied and how rigorous judicial review will be under each. Moreover, the standard of review to be used in each case is not always clear. Often a party challenging agency action asserts that a more demanding standard should apply, such as substantial evidence, but the reviewing court will choose a more lenient standard, such as the arbitrary or capricious test. It is therefore important to review case law to determine which sets of facts give rise to which standards. The following paragraphs will review several of the decisions handed down by the Tenth Circuit this term and will analyze the scope of judicial review applied in each.

### B. *Review Utilizing the Arbitrary, Capricious, or Abuse of Discretion Standard*

In order to understand how the Tenth Circuit applies the arbitrary or capricious standard, four cases will be discussed briefly. The first is *Anderson v. Department of Housing*.[127] In *Anderson*, the Tenth Circuit considered which standard to apply in reviewing a Department of Housing and Urban Development (HUD) mortgage assignment decision. By statute,[128] the Secretary was authorized to prescribe regulations to implement a mortgage insurance program designed to assist low-income families in purchasing a home. One provision of the implementing regulations permitted HUD to accept mortgage assignments for the purpose of preventing foreclosures.[129] The statute

121. *Id.* In the recent decision of Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 103 S. Ct. 2246 (1983), the Supreme Court noted that the arbitrary and capricious standard articulated in *Overton Park* is still the correct formulation. 103 S. Ct. at 2257. The Court also noted: "It is not our task to determine what decision we, as Commissioners [of the Nuclear Regulatory Commission], would have reached. Our only task is to determine whether the commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Id.*

122. 5 U.S.C. § 706(2)(E) (1982).

123. *See Overton Park*, 401 U.S. at 413-14.

124. 5 U.S.C. § 706(2)(E) (1982).

125. *Id.*

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

127. 701 F.2d 112 (10th Cir. 1983).

128. 12 U.S.C. § 1709(a) (1982).

129. 24 C.F.R. § 203.640(a) (1983).

did not mention such a provision.[130]

HUD denied Anderson's request that HUD accept an assignment after her default and she brought suit challenging the denial.[131] The Tenth Circuit characterized HUD's refusal as "informal agency action" and therefore held that the arbitrary or capricious standard should apply.[132] The court affirmed the agency action, holding that because the record showed that the agency followed its own internal guidelines and had not acted irrationally, the refusal was not arbitrary, capricious, or an abuse of discretion.[133]

A second case providing insight into application of the abuse of discretion standard involved an Occupational Safety and Health Review Commission (OSHRC) violation of its own procedural guidelines. The court in *Dye Construction Co. v. OSHRC*[134] held that the violation did not constitute an abuse of discretion, and affirmed OSHRC's decision.

The violation arose when the administrative complaint against Dye was amended to extend the period of Dye's alleged improper behavior.[135] OSHRC was required by its regulations to set forth its reasons for amending a complaint.[136] Although OSHRC failed to do so in this case, the court noted that the regulation provides no sanctions for such a failure, and that dismissal of the complaint was therefore not automatically required.[137] The court then found that the petitioning construction company was not surprised or prejudiced by the amendment; hence, the failure to comply with the regulations was not an abuse of discretion.[138]

A third case reviewed under the arbitrary or capricious standard was *American Trucking Association v. ICC*,[139] examining an ICC decision granting a railroad company's subsidiary unrestricted authority to operate as a motor carrier. The Tenth Circuit held that this grant of authority did not constitute an abuse of discretion.[140]

By statute, the ICC is permitted to grant motor carrier authority to a railroad subsidiary only upon a showing that the transaction is consistent with the public interest, will enable the railroad to use its rail service to public advantage, and will not restrain competition.[141] The Supreme Court has held that to meet the statutory standard "special circumstances" must be shown.[142]

The plaintiffs had two separate arguments. First, they argued that one permit lacked the required finding of special circumstances.[143] Second, they

130. 701 F.2d at 114.
131. *Id.* at 113.
132. *Id.*
133. *Id.* at 114-15.
134. 698 F.2d 423 (10th Cir. 1983).
135. *Id.* at 425.
136. 29 C.F.R. § 2200.33(a)(3) (1983).
137. 698 F.2d at 425.
138. *Id.*
139. 703 F.2d 459 (10th Cir. 1983).
140. *Id.* at 462.
141. 49 U.S.C. § 11344(c) (1976).
142. American Trucking Ass'ns v. United States, 355 U.S. 141, 151-52 (1957).
143. 703 F.2d at 462.

argued that the Commission's reversal of a lower administrative tribunal's finding of no special circumstances on a second permit was not supported by the record.[144]

The Tenth Circuit's decision to uphold the ICC[145] is not as significant as its delineation of the appropriate standard of review. The court relied upon a formulation announced in an earlier Tenth Circuit case, *Midwestern Transportation, Inc. v. ICC*.[146] In both *Midwestern* and *American Trucking* the Tenth Circuit combined the arbitrary or capricious standard and the substantial evidence standard for purposes of reviewing ICC decisions.[147] Such a combining of standards, however, seems inconsistent with the leading case of *Citizens to Preserve Overton Park, Inc. v. Volpe*[148] which noted that the substantial evidence standard was only applicable in statutorily defined circumstances.[149] Until the Tenth Circuit establishes that those circumstances are present in this class of cases, its hybrid standard is improper.

Finally, in another ICC case, *Turner Brothers Trucking Co. v. ICC*,[150] the administrative action at issue was a denial of a request for a waiver from an ICC rule.[151] The court, relying upon *Citizens to Preserve Overton Park, Inc. v. Volpe*,[152] noted that it could not substitute its judgment for that of the agency[153] and upheld denial of the waiver.[154] Although the court did not characterize the waiver denial, the holding implies that the denial was "informal" agency action and therefore subject to the arbitrary or capricious standard of review.[155] *Turner Brothers* also rejected a due process challenge, holding that the Constitution did not require a hearing on a decision denying a request for a specific waiver from a rule of general application.[156]

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144. *Id.* at 463.

145. *Id.* The Tenth Circuit equated a finding of special circumstances with a finding of action in the public interest. The administrative records supported this finding, justifying grant of the permits. *Id.* at 462-63.

146. 635 F.2d 771 (10th Cir. 1980).

147. In *Midwestern Transp.*, the court defined the standard of review as follows:

> The Administrative Procedure Act, 5 U.S.C. § 706(2) provides . . . that a reviewing court shall set aside agency action if determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law *or unsupported by substantial evidence on the record as a whole*.
>
> The ICC interpretations of its regulations and the facts supporting a grant or denial of a certificate require recognition of its expertise and our deference thereto.

*Id.* at 774 (emphasis supplied, citation omitted).

In *American Trucking Ass'ns,* the court defined the standard of review as follows:

> It is axiomatic that the scope of review by an appellate court of a Commission decision is a narrow one. We may not set aside Commission action unless it be arbitrary, capricious, and an abuse of discretion, or unless it be otherwise not in accord with law *or unsupported by substantial evidence on the record as a whole*.

703 F.2d at 462 (emphasis supplied).

148. 401 U.S. 402 (1971).

149. *Id.* at 414. Those circumstances exist when an agency engages in rulemaking required to be on the record, or an adjudication. 11 U.S.C. § 702(2)(E) (1982); *see also id.* at §§ 553(c), 554(c)(2).

150. 684 F.2d 701 (10th Cir. 1982).

151. 49 C.F.R. § 1057.12(g), (h) (1982). This regulation details billing requirements imposed on carriers leasing their equipment.

152. 401 U.S. 402 (1971).

153. 684 F.2d at 703.

154. *Id.* at 704.

155. *Id.* at 703.

156. *Id.* at 703-04.

In summary, plaintiffs were not successful in challenging informal agency action during the survey period. In each of the cases reviewed which applied the "arbitrary, capricious, or abuse of discretion" standard, agency action was sustained.

C. *Substantial Evidence Review*

The substantial evidence standard is less deferential to an agency than the arbitrary or capricious standard. It is therefore not surprising that of the thirty administrative law cases reviewed during the survey period, two of the three cases where a federal agency was reversed were a result of the agency failing to satisfy the substantial evidence test.[157] Both cases involved a denial of Social Security benefits.

In the first case, *Broadbent v. Harris*,[158] the plaintiff sought Social Security disability benefits. *Broadbent* reviewed a decision by an administrative law judge (ALJ) who had recommended that plaintiff's application for benefits be denied because the plaintiff was not "disabled" as defined by the relevant statute.[159] The ALJ relied heavily on the finding of no disability by the single physician who examined the plaintiff on behalf of the Social Security Administration,[160] rejecting the opinions of six independent physicians who found the plaintiff to be disabled.[161] The Tenth Circuit noted that although ALJ determinations are generally binding on a reviewing court,[162] in this case the ALJ had not given sufficient weight to the testimony of the six independent doctors, who had had much more experience examining the plaintiff.[163] Considering the record as a whole, the plaintiff's prima facie case of disability was not rebutted and the administrative decision did not meet the substantial evidence test.[164] Although the court did not expressly articulate the basis for its ruling, the court in effect ruled that the medical report by the one government-hired doctor did not constitute the "more than a mere scintilla"[165] of evidence necessary to sustain the administrative decision.[166]

The second case overturning an administrative decision under the substantial evidence test is *Cavitt v. Schweiker*.[167] The issue in *Cavitt*, as in *Broadbent*, was whether an applicant was eligible for Social Security disabil-

157. These two cases Broadbent v. Harris, 698 F.2d 407 (10th Cir. 1983) and Cavitt v. Schweiker, 704 F.2d 1193 (10th Cir. 1983), will be discussed immediately below. The third case referred to is Home Savings & Loan Ass'n v. Nimmo, 695 F.2d 1251 (10th Cir. 1982). For a discussion of *Home Savings, see supra* notes 74-114 and accompanying text.

158. 698 F.2d 407 (10th Cir. 1983).

159. *Id.* at 411. 42 U.S.C. § 423(d) (1976 & Supp. V 1981) defines "disability" for purposes of the Social Security laws.

160. 698 F.2d at 409.

161. *Id.*

162. *Id.* at 413 (citing Richardson v. Perales, 402 U.S. 389 (1971)).

163. 698 F.2d at 414.

164. *Id.*

165. *Id. See also* Richardson v. Perales, 402 U.S. 389, 401 (1971) (defining substantial evidence to mean relevant evidence a reasonable mind would accept as supporting an administrative conclusion).

166. *See* 698 F.2d at 414.

167. 704 F.2d 1193 (10th Cir. 1983).

ity benefits.[168] Here, as in *Broadbent*, the court cited *Richardson v. Perales*,[169] and held that a "reasonable mind" would not conclude that the plaintiff was not disabled within the meaning of the social security laws.[170] Again, as in *Broadbent*, the available medical evidence weighed strongly in favor of the applicant.[171]

In *Meredith Corp. v. NLRB*,[172] the court reviewed a NLRB decision that directors and production managers were not "supervisors" within the meaning of the National Labor Relations Act (NLRA).[173] The NLRB held that the employees were not supervisors, and that the employer violated the NLRA by failing to negotiate collectively with these employees.[174] The basis of the NLRB's decision was that any control the directors or production managers exercised over other employees was either routine or motivated by artistic reasons, and that this control was not supervisory.[175] The court, after making a detailed review, sustained the NLRB's decision because it was supported by substantial evidence.[176] Doubt was expressed, however, concerning the relevance of "artistic motivation" in determining the supervisory status of a particular position.[177]

The substantial evidence test was also used in *CCI, Inc. v. OSHRC*[178] to determine whether a citation issued pursuant to the Occupational Safety and Health Act (OSHA)[179] was sustainable. OSHA regulations require shaping and shoring of excavation trenches when certain soil conditions are present.[180] OSHRC held CCI in violation of these regulations.[181] On review, the court focused on evidence pertaining to soil conditions.[182] Because of strong evidence that the kinds of soil conditions requiring shoring or trenching were present,[183] the agency's burden under the substantial evidence test was met.[184]

## IV. Exclusive Jurisdiction: Contracts for Interstate Sales of Power

In *Utah v. Federal Energy Regulatory Commission*,[185] the Tenth Circuit re-

168. *Id.* at 1194.
169. 402 U.S. 389 (1971).
170. 704 F.2d at 1195.
171. *Id.* at 1194-95.
172. 679 F.2d 1332 (10th Cir. 1982).
173. 29 U.S.C. §§ 151-169 (1982).
174. 679 F.2d at 1335.
175. *Id.* at 1341.
176. *Id.* at 1345.
177. *Id.* at 1344.
178. 688 F.2d 88 (10th Cir. 1982).
179. 29 U.S.C. §§ 651-678 (1982).
180. 29 C.F.R. § 1926.652(c) (1983).
181. 688 F.2d at 89.
182. *Id.* at 89-90.
183. The court held that in a multi-material excavation the applicability of the trenching regulations turned on the weakest significant component of the soil. *Id.* at 90. The substantial evidence inquiry could therefore be satisfied without showing the soil was exclusively of the type covered by 29 C.F.R. § 1926.652(c). 688 F.2d at 90.
184. 688 F.2d at 90.
185. 691 F.2d 444 (10th Cir. 1982).

jected an attempt by the Utah Public Service Commission (PSC) to circumvent the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC).[186] The specific issue in *Utah v. FERC* concerned a wholesale contract between Utah Power, a utility under the jurisdiction of the Utah PSC, and Sierra Pacific Power Company, a utility operating in Nevada and California.[187] The Utah PSC asserted jurisdiction over this contract based on its jurisdiction over Utah Power's generating facilities.[188] Finding the FERC approved contract not in the best interest of Utah's utility customers, PSC ordered Utah Power not to comply with the terms of the contract.[189] FERC, upon Sierra Pacific's motion for declaratory relief, held that its jurisdiction over the contract was exclusive, and directed Utah Power to comply with the contract.[190] The Tenth Circuit then addressed the conflict on a petition for review of the FERC order.[191]

The Tenth Circuit rejected PSC's assertion of jurisdiction. Congress, the circuit held, had given FERC exclusive jurisdiction over contracts for wholesale interstate power sales.[192] The PSC's argument that the FERC approval was in effect an order to construct additional generating facilities, and therefore not within FERC's exclusive jurisdiction, was rejected.[193] FERC's order merely approved the contract for sale of power; because it did not mandate the manner in which the contract was to be performed, the order remained within FERC's exclusive jurisdiction.[194] As an alternate basis for upholding FERC, the Tenth Circuit characterized the PSC order as an attempt to benefit Utah utility customers at the expense of out-of-state utility customers, which was invalid as an attempted protectionist measure.[195] Finally, given the parties' knowledge that FERC had exclusive jurisdiction over the contract, a contractual clause requiring approval by "regulatory authorities having jurisdiction" was held to contemplate only FERC's approval.[196]

Summing up its decision, the court noted that Congress had placed such contracts under the exclusive review of FERC, and had placed FERC's decisions under review by the courts. If in fact the contract became unduly burdensome, "surely relief would be available."[197] Absent such a showing (which was not urged upon the court), the only proper course of action was to affirm FERC's exclusive jurisdiction.

186. It has long been recognized that FERC has exclusive jurisdiction over wholesale interstate sales of electric power under the Federal Power Act, 16 U.S.C. §§ 794a-828c (1982). *See, e.g.*, Federal Power Comm'n v. Southern Cal. Edison Co., 376 U.S. 205 (1964).

187. 691 F.2d at 445.

188. *Id.* at 446.

189. *Id.*

190. *Id.*

191. *Id.* at 445.

192. *Id.* at 447-48. The court noted that FERC did not have exclusive jurisdiction over *intrastate* power sales, nor over interstate *retail* power sales. *Id.* at 447.

193. *Id.* at 448.

194. *Id.*

195. *Id.* (citing New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)).

196. 691 F.2d at 448.

197. *Id.* at 448-49.

## V. SUBSTANTIAL FEDERAL QUESTION EXCEPTION TO PRIMARY JURISDICTION

In *Mountain States Natural Gas Corp. v. Petroleum Corp. of Texas*,[198] the Tenth Circuit held that the presence of a "substantial federal question" could circumvent the bar to original judicial review created by the primary jurisdiction doctrine.[199] In arriving at this conclusion the Tenth Circuit extended precedent previously recognizing that plaintiffs presenting substantial federal questions were not required to exhaust their administrative remedies.[200] The analysis below questions the propriety of that extension.

*Mountain States* began when the defendant Petroleum Corp. of Texas (Petco) obtained a state agency[201] order permitting Petco to pool its leased acreage with the acreage of Mountain States, another oil company, for the purpose of producing an oil well.[202] The pooling order required Petco to give all persons with interests in the common field, including Mountain States, notice of drilling at least thirty days before drilling commenced.[203] Upon receipt of the notice an interested party had the option of paying estimated well costs (provided by Petco), or of paying its share of production costs from revenues.[204] Failure to pay the estimated costs resulted in a risk penalty of 200% of the required payment.[205]

Petco sent the required notice to Mountain States, although not within time periods stipulated by the order.[206] Mountain States never retrieved the notice from its post office box.[207] Petco was aware of this, but it took no further action to notify Mountain States that drilling was commencing, instead assessing the 200% penalty against Mountain States' share of the proceeds from the well.[208] Litigation ensued when Petco refused to permit Mountain States, independently apprised of the drilling, to pay its share of

198. 693 F.2d 1015 (10th Cir. 1983).

199. Primary jurisdiction is a court-made doctrine, grounded in separation of powers concerns. It allocates decisionmaking power between a court and an administrative agency having concurrent jurisdiction over a dispute. When applicable, the doctrine mandates deferring judicial consideration of an issue until the agency has given its decision. Following agency action the court exercises a review power of varying scope. For example, administrative interpretations of law may be subjected to de novo review, while administrative factfinding may be given great deference. One essential feature of the doctrine is that the court upon review may not usurp the decisionmaking power allocated to the agency. *See generally* 4 K. DAVIS, *supra* note 18, at § 22:1 (2d ed. 1983); B. SCHWARTZ, ADMINISTRATIVE LAW §§ 166-168 (1976).

200. *See* 693 F.2d at 1019.

201. *Mountain States* involved the interaction between a federal court and a state agency's primary jurisdiction. The policies which underly the primary jurisdiction doctrine should apply with equal force to both federal and state agencies. *See supra* note 199. Nonetheless, because application of the primary jurisdiction doctrine in the federal court [state agency context may raise different considerations than those present in the federal court] federal agency context, *see* 4 K. DAVIS, *supra* note 18, at § 26:14 (2d ed. 1983), the Tenth Circuit should have examined the intrinsic propriety of using the primary jurisdiction doctrine in *Mountain States*.

202. 693 F.2d at 1017. The order permitted Petco to capture the oil from a common field over Mountain States' objection. *Id.*

203. *Id.* at 1017.

204. *Id.*

205. *Id.*

206. *Id.* at 1017-18.

207. *Id.* at 1017.

208. *Id.*

estimated costs and recover the 200% penalty.[209]

Mountain States claimed Petco's failure to provide the required notice constituted a denial of due process.[210] Petco responded by claiming that the New Mexico Oil Conservation Division (Division) had primary jurisdiction over the question of compliance with its orders.[211] The federal district court first ruled in Petco's favor, dismissing the complaint until the Division had considered the issues; upon motion for reconsideration, however, the district court set aside its dismissal and heard the case.[212] The district court, holding in favor of Mountain States, did not rest its decision on due process grounds, instead holding that the Division's order required actual notice at least thirty days prior to drilling, and that Petco had failed to meet that requirement.[213]

Petco appealed on the grounds that the district court erred by failing to recognize the Division's primary jurisdiction, that Mountain States' due process claim was insufficient as a matter of law, and that the construction of the notice was not raised by the pleadings.[214] The Tenth Circuit did not reach the merits of the due process claim, resting its decision on the district court's construction of the notice.[215] In arriving at the decision on the merits, however, the Tenth Circuit created an exception to the primary jurisdiction doctrine, allowing courts to bypass agencies when a plaintiff merely presents a substantial federal question.[216] This exception, however, is so broad that it undermines the primary jurisdiction doctrine.

The Tenth Circuit's exception was premised on the close relationship between the doctrines of primary jurisdiction and exhaustion of administrative remedies.[217] Given that close relationship, conditions justifying exceptions to the exhaustion requirement were perceived to justify exceptions to an agency's primary jurisdiction.[218] Its reading of cases dealing with exceptions to the exhaustion doctrine led the court to conclude that when a substantial federal question was present, exhaustion, and therefore resort to primary jurisdiction, was not required.[219] The result is the creation of an exception to primary jurisdiction which is sui generis.

*Martinez v. Richardson*,[220] an earlier Tenth Circuit decision, was the primary authority relied on in creating the substantial federal question exception. *Martinez* held that exhaustion was not required if existing administrative remedies were inadequate and a "federal question is so plain that exhaustion is excused."[221] This proposition was articulated by relying upon the Supreme Court's decision in *Greene v. United States*.[222] *Greene*, how-

209. *Id.* at 1018.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 1020.
216. *Id.* at 1018-19.
217. *See id.* at 1018.
218. *See id.* at 1018-19.
219. *Id.* at 1019.
220. 472 F.2d 1121 (10th Cir. 1972).
221. *Id.* at 1125.
222. 376 U.S. 149 (1964). *See* 472 F2d at 1125 n.10.

ever, said nothing about excusing the exhaustion requirement when a federal question was plain. Quite to the contrary, the Court's holding in *Greene* was limited to concluding that existing administrative remedies were inadequate with respect to Greene's claim.[223] Thus, *Martinez'* language concerning a federal question exception to exhaustion is not supported by Supreme Court precedent.

Further, although *Martinez* referred to a federal question exception to the exhaustion doctrine, *Martinez* was in fact decided upon traditional grounds for bypassing the exhaustion requirement. Inadequacy of existing administrative remedies is a well recognized exception to the exhaustion requirement.[224] Administrative remedies were inadequate in *Martinez* because the plaintiffs were elderly and infirm and because there was an extreme unlikelihood of meaningful administrative relief.[225] Accordingly, the actual ground of decision in *Martinez* is consistent with *Greene*, and does not support recognition of a general federal question exception to administrative review.

The Tenth Circuit in *Mountain States* also sought to justify its refusal to defer to the Division's primary jurisdiction by relying upon *McKart v. United States*[226] and *Mathews v. Eldridge*.[227] *McKart*, while in fact holding that exhaustion was not an invariable requirement, was also a very narrow holding. The Court noted that *McKart* did not involve mere premature resort to judicial process, but involved a situation in which the plaintiff's failure to take an administrative appeal prevented him from raising certain defenses to criminal prosecution.[228] Plaintiff's interest therefore outweighed the considerations of deference to agency jurisdiction underlying the exhaustion requirement.[229] *McKart* therefore establishes only that when a substantial liberty interest will be unfairly denied, exhaustion will not be required.[230] Similarly, *Mathews* recognized only that a procedural due process challenge could be raised without exhaustion when hardship to the claimant outweighs the benefits flowing from the exhaustion doctrine.[231] *McKart* and *Mathews* clearly do not support the Tenth Circuit's conclusion that merely asserting a substantial federal question justifies circumventing the exhaustion requirement and, by analogy, the primary jurisdiction doctrine.

There are a number of other considerations which demonstrate the inappropriateness of the court's assumption of jurisdiction. For example, there was no evidence in the opinion that the Division was without competence to decide constitutional questions concerning its alleged actions; in all likelihood, the Division had such power.[232] Thus, traditional grounds for

223. *See* 376 U.S. at 163.
224. *See* 472 F.2d at 1125.
225. *Id.*
226. 395 U.S. 185 (1969).
227. 424 U.S. 319 (1976).
228. 395 U.S. at 197.
229. *Id.*
230. *Cf.* Moore v. City of East Cleveland, 431 U.S. 491, 494 n.5 (1977) (exhaustion not necessarily appropriate when facing criminal penalty).
231. *See* 424 U.S. at 330-31. *See also* 4 K. DAVIS, *supra* note 18, at § 22:1 (2d ed. 1983).
232. *Cf.* 4 K. DAVIS, *supra* note 18, at § 26:6, at 435 (2d ed. 1983) (agencies typically have authority to decide constitutionality of their actions).

refusing to defer to administrative remedies were not present.[233] In addition, under well-established principles the presence of a nonconstitutional ground for granting plaintiff's requested relief mandated deference to the agency.[234] Further, deferring receipt of money, in the absence of a showing of undue hardship, does not justify bypassing an agency.[235] Given the allocation of decisionmaking power reflected in the doctrine of primary jurisdiction, with its separation of powers implications, even if exceptions to primary jurisdiction exist arguendo, *Mountain States* was clearly not a case to apply those exceptions.

The actual relief granted by the Tenth Circuit in *Mountain States* also underscores the inappropriateness of not dismissing the complaint until the state agency had considered the issues. The Tenth Circuit's decision relied upon the Division's own order, requiring that thirty-days notice be given prior to drilling, to decide the case.[236] By so doing, the court prevented the agency from enforcing its own order and ignored an important reason for the primary jurisdiction doctrine's existence—allowing an agency to carry out its statutory mandate.

*Mountain States* creates a rule of administrative law which deviates from established principles. The "federal question" exception creates a large potential for disturbing the proper allocation of function between court and agency, especially because the facts of *Mountain States* reflect an absence of the traditional, equitably-oriented grounds for bypassing administrative review. It is submitted here that the Tenth Circuit should either repudiate the direct holding in *Mountain States*, or limit it to situations akin to *Martinez* and *Mathews*. Failure to do so may cause unforeseen increases in the federal docket and may disrupt the legislative allocation of power between court and agency.

## VI. REJECTION OF ADMINISTRATIVE *MIRANDA* RIGHTS

In *Sorensen v. National Transportation Safety Board*,[237] a commercial pilot's certificate was suspended for violation of regulations prohibiting both the operation of an aircraft within eight hours of drinking an alcoholic beverage or while under the influence of alcohol,[238] and the operation of an aircraft recklessly or carelessly.[239] The pilot challenged the certificate suspension and novelly claimed that evidence, obtained during a brief detention by airport security, should have been excluded from the administrative hearing

233. *Cf. id.* § 26:1, at 414-15 (exhaustion not required where agency has no jurisdiction over a relevant question of law, or where resort to agency would be futile).

234. *Id.* § 26:8, at 450. *See also* Pub. Util. Comm'n v. United States, 355 U.S. 534, 539-40 (1958). The agency could have resolved the dispute by construing its order to require actual rather than constructive notice, thereby precluding assessment of a risk penalty against Mountain States.

235. *Cf.* Mathews v. Eldridge, 424 U.S. 319, 331 (1976) (undue hardship from deferral of monetary payment justified bypassing administrative proceeding).

236. 693 F.2d at 1020.

237. 684 F.2d 683 (10th Cir. 1982).

238. 14 C.F.R. §§ 91.11(a)(1)-(2) (1983).

239. 14 C.F.R. § 91.9 (1983).

pursuant to *Miranda v. Arizona*.[240] The Tenth Circuit rejected this assertion on the basis that no criminal charges were contemplated at the time of the detention, that there had been no coercive atmosphere surrounding the detention, and that there had been no significant deprivation of freedom.[241] Given these factors, the constitutional protections of *Miranda* were irrelevant, and there was no mistake in admitting evidence obtained at the detention.[242]

A second interesting point raised by *Sorenson* related to the use of hearsay in administrative proceedings. Sorenson claimed that the agency had relied exclusively on uncorroborated hearsay in suspending his license.[243] The Tenth Circuit rejected this contention, but noted that whether uncorroborated hearsay can constitute substantial evidence remained an open question.[244]

## VII. FREEDOM OF INFORMATION ACT

Only one case decided during the survey period involved the Freedom of Information Act (FOIA).[245] In *Aviation Data Service v. FAA*,[246] the issue considered was whether attorney fees should be awarded to a prevailing party if the FOIA request was for commercial purposes. Here, the complainant was in the business of seeking information from the government.[247] Litigation ensued when the FAA refused to provide plaintiff with names and addresses of airmen and aircraft registrants.[248]

The FOIA allows attorney fees to be awarded to a complainant who is forced to take the government to court to obtain information under the FOIA if the complainant "substantially prevails."[249] This provision does not, however, create an absolute right to attorney fees.[250] The Tenth Circuit, relying primarily upon several cases extensively reviewing the legislative history of the FOIA,[251] held that in an FOIA case seeking information for commercial gain, some "public benefit" or willful agency misconduct must be shown before attorney fees will be awarded.[252] "Public benefit" was defined in terms of information which would assist citizens in making informed political decisions.[253] Finding no such benefit to the public in this

240. 384 U.S. 436 (1966). *See* 684 F.2d at 685.
241. 684 F.2d at 685-86.
242. *Id.*
243. *Id.* at 686.
244. *Id.*
245. 5 U.S.C. § 552 (1982).
246. 687 F.2d 1319 (10th Cir. 1982).
247. *Id.* at 1320.
248. *Id.* at 1321.
249. 5 U.S.C. § 552(a)(4)(E) (1982) provides: "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."
250. 687 F.2d at 1321.
251. The court relied on La Salle Extension University v. FTC, 627 F.2d 481 (D.C. Cir. 1980); Fenster v. Brown, 617 F.2d 740 (D.C. Cir. 1979), and Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977). *See* 687 F.2d at 1321-22.
252. 687 F.2d at 1322.
253. *Id.* at 1323.

case and no agency misconduct, the Tenth Circuit denied an award of attorney fees.[254]

## VIII. LIMITING AGENCY RIGHT TO INSPECT REQUIRED RECORDS

In *CAB v. Frontier Airlines, Inc.*[255] the Tenth Circuit, on rehearing en banc, considered whether the Civil Aeronautics Board (CAB) had authority to inspect all the minutes of Frontier's directors meetings without stating a proper investigative purpose. Frontier was required to keep those records as a condition of its operation.[256] CAB asserted that the Federal Aviation Act of 1958[257] authorized complete access to airline company records required by statute, regardless of investigatory purpose.[258] In the original panel decision, the Tenth Circuit held that the CAB was not required to show a relevant purpose in order to obtain access to the minutes.[259]

Upon rehearing en banc the Tenth Circuit reversed the panel and, in a five to three decision, held that a "rule of reason" must be applied to CAB investigations.[260] The basis of the decision was an interpretation of the statute granting the CAB the power to examine the records regulated airlines are required to keep.[261] The court held that the statute embodied a congressional intent to limit CAB access to those records reasonably necessary to the purpose of a particular investigation.[262] But the court's solution of ordering an in camera inspection to determine what documents were necessary to CAB's investigation is questionable. The majority went to considerable lengths to argue that resorting to this technique should not be done on a regular basis.[263] Relying on such ad hoc solutions, however, does little to help either an agency or a regulatee understand the limits of agency investigative powers.

The dissenting judges rejected the majority's balancing concerns. Judge McKay, dissenting alone and also joining Judge McWilliams in Judge Logan's dissent, reasoned that if welfare recipients could be required to submit to inspection as a condition of continued benefits,[264] it was not necessary to show any greater consideration to an airline enjoying the benefits of agency regulation.[265] All three dissenters also rejected the majority's statutory analysis, finding no congressional intent to limit CAB's right to inspect required records.[266] The dissenters viewed the majority's decision as unwarranted (based on precedent and congressional intent) and unsound (based on the

254. *Id.* at 1324.
255. 686 F.2d 854 (10th Cir. 1982) (en banc).
256. *Id.* at 857.
257. 49 U.S.C. §§ 1301-1552 (1976 & Supp. V 1981).
258. 686 F.2d at 856.
259. CAB v. Frontier Airlines, Inc., No. 79-1584 (10th Cir. April 17, 1981), *rev'd*, 686 F.2d 854 (10th Cir. 1982) (en banc). *See also Administrative Law, Eighth Annual Tenth Circuit Survey*, 59 DEN. L.J. 173, 212-15 (1982).
260. 686 F.2d at 858.
261. 49 U.S.C. § 1377(e) (Supp. V 1981).
262. 686 F.2d at 860.
263. *Id.*
264. *Id.* at 861 (McKay, J., dissenting) (citing Wyman v. James, 400 U.S. 309 (1971)).
265. 686 F.2d at 861 (McKay, J., dissenting).
266. *Id.* at 862 (Logan, J., dissenting).

foreseeable injection of the judiciary into agency/airline disputes).[267]

## IX. CONCLUSION

The commentator in last year's administrative law comment appearing in the Denver Law Journal's Ninth Annual Tenth Circuit Survey concluded by stating that in the area of administrative law the Tenth Circuit's decisions were "more notable for their evenhanded application of the law than for equitable considerations."[268]

This survey period, however, equitable considerations were apparent in a number of decisions as the court addressed several controversial administrative law questions. *Thompson* provided an opportunity for examination of the ongoing debate over the propriety of generic rulemaking;[269] *Home Savings* found the Tenth Circuit recognizing estoppel against the government;[270] *Mountain States* created a new (and questionable) exception to the doctrine of primary jurisdiction;[271] and other decisions sparked controversy and dissent among the judges. The opinions reviewed for this survey demonstrate the volatility of administrative law and therefore the need for further evaluation of existing administrative theory and precedent.

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267. *Id.*
268. *Administrative Law, Ninth Annual Tenth Circuit Survey*, 60 DEN. L.J. 149, 176 (1983).
269. *See supra* notes 8-73 and accompanying text.
270. *See supra* notes 74-114 and accompanying text.
271. *See supra* notes 198-236 and accompanying text.