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**INTRODUCTION TO THE SPECIAL ISSUE OF THE *WINDSOR*  
*YEARBOOK OF ACCESS TO JUSTICE***

**TRANSNATIONAL AND COMPARATIVE ADMINISTRATIVE LAW:  
PAPERS FROM THE SIXTH ADMINISTRATIVE LAW DISCUSSION  
FORUM, QUÉBEC CITY**

**Russell Weaver,\* Denis Lemieux\*\* & Laverne Jacobs\*\*\***

On May 25 - 26, 2010, Université Laval, the University of Windsor Faculty of Law and the University of Louisville Brandeis School of Law, hosted the Sixth Administrative Law Discussion Forum. These discussion fora, which have become an international academic success, have been held in a variety of venues in North America and Europe since the early 1990s. They are an initiative of Russell Weaver, Professor of Law & Distinguished University Scholar at the University of Louisville. The fora provide an opportunity for thoughtful exchange among administrative law academics on contemporary issues that cut across national borders.

The discussions reflected in this collection of papers touch on a variety of major administrative law themes. In addition, they examine local aspects of problems that transcend regional and national borders, and show connections and preoccupations between jurisdictions and indeed between countries. Because “transnational and comparative law” is a distinguishing theme of the University of Windsor, Faculty of Law, it was particularly appropriate to publish these papers in the *Windsor Yearbook of Access to Justice*. The conference organizers and participants were enthusiastic about the opportunity to do so.

This year’s forum centred on two topics: “The New Regulation,” which included a variety of regulatory issues that affect not only Canada and the US, but also Europe; and “The Differences between Adjudicative Structures” which brought attention to European decision-making models and North American debates about internal and external structures of administrative adjudication. Through the lens of these two broad themes flowed a rich and contextualized discussion of topics ranging from accountability and consultation in the regulatory context, to challenges posed by the structural role of decision-making agents and processes in an administrative state. The authors of this collection of papers are notable scholars in the field who have addressed these issues with perspicacity and candour. Offering both theoretical grounding as well as practical insight on a host of administrative law challenges, their work will prove of interest to academics, policymakers and practitioners alike. The following is a brief overview.

The collection opens with a look at administrative law judges and the structure of agency decision-making in the United States. In “Neither Fish Nor Fowl:

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\*\*\* Assistant Professor, Faculty of Law, University of Windsor. The authors wish to thank the *Yearbook’s* Editor and editorial staff for all their work in preparing this special issue.

Administrative Judges in the Modern Administrative State,” Russell Weaver and Linda Jellum examine the proposition that administrative law judges should possess greater independence in agency decision-making, including the power to render the final decisions in cases made by executive agencies. At the heart of their discussion lies the difficult question of the extent to which the executive branch of government should be allowed to ensure that adjudicative decisions conform to agency policy and political concerns. Weaver and Jellum highlight the difficult trade-offs between independence, political control and accountability that exist in agency adjudication even with the reforms that were brought to formal administrative proceedings by the *Administrative Procedure Act* in 1946. Their article discusses the advantages and disadvantages of various alternatives to the current system in order to explore the ability to import into a greater degree of judicial independence and impartiality to administrative decision-making in the United States.

In “The Merits of ‘Merits’ Review: A Comparative Look at the Australian Administrative Appeals Tribunal”, Michael Asimow and Jeffrey S. Lubbers explore whether it would be beneficial for the United States to create a national appeals tribunal model like that used in Australia. After a thorough discussion of the Australian system, as well as a look at administrative adjudication in the UK, the authors conclude that an independent US Social Security Tribunal, similar to the Australian Social Security Appeals Tribunal could be helpful in addressing challenges that exist at the hearing stage of Social Security adjudication. These challenges include: an overwhelming caseload, problems surrounding efficiency, accuracy and consistency of the decision-making process, and issues related to the hiring and management of administrative law judges.

The issues of independence and its often cited counterpart, accountability, are addressed in detail in the subsequent three articles. In “A Wavering Commitment? Administrative Independence and Collaborative Governance in Ontario’s Adjudicative Tribunals Accountability Legislation”, Laverne Jacobs examines a new piece of Ontario legislation designed to ensure the accountability of adjudicative tribunals through various forms of reporting while concurrently preserving their decision-making independence. Jacobs outlines the requirements of this unique statute and the concepts of independence and accountability as they are found in Canadian administrative law. She argues that the legislature’s goal of bringing the executive branch of government and tribunals together to achieve accountable, internal tribunal governance is laudable. However, the statute tends to favour the enforcement of accountability measures from the outside rather than fostering elements of internal tribunal culture that could lead to more authentic and durable measures of accountability. Moreover, the statute fails to address many contemporary concerns relating to accountability and independence, including the need for accountability on the part of the executive branch of government in order to ensure that the public is served adequately by adjudicative tribunals.

Continuing the discussion of independence and accountability, Herwig C.H. Hofmann examines these two values in the context of the European Union. In his article entitled, “Agency Design in the European Union”, Hofmann discusses the prolific creation of administrative agencies in the EU. He asserts that one of the main reasons for this “agencification” is so that agencies may assist in implementing EU

policies within networks of EU and Member State actors. Hofmann notes that the independence of EU agencies is enabled by their expertise -- their ability to provide technical and/or scientific assessments. Their expertise has also allowed them to be viewed as a means of providing high-quality decisions that transcend political influence. Yet, EU agencies remain accountable to political bodies of the EU and to Member States. Hofmann reflects on the variety of useful ways in which accountability may be demanded from EU agencies, including *ex ante* and *ex post* supervision, and increasing transparency.

Politics and political accountability are inescapable in any administrative state. In “Politics and Policy Change in American Administrative Law”, Richard Murphy explores the daunting question of the extent to which political preferences should be allowed to affect the discretionary judgment of agencies. Using the 2009 US Supreme Court decision of *FCC v. Fox Television Stations Inc.*<sup>1</sup> as a point of departure, Murphy examines the contested relationship between the politicization of agency decisions and policy change. He asserts that political preferences should affect some regulatory choices but should not distort expert administrative judgments.

The next two papers address accountability and evaluation of administrative action from fresh new perspectives. Much overlooked in discussions of administrative agency accountability is their success or failure in achieving the policy purposes for which they were created. In their essay, “The Elusive Search for Accountability: Evaluating Adjudicative Tribunals”, Lorne Sossin and Steven Hoffman address this question. Using Ontario’s health-related adjudicative tribunals as a case study, they reflect on the challenges involved in pursuing empirical inquiry to evaluate adjudicative tribunals -- challenges which become particularly acute when the goal is to assess their societal impact. Yet, as Sossin and Hoffman note, despite legal and methodological hindrances and the absence of empirical studies that evaluate the external impact of tribunals, empirical data is undoubtedly important. It may demonstrate performance benchmarks, ensure the appropriate use of public funds, ensure continuous quality improvement and identify reasons for reform. The authors conclude with an optimistic outlook, noting promising methodologies that have been used to evaluate specialized courts and possibilities for the measurement of outcomes.

In many jurisdictions, judicial review of administrative action is the most traditional accountability mechanism. Can judicial review keep up with the various regulatory reforms that have been brought about through the theory of new governance? In “Reinventing Regulation/Reinventing Accountability: Judicial Review in New Governance Regimes”, William D. Araiza analyzes this fundamental but underexplored issue. In his essay, Araiza notes the challenges that new governance principles raise for the determination of standing to challenge administrative action, looking to other jurisdictions for possible ways of addressing them. More broadly, Araiza argues thoughtfully for a reconceptualization of the notion of judicial review in order to provide adequate judicial supervision of forms of new governance regulations, such as ongoing agency management of public-private collaboration, without overstepping the realm of judicial competence.

Following these papers on accountability are a set of three papers focused on processes of public participation in the administrative state. In “Implications of the Internet for Quasi-Legislative Instruments of Regulation”, Peter L. Strauss explores

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<sup>1</sup> 129 S. Ct. 1800 (2009).

the place that the Internet has started to occupy within agency rulemaking processes in American administrative law. Discussing initiatives such as enactment of the *E-Government Act*<sup>2</sup> of 2002, emphasis on improving government transparency by the Obama Administration and the development of the new government portal *regulations.gov*, Strauss suggests that the Internet explosion has the potential to offer much greater input by the public in the consultation processes of agency rulemaking.

The theme of using consultation to improve the democratic legitimacy of executive branch regulations continues in the next article by France Houle. In “Implementing Consultation during Rule-Making: A Case Study of the *Immigration and Refugee Protection Regulation*”, Houle presents the findings of an empirical study designed to find out more about civil servants’ perceptions of mandatory consultation processes adopted pursuant to a federal Cabinet directive<sup>3</sup> requiring consultation during the creation of regulations. In contrast to the United States, consultation during the rulemaking process is still at a relatively early stage of development in Canada. Houle conducted interviews with civil servants in 11 different divisions of Canada’s federal Department of Citizenship and Immigration to gain a better understanding of their knowledge about stakeholders, how they approached consultation, the reasons underpinning consultation and of procedural aspects of the consultations. Houle’s research findings lead her to suggest a re-examination of the federal government’s current guidelines.

Hoi Kong rounds out this set of papers on designing effective consultative processes for the creation of regulations with a look at the municipal zoning bylaw context. In “The Deliberative City”, Kong asserts that concerns about the legitimacy and effectiveness of rulemaking gain special force when it comes to municipal law. On a theoretical level, he argues that developments in municipal consultation processes find their most appropriate normative foundation in a civic republican conception of legitimate state action. On a practical level, he examines the ward council – a municipal institution in Québec – and discusses the ways in which ward councils offer a civic republican response to the democratic deficit that can be noted in the consultative processes used in the development of zoning bylaws.

The last piece in this special issue is as much an invitation to further reading as it is a conclusion. In “Comparative Administrative Law: Outlining a Field of Study”, Susan Rose-Ackerman and Peter L. Lindseth discuss their new edited collection<sup>4</sup> which contributes to the renaissance of comparative administrative law. In this overview of their book, they highlight administrative law themes that offer points of connection across jurisdictions. Such themes include constitutional structures and administrative law; administrative independence; process and policy; administrative litigation; public-private relationships and transnational administration in the European Union. Rose-Ackerman and Lindseth state that their hope is that their

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<sup>2</sup> Pub. L. No. 107-347, 44 U.S.C.

<sup>3</sup> *Cabinet Directive on Streamlining Regulation*, Treasury Board of Canada Secretariat, Cabinet Directive on Streamlining Regulation, Section 2.0, online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca/ri-qr/directive/directive01-eng.asp>>.

<sup>4</sup> Susan Rose-Ackerman and Peter L. Lindseth, eds, *Comparative Administrative Law* (Cheltenham UK: Edward Elgar, 2010).

book of essays will generate interest in the field of comparative administrative law. We are certain that it will do so.

In conclusion, the Sixth Administrative Law Discussion Forum was an opportunity for fruitful discussion on transnational and comparative administrative law themes. These themes, which are pervasive and uniting, included independence, transparency, politicization and consultation. They dealt with the effectiveness of a range of administrative law tools, places for improvement and means for providing such improvement. From a very successful conference, we are delighted to present this engaging set of essays which we are confident will make a valuable contribution to administrative law scholarship across jurisdictions.

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Louisville, Kentucky

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*Conference Organizers*  
*Sixth Administrative Law Discussion Forum*  
*May, 25-26 2010*



## ARTICLES



## NEITHER FISH NOR FOWL: ADMINISTRATIVE JUDGES IN THE MODERN ADMINISTRATIVE STATE

Russell L. Weaver\*  
Linda D. Jellum\*\*

*This article examines the role of administrative adjudication in the United States constitutional system. It begins by noting that such adjudication fits uncomfortably within a system of divided powers. Administrative judges, including administrative law judges [ALJs] (who have the highest level of protection and status), are considerably more circumscribed than ordinary Article III judges. Indeed, administrative judges are usually housed in the agencies for which they decide cases, rather than in independent adjudicative bodies, and they do not always have the final say regarding the cases they decide. In many instances, the agency can appeal an adverse administrative judge's decision directly to the head of the agency, and the agency head retains broad power to overrule the administrative judge's determinations. In other words, the agency can substitute its judgment for that of the administrative judge regarding factual determinations, legal determinations, and policy choices. As a result, many administrative adjudicative structures involve difficult trade-offs between independence, political control, and accountability. This article examines issues related to the status and power of administrative judges, as well as the constraints that have been imposed on administrative adjudicative authority, and explores whether those constraints continue to serve the purposes for which they were originally imposed.*

*Cet article examine le rôle du règlement de différends dans le domaine administratif dans le cadre du système constitutionnel des États-Unis. Il note d'abord qu'une telle façon de régler les différends cadre difficilement avec un système où les pouvoirs sont divisés. Les juges administratifs, y inclus les juges de droit administratif (qui jouissent du niveau le plus élevé de protection et de statut), sont considérablement plus restreints que les juges ordinaires sous l'Article III. En effet, les juges administratifs sont d'habitude logés dans les agences pour lesquelles ils décident les cas, plutôt qu'au sein d'organismes indépendants de règlement de différends, et ils n'ont pas toujours le dernier mot dans les cas qu'ils jugent. Dans bien des cas, l'agence peut porter en appel directement au chef de l'agence une décision défavorable d'un juge administratif, et le chef de l'agence possède de vastes pouvoirs pour annuler la décision du juge administratif. En d'autres mots, l'agence peut substituer son jugement à celui du juge administratif quant aux décisions de fait, aux décisions de droit et*

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\* Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law. This paper was originally written for and presented at the Sixth Administrative Law Discussion Forum, Québec City, May 25-26, 2010. The authors wish to thank the forum participants for their comments, and especially to thank Professor Michael Asimow and Professor Jeffrey Lubbers.

\*\* Professor of Law, Mercer University School of Law. We would both like to thank Troy Clark (J.D. expected Mercer Law School 2010) for his help researching this article.

*aux choix de politiques. Par conséquent, plusieurs structures de règlement de différends dans le domaine administratif comportent des compromis difficiles entre l'indépendance, le contrôle politique et l'obligation de rendre compte. Cet article examine des questions se rapportant au statut et au pouvoir de juges administratifs, ainsi qu'aux contraintes qui ont été imposées sur l'autorité de régler des différends dans le domaine administratif, et explore la question à savoir si ces contraintes continuent à servir les buts pour lesquels elles ont été imposées originellement.*

## I. INTRODUCTION

Administrative adjudication has always rested uncomfortably in the United States constitutional system. In theory, if not entirely in practice, the system includes separation of powers principles, as well as the concept of checks and balances, throughout the constitutional structure.<sup>1</sup> For example, the Constitution vests legislative power in Congress,<sup>2</sup> judicial power in the courts<sup>3</sup> and executive power in the President.<sup>4</sup> However, the lines of separation between the branches are not complete; and, there are many instances when power is divided between two branches of government. For example, not only must both houses of Congress pass legislation, it must be presented to the President for signature or veto.<sup>5</sup>

Modern administrative agencies present significant challenges to the notion of separated powers because they frequently perform many functions committed to coordinate branches of government. For example, many agencies “legislate” (in the sense of creating rules and regulations that can have the force and effect of legislative enactments),<sup>6</sup> “adjudicate” (in the sense of deciding cases), and “administer” (in the sense of executing and administering the laws).<sup>7</sup> Additionally, although most administrative agencies reside in the executive branch of government, Congress has limited the President’s authority to remove the heads of some agencies and other executive officials,<sup>8</sup> and thereby allowed those agencies to function relatively independently of presidential authority.

<sup>1</sup> Political philosophers whose ideas influenced the writing of the United States Constitution include (but are hardly limited to) Montesquieu and Locke. See Baron de Montesquieu, *The Spirit of Laws*, David Wallace Carrithers ed translated by Thomas Nugent, (London: Nourse, 1750; Berkeley: University of California Press, 1977) at 202. “When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can then be no liberty....”; John Locke, *Two Treatises of Government*, Peter Laslett, ed, 2d ed. (London: Cambridge University Press, 1690, 1970) at 380. (“the legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.”).

<sup>2</sup> U.S. Const. art. I, § 1 (“[a]ll legislative Powers . . . shall be vested in a Congress of the United States...”).

<sup>3</sup> U.S. Const. art. III, § 1 (“[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). The framers founded an independent judiciary to rectify the mistake of the English Constitution, which made its judiciary subject to the control and pressures of Parliament. Irving R. Kaufman, “The Essence of Judicial Independence” (1980) 80 Colum L Rev 671 at 672-87.

<sup>4</sup> U.S. Const. art II, § 1 (“[t]he executive Power shall be vested in a President of the United States of America.”).

<sup>5</sup> U.S. Const. art. 1§ 7.

<sup>6</sup> See William F. Funk, Sidney A. Shapiro & Russell L. Weaver, *Administrative Practice and Procedure: Problems and Cases*, 4th ed, (St. Paul, MN: West Publishing Company, 2010) at 517.

<sup>7</sup> *Ibid.* See also *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).

<sup>8</sup> See *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

One peculiarity of the U.S. administrative system is the fact that many agencies are allowed to hear and adjudicate cases. Article III of the United States Constitution vests judicial power in the federal courts<sup>9</sup> and provides Article III judges with lifetime tenure and substantial independence from the other two branches of government. Under the Constitution, Article III courts exercise broad power to “say what the law is”<sup>10</sup> and have sometimes rendered sweeping decisions that have reshaped society.<sup>11</sup> If Congress wishes to override an Article III court’s decision, Congress may have no choice but to try and amend the Constitution (a process that rarely succeeds).

Administrative courts and adjudicative structures<sup>12</sup> function much differently.<sup>13</sup> In contrast to Article III judges, the powers of administrative judges, including administrative law judges [ALJs] (who have the highest level of protection and status),<sup>14</sup> are considerably more circumscribed. Administrative judges are usually housed in the agencies for which they decide cases,<sup>15</sup> rather than in independent adjudicative bodies.<sup>16</sup> In addition, administrative judges do not always have the final say regarding the cases they decide. In many instances, the agency can appeal an

<sup>9</sup> U.S. Const. art. III.

<sup>10</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>11</sup> See *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Board of Education*, 349 U.S. 294 (1955).

<sup>12</sup> In the federal system, an adjudicative body can now be classified as an Article I, Article II, Article III, or Article IV court, in reference to the article of the Constitution from which the court’s authority stems. Article I courts are typically legislative courts. Some examples include the Social Security Administration’s Office of Disability Adjudication and Review and the United States Court of Appeals for Veterans Claims. There are many others. Article II courts are generally established under the President’s authority pursuant as Commander in Chief to maintain order and justice in military occupied territories and insular possessions. Some examples include Guantanamo military commission and High Court of American Samoa. The Article III courts include the Supreme Court of the United States and the inferior courts established by the Congress pursuant to its Article III powers. U.S. Const. art. III, § 1. There are currently thirteen courts of appeals, ninety-four district courts, and the U.S. Court of International Trade. Article IV courts are tribunals established in territories of the United States by the Congress, pursuant to the Territorial Clause. A few examples of the Article IV courts that still exist include the United States District Court for the Northern Mariana Islands, the District Court of Guam, and the District Court of the Virgin Islands.

<sup>13</sup> Commentators have long discussed the lack of independence in this area. For just a few examples, see Ron Beal, “The Texas State Office of Administrative Hearings: Establishing Independent Adjudicators in Contested Case Proceedings While Preserving the Power of Institutional Decision-Making” (2005) 25 *Journal of the National Association of Administrative Law Judges* 119; James F. Flanagan, “Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review” (2002) 54 *Admin L Rev* 1355 at 1382-85; Richard B. Hoffman & Frank P. Cihlar, “Judicial Independence: Can It Be Without Article III?” (1995) 46 *Mercer L. Rev.* 863; Harold J. Krent & Lindsay DuVall, “Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary” (2005) 25 *Journal of the National Association of Administrative Law Judges* 1; L. Hope O’Keeffe, “Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability”, Note, (1986) 54 *Geo Wash L Rev* 591.

<sup>14</sup> See 5 U.S.C. § 7521 (2009); 5 C.F.R. § 1201.131 (2007).

<sup>15</sup> Administrative adjudicators have existed in the United States since the earliest times. See Louis G. Caldwell, “A Federal Administrative Court” (1936) 84 *U Pa L Rev* 966 at 970 (“[U]nder a bewildering medley of federal statutes, judicial functions galore have been lodged in the President, in agencies directly responsible to the President, in the heads of government departments, in subordinate officials and bureaus in those departments, and in the so-called independent boards and commissions...”). As early as 1936, there were “about seventy-three administrative tribunals in the federal government performing judicial functions in about 267 classes of cases.” *Ibid* at 970.

<sup>16</sup> See Russell L. Weaver, “Management of ALJ Offices in Executive Departments and Agencies” (1995) 47 *Admin L Rev* 303 [“Management of ALJ Offices”].

adverse administrative judge's decision directly to the head of the agency.<sup>17</sup> If the decision is not appealed, it becomes the "decision of the agency."<sup>18</sup> Yet, if appealed, the agency retains broad power to overrule the administrative judge's determinations under the *Administrative Procedure Act* [APA]: "On appeal from or review of the initial decision, the agency has all the powers which it would have [had] in making the initial decision...."<sup>19</sup> In other words, the agency can substitute its judgment for that of the administrative judge regarding factual determinations,<sup>20</sup> legal determinations, and policy choices.

As a result, many administrative adjudicative structures involve difficult trade-offs between independence, political control, and accountability. Most administrative judges function as employees of the agencies for which they decide cases. If independence is truly a core attribute of the American style of judging and if administrative judges are not truly independent, then administrative judges may be more accurately characterized as administrative functionaries with judge-like duties than as true judges.<sup>21</sup>

In this article, we examine issues related to the status and power of administrative judges. We begin by examining the history and development of existing administrative structures and the current status of the law. From there, we explain the constraints that have been imposed on administrative adjudicative authority and explore whether those constraints continue to serve the purposes for which they were originally imposed. We then examine some of the ideas that have been floated regarding how administrative judges (including ALJs) could be restructured and governed. None of these ideas is entirely satisfactory. However, given that the status quo is not entirely satisfactory either, it is worthwhile to re-examine some of these ideas and to explore some new ones.

## II. EVOLUTION OF THE MODERN ADJUDICATIVE STRUCTURE

Even though the modern administrative *adjudicative* system is imperfect, it is a vast improvement over the system that preceded it. At the beginning of the nineteenth century, most adjudications were presided over by "examiners"<sup>22</sup> who were appointed by the agencies themselves.<sup>23</sup> These examiners were hardly independent, holding the status of "underling" or "subordinate"<sup>24</sup> in the sense that the agencies for which they worked controlled their assignments, their compensation, their promotions, and their retention.<sup>25</sup> Indeed, some early examiners served completely at the pleasure of their

<sup>17</sup> 5 U.S.C. § 557(b). Of course, the reason for allowing appeals to the agency is that the agency is empowered to make law through adjudication.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Agencies are somewhat limited in rejected ALJ findings of fact based on testimonial evidence. *Penasquitos Village v. Nat. Labor Relations Bd.*, 565 F.2d 1074 (9th Cir. 1977).

<sup>21</sup> James E. Moliterno, "The Administrative Judiciary's Independence Myth" (2006) 41 Wake Forest L. Rev 1191 at 1197.

<sup>22</sup> The term "examiners" came into use in 1906. 3 Kenneth Culp Davis, *Administrative Law Treatise* 2d ed. (San Diego: K. C. Davis Pub. Co., 1980) § 17.11, at 313.

<sup>23</sup> See Management of ALJ Offices, *supra* note 16, at 303.

<sup>24</sup> See Malcolm Rich, "Adapting the Central Panel System: A Study of Seven States" (1981) 65 Judicature 246 at 246 ("The agencies controlled the compensation and job tenure of their hearing officers and could ignore their decisions and enter de novo rulings instead.").

<sup>25</sup> *Ibid* at 303-04.

superiors and had no job security whatsoever.<sup>26</sup> Hence, judicial “independence” and “impartiality” were not an assured part of the administrative equation.

By the 1930s, commentators began to raise serious concerns regarding the status of hearing examiners, as well as about their ability to decide cases fairly, independently, and impartially.<sup>27</sup> In a 1934 report, the American Bar Association’s [ABA] Special Committee on Administrative Law criticized the fact that some examiners exercised both prosecutorial and adjudicative functions.<sup>28</sup> One member of the Committee summed up the concerns as follows:

If there is anything of which we can be relatively sure after some hundreds, even thousands, of years of experience with judicial machinery, it is that no man can be trusted to be judge in his own case. And he is a judge in his own case if he is also the prosecutor or if he is also the legislator who made the rule he is asked to interpret and apply. Agency after agency in our federal government is authorized to wield all three powers of government at once. Wearing its legislative toga, a commission makes a regulation, on compliance with which John Doe's right to continue in business may depend. Having reason to believe that John Doe is guilty of violating the regulation, the commission doffs the toga and, taking up the executive sceptre, investigates and prosecutes him. With the sceptre still in its hand, the commission hurriedly dons the judicial ermine and proceeds to present itself at least two scintillas of evidence to prove that it was right in the first place. While care is sometimes taken to preserve the form of placing the burden of proof on the prosecutor, all the form in the world cannot disguise the fact that the burden is usually on John Doe to prove himself innocent before a commission that at least strongly suspects he is guilty. If John or his lawyer construes the regulation differently than does the commission, that is just unfortunate for John. The commission made the regulation and is confident that it knows just what it meant to say. And it is always free to change its mind. John is in the position of a man whose wife changes her system of bidding in the middle of a bridge game without notice. He is sure to lose and is equally sure to get blamed for it.<sup>29</sup>

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<sup>26</sup> *Ibid.*

<sup>27</sup> An ABA Report concluded that appointments to administrative tribunals are all too generally classed as patronage and, it is to be feared, the decisions of some of them are occasionally dealt with as a form of patronage. It is not easy to maintain judicial independence or high standards of judicial conduct when a political sword of Damocles continually threatens the judge's source of livelihood. While a few federal administrative tribunals have, in spite of all obstacles, preserved a high degree of independence from political pressure and political considerations, unfortunately there are others which have yielded and as a result the cause of justice has suffered. Special Report of the Special Committee on Administrative Law, (1934) 59 American Bar Association 539 at 546 [ABA Special Report]; See also Jeffrey S. Lubbers, “Federal Administrative Law Judges: A Focus on Our Invisible Judiciary” (1981) 33 Admin L. Rev 109 at 111.

<sup>28</sup> ABA Special Report, *ibid* at 545-46.

<sup>29</sup> Caldwell, *supra* note 15, at 973-74.

Separation of functions and status were not the only concerns. Even had examiners been functionally separate from their agencies, their decisions were not final and could be overridden by agency superiors.<sup>30</sup>

During the debate, many suggestions were offered regarding how to reform the system. Some argued that Congress should create a federal administrative court that would hear only administrative cases.<sup>31</sup> Others suggested that Congress should create an independent administrative judiciary, a central panel of judges, to adjudicate administrative matters.<sup>32</sup> Congress ultimately rejected both of these suggestions. In 1946, with the passage of the *APA*,<sup>33</sup> Congress opted for a third approach that was unique to administrative law, but included a number of protective components. First, Congress sought to prevent agency officials from acting as lawmaker, investigator, prosecutor, and jury in the same case. Importantly, the *APA* provided that ALJs could not be responsible to, or subject to supervision by, anyone performing investigative or prosecutorial functions for an agency.<sup>34</sup> To do so, the *APA* required agencies to separate the prosecuting functions of an agency from its adjudicating functions.<sup>35</sup> Specifically, anyone who investigated or prosecuted a case could not supervise or direct those individuals who adjudicated the case.<sup>36</sup> Additionally, those individuals who investigated or prosecuted could not be part of the decisionmaking process.<sup>37</sup> Further, the *APA* limited some *ex parte* communications.<sup>38</sup>

The centerpiece of the *APA* reforms, however, involved a strengthening of the position and status of hearing examiners.<sup>39</sup> The *APA* greatly improved the status of some, but not all, administrative judges by creating a new position, that of the ALJ

<sup>30</sup> See Lubbers, *supra* note 27 at 111 ("Furthermore, the role of the presiding officer in an agency's decisional process was often unclear; many agencies would ignore the officer's decisions without giving reasons, and enter their own de novo decisions.").

<sup>31</sup> John D. O'Reilly, Jr., "The Federal Administrative Court Proposal: An Examination of General Principles" (1937) 6 *Fordham L Rev* 365; See also Attorney General's Committee on Administrative Procedure - Majority and Minority Reports, (1941) 27 *ABA J* 91 at 93.

<sup>32</sup> See Rich, *supra* note 24 at 246 ("Yet the hearing officers were not granted complete independence from the agencies, for the *APA* allowed them to be assigned exclusively to particular agencies.").

<sup>33</sup> 5 U.S.C. § 551 *et. seq.*

<sup>34</sup> See 5 U.S.C. § 554(d)(2) (2009). Indeed, Congress created a unique system because of its concern about separating the adjudicatory function from other conflicting agency functions. In 1970 and 1977 respectively, Congress created the Occupational Safety and Health Review Commission [OSHRC] and the Federal Mine Safety and Health Review Commission [FMSHRC]. Both are independent, Executive Branch agencies located outside the Department of Labor. Importantly, they have adjudicative authority only. "OSHRC determines whether regulations promulgated and enforced by the Occupational Safety and Health Administration have been violated. FMSHRC adjudicates violations of standards promulgated and enforced by the Mine Safety and Health Administration." Robin J. Arzt, "Recommendations for a new Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims" (2003) 23 *Journal of the National Association of Administrative Law Judges* 267 at 281.

<sup>35</sup> 5 U.S.C. § 554(d).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* There were, however, some exceptions. The *APA* provides that "[t]his subsection does not apply... to the agency or a member or members of the body comprising the agency." 5 U.S.C. § 554(d)(2)(C). As a result, "a member or members of the body comprising the agency" could be involved in prosecutorial, investigatory, and adjudicatory functions. *Ibid.*

<sup>38</sup> 5 U.S.C. § 554(d). Congress later amended the *APA* to add another section designed to address *ex parte* communications. 5 U.S.C. § 557(d).

<sup>39</sup> William S. Jordan, III, "Chevron and hearing rights: An Unintended Combination, (2009) 61 *Admin L Rev* 249 at 270 citing Kenneth Culp Davis, *Administrative Law* (St. Paul, MN: West Publishing Company, 1951) at 309.

(initially, the *APA* referred to ALJs as “hearing examiners”),<sup>40</sup> and by giving ALJs protections designed to bolster their independence.<sup>41</sup> In particular, ALJs were to be certified by the Office of Personnel Management [OPM] and were not subject to a probationary period.<sup>42</sup> OPM was directed to determine the minimum experience needed to be an ALJ and to evaluate applicants for the position (by conducting interviews, administering a test of writing ability, evaluating the experience of applicants, and ranking eligible applicants).<sup>43</sup> Despite these improvements, agencies retained control over the choice of who was actually selected from OPM’s register and who was actually hired into ALJ positions.<sup>44</sup> In other words, the agencies retained control over the selection of ALJs who worked for them, even if the pool of available candidates was shrunk and controlled by OPM.

Once hired, ALJs enjoyed increased job protections and independence *vis-a-vis* pre-*APA* hearing examiners. Although the *APA* did not grant ALJs the life tenure granted to Article III judges, ALJs could be removed only for cause or due to a reduction in workforce.<sup>45</sup> In addition, the *APA* required that ALJs be assigned cases in rotation and that ALJs not perform duties inconsistent with their role as ALJs.<sup>46</sup> Additionally, the *APA* required that ALJ compensation be determined based on length of service rather than based on performance evaluations. As the Supreme Court concluded, these changes made a significant difference in the status of ALJs:

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is “functionally comparable” to that of a judge. His powers are often, if not generally, comparable to those of a trial judge.... More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.<sup>47</sup>

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<sup>40</sup> Marvin H. Morse, “The Administrative Law Judge: A New Direction for the Corps?” (1983) 30 Fed B News & J 398 at 401 n. 2 (“The *APA* ... initially referred to presiding officers as examiners, colloquially referred to as hearing examiners. The title was administratively standardized to Administrative Law Judge by the Civil Service Commission in August 1972. The ALJ title was ratified by the Act of March 27, 1978, Pub. L. No. 95-251, 92 Stat. 183.”). See also Paul R. Verkuil *et al.*, “The Federal Administrative Judiciary” 1992 Administrative Conference of the United States 771, 798 (1992). In 1978, Congress amended the *APA* to official change the term from hearing examiners to administrative law judges. Pub. L. No. 95-251, 92 Stat. 183 (1978).

<sup>41</sup> See also Rich, *supra* note 24 at 246. Congress, in its 1946 *Administrative Procedure Act* [*APA*] sought to establish a corps of federal hearing officers that were more independent of the agencies. Hearing officers were to be given career appointments and compensation was to be managed by the Office of Personnel Management. Yet the hearing officers were not granted complete independence from the agencies, for the *APA* allowed them to be assigned exclusively to particular agencies.

<sup>42</sup> OPM has been “exclusively responsible for the initial examination, certification for selection, and compensation of ALJs.” Lubbers, *supra* note 27 at 112.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> 5 U.S.C. § 7521; 5 C.F.R. § 1201.131 (2007).

<sup>46</sup> 5 U.S.C. § 3105 (2009); 5 C.F.R. § 930.212 (2007).

<sup>47</sup> *Butz v. Economou*, 438 U.S. 478, 513 (1978).

As Michael Asimow and Jeffrey Lubbers have argued,<sup>48</sup> the *APA* system is hardly perfect. There are difficulties with selection criteria, as well as with the inability of agencies to conduct performance evaluations. These concerns may be legitimate, but are beyond the scope of this article.

### III. DEPARTURES FROM THE ARTICLE III JUDICIAL MODEL

Even though the *APA* significantly altered the status and work of administrative judges, the *APA* departed from the Article III judicial model in important respects. Critically, the *APA* did not convert all administrative judges into “ALJs.” Indeed, the *APA* did not even require that all administrative adjudications be conducted by ALJs.<sup>49</sup> Rather, the *APA* required only that ALJs be used for “formal,” as opposed to “informal,” hearings.<sup>50</sup> Today, informal adjudication is much more prevalent than formal adjudication as a consequence of the Supreme Court’s decision in *Florida East Coast Ry. v. United States*<sup>51</sup> (which created a presumption in favour of informality for rulemaking), and the lower courts’ application of this principle to adjudication.<sup>52</sup> As a result, many administrative judges continue to decide cases without the status of an ALJ.

Even when the *APA* (or the agency’s governing statute) requires an agency to use an ALJ, the *APA* limits the ALJs’ power. Specifically, the drafters of the *APA* chose not to give ALJs complete control over the cases they decided. Thus, if an agency wished, the agency was free to decide the case itself or to have the case heard by one or more members of the body comprising the agency.<sup>53</sup> If the agency did not choose one of those two options, however, the *APA* did require the agency to have one or more ALJs appointed to preside at the taking of evidence.<sup>54</sup> But, even when an ALJ heard a case, the *APA* did not require the agency to allow the ALJ to render the final decision in the case.<sup>55</sup> The agency could command “either in specific cases or by general rule, the entire record to be certified to it for decision.”<sup>56</sup> In other words, the agency could direct the ALJ to act as no more than an information gatherer.

<sup>48</sup> See Michael Asimow and Jeffrey S. Lubbers, “The Merits of ‘Merits’ Review: A Comparative Look at the Australian Administrative Appeals Tribunal” (2010) 28:2 Windsor YB Access Just, for a more detailed discussion of these issues [“The Merits of ‘Merits’ Review”].

<sup>49</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>50</sup> Section 554 of the *APA* applies “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.” 5 U.S.C. § 554(a).

<sup>51</sup> 410 U.S. 224 (1973) (suggesting that Congress must use relatively specific language in its enabling statute to trigger formal rulemaking).

<sup>52</sup> *Chemical Waste Mgmt., Inc. v. U.S. EPA*, 873 F.2d 1477 (D.C. Cir. 1989) (holding that *Chevron* deference applies to an agency’s decision regarding whether a formal rather than an informal adjudication was required by the enabling statute). But see Jordan, *supra* note 39, at 254 (arguing that the *APA* creates a presumption that formal adjudication should apply unless Congress clearly provides otherwise); Melissa M. Berry, “Beyond *Chevron*’s Domain: Agency Interpretations of Statutory Procedural Provisions,” (2007) 30 Seattle UL Rev 541 (arguing that Congress did not intend to delegate this decision to the agencies in light of concerns about agency self-interest and fairness); John F. Stanley, “The ‘Magic Words’ of § 554: A New Test for Formal Adjudication Under the Administrative Procedure Act”, Note, (2005) 56 Hastings LJ 1067 (suggesting that *Skidmore* deference would be a better deference standard for review of agency decisions regarding the formality of the procedure required by the *APA*).

<sup>53</sup> 5 U.S.C. § 554(a).

<sup>54</sup> 5 U.S.C. § 556(b).

<sup>55</sup> 5 U.S.C. § 557.

<sup>56</sup> 5 U.S.C. § 557(b).

Perhaps most importantly, although the ALJ's decision would become the agency's final decision if it were not appealed to the agency, the agency retained broad authority to review the ALJ's decision and to substitute its own judgment for that of the ALJ.<sup>57</sup> The net effect was that administrative judges were "subservient to their agencies in the permanency of their decisions."<sup>58</sup> Unlike Article III judges, who are immune from executive override (even Congress has limited authority to overrule their decisions retroactively), ALJs (at the agency's option) can be forced to play a minimal (advisory), even no, role in adjudication.

Hence, although the *APA* improved the administrative law judge's independence and impartiality<sup>59</sup> in many ways, the reforms were not intended to and did not give administrative judges the status of Article III judges, nor completely shift the nature of the administrative adjudicative process.

#### IV. ALTERNATIVES TO THE CURRENT SYSTEM

For decades, commentators have suggested alternative models for administrative adjudication. Of course, any suggested reform must deal with fundamental trade-offs. In other words, even if some might prefer to make administrative adjudication more independent and impartial, the question is whether and, if so to what extent, executive agencies should be allowed to ensure that adjudicative decisions conform to the policy and political concerns of agency administrators. A number of suggestions have been made for how to resolve this fundamental conflict. Below are a few options that other scholars have suggested along with a few new ideas.

##### A. Expanding *APA* Protections to Administrative Judges

One solution to this problem would be to extend ALJ-like protections to more administrative judges. It is difficult to deny that the *APA* has brought significant improvements to the status of those administrative judges denominated "ALJs." However, it is also difficult to deny the fact that the *APA* left a variety of administrative judges without the benefit of ALJ status. As we noted earlier, informal adjudications are much more common today than perhaps was originally envisioned by the *APA* drafters, and therefore many of the decisionmakers in these informal adjudications function with fewer protections than ALJs. So, one possibility would be to require that more administrative adjudications be conducted as "formal" (rather than "informal") proceedings.<sup>60</sup> If that were done, then the *APA* would require agencies to make greater use of ALJs (with, of course, greater protections than the administrative judges currently deciding their cases).

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<sup>57</sup> *Ibid.*

<sup>58</sup> Moliterno, *supra* note 21, at 1224.

<sup>59</sup> "Impartiality as a judicial trait is often confused with independence. Impartiality is about fair-minded, neutral decisionmaking. Independence is created primarily by structural aspects of government. Impartiality is created primarily by the structure of the dispute resolution process. All judges are in systems that foster impartiality; some judges are in structures that foster independence." Moliterno, *supra* note 21, at 1199.

<sup>60</sup> This topic is beyond the bounds of this paper; however, for an excellent discussion of this issue, see Jordan, *supra* note 39 at 254 (arguing that formal adjudication should apply unless Congress clearly provides otherwise in the enabling statute); Michael Asimow, "The Spreading Umbrella: Extending the *APA*'s Adjudication Provisions to all Evidentiary Hearings Required by Statute" (2004) 56 Admin L. Rev 1003 (suggesting that some *APA* protections, e.g. *ex parte* prohibitions, should be accorded to adjudications that while not formal under the *APA* distinction are very procedurally prescribed due to statutory requirements). *Acord, Berry*, *supra* note 52, at 579-80 (suggesting that Congress did not intend for agencies to choose whether formal or informal hearings were appropriate).

The downside to this approach is that it may not be wise to unduly formalize the administrative process. Formal procedures are more involved and burdensome, and require administrative agencies to provide greater process to litigants.<sup>61</sup> However, more is not always better, and an enhanced process is not always preferable to an informal process. For example, administrative agencies frequently conduct so-called “due process” hearings under the United States Supreme Court’s decision in *Goldberg v. Kelly*.<sup>62</sup> Under that decision, courts are required to grant hearings in a variety of contexts, not by virtue of a congressional mandate, but rather because a hearing is required under one of the due process clauses.<sup>63</sup> Even though a due process hearing might be required in a given case, the Court does not require that the process be “formal” in the *APA* sense. On the contrary, the Court has recognized that it is often permissible to allow agencies to utilize less involved procedures. Indeed, in the Court’s decision in *Mathews v. Eldridge*,<sup>64</sup> the Court suggested that the amount of process required in a given case should depend upon a balancing of the need for enhanced procedures against the burden that the additional procedures would impose on the administrative process. A shift to a widespread use of formal hearing procedures would necessarily impose a much greater burden on the agencies involved and might discourage agencies from granting hearings in more cases (and, correspondingly, may discourage courts from ordering more hearings).

## B. The Central Panel and Federal Administrative Court Systems

Denouncing the present system as one that hinders independence, many ALJs enthusiastically support the option of creating a central panel of administrative law judges (essentially, an independent administrative judiciary managed by a central administrator).<sup>65</sup> ALJs were not the first to propose this option. As noted earlier, prior to the enactment of the *APA*, some commentators argued for creation of a central panel system.<sup>66</sup> During enactment of the *APA*, the idea was revived and discussed further.<sup>67</sup> A variation of the central panel option would be to establish a single, federal administrative court. The judges on such a court would hear only administrative cases.<sup>68</sup>

As noted, when Congress enacted the *APA*, it specifically rejected both the single panel and administrative court options, choosing instead to have ALJs work within the agencies for which they adjudicate and to have ALJs report to non-ALJs within those agencies. As a result, instead “of establishing the examiners as an independent

<sup>61</sup> See generally procedures in 5 U.S.C. §§ 556 & 557 (2009).

<sup>62</sup> 397 U.S. 254 (1970)

<sup>63</sup> The Constitution contains two due process clauses; one located in the Fifth Amendment and one located in the Fourth Amendment. U.S. Const. amend. V & XIV, § 1.

<sup>64</sup> 424 U.S. 319 (1976).

<sup>65</sup> Moliterno, *supra* note 21, at 1227 (citing Victor W. Palmer, “The Administrative Procedure Act: After 40 Years, Still Searching for Independence” (1987) *Judges’ Journal* at 34, 39).

<sup>66</sup> See John D. O’Reilly, Jr., “The Federal Administrative Court Proposal: An Examination of General Principles” 6 *Fordham L Rev* 365 (1937); See also Attorney General’s Committee on Administrative Procedure - Majority and Minority Reports, (1941) 27 *ABA J* 91 at 93.

<sup>67</sup> Moliterno, *supra* note 21, at 1227 (citing Palmer, *supra* note 65, at 37 and Ralph F. Fuchs, “The Hearing Examiner Fiasco Under the Administrative Procedure Act” (1950) 63 *Harv L Rev* 737 at 739 (“[C]orps of highly responsible hearing officers [was] originally put forward by the Attorney General’s Committee.”)).

<sup>68</sup> While the two are similar, a federal administrative court would actually hear cases. In contrast, a central panel would manage the ALJs and assign them to hear cases within agencies (and within the agency judicial structures).

corps, as recommended in the minority report, the responsibility for protecting critical elements in the employment of hearing examiners was entrusted to the Civil Service Commission.”<sup>69</sup>

Despite Congress’s rejection of the central panel option, support for that idea has never entirely disappeared. In 1983, “[t]he Judicial Administration Division passed a resolution ... favoring the passage of legislation to establish federal administrative law judges as an independent corps.”<sup>70</sup> Some scholars have made similar recommendations,<sup>71</sup> and central panels have been used successfully in a number of states.<sup>72</sup>

There are a number of advantages to the central panel and federal administrative court options. First, both systems would increase efficiency by allowing for centralized organization and management of ALJ offices. Rather than having lots of judges scattered among a variety of agencies, there would be one large judicial structure. Second, impartiality, or at least the appearance of impartiality, would increase as administrative judges would be located outside of the agencies for which they decide cases. Under the current system, litigants (especially *pro se* litigants) may be uncertain about the impartiality of administrative judges who work for the agency that the litigants are appearing before.<sup>73</sup>

One primary concern—judicial independence—would likely increase as well. As Justice Scalia has recognized, the “problem of improper influence would ... be solved by implementing proposals for establishment of a unified ALJ corps, headed by an independent administrator.”<sup>74</sup> At least one commentator agreed with Justice Scalia when he stated that the “basic purpose of the central panel system is to give ALJs a certain amount of independence from the agencies over whose proceedings they preside...”<sup>75</sup> As these comments suggest, judicial independence is less achievable when administrative judges are employees of the agencies for which they decide cases, and a federal administrative court separates litigants from their agencies.

But proposals to create either a central panel system or a federal administrative tribunal are not without disadvantages as well. Indeed, in a 1992 study prepared by the Administrative Conference of the United States, the idea of a central panel system

<sup>69</sup> Palmer, *supra* note 65 at 37.

<sup>70</sup> *Ibid* at 39.

<sup>71</sup> See e.g. Hoffman & Cihlar, *supra* note 13, at 878; See also Jim Rossi, “Overcoming Parochialism: State Administrative Procedure and Institutional Design” (2001) 53 Admin L Rev 551 at 568 (“[T]he central panel promotes independence ... [b]y removing ALJs from the managerial auspices of the agencies whose matters they adjudicate ....”).

<sup>72</sup> Palmer, *supra* note 65 at 39. See e.g. Ariz. Rev. Stat. Ann. § 41-1092.01; Ga. Code Ann. § 50-13-40; Md. Code Ann., State Gov’t § 9-1602 (LexisNexis); Tex. Gov’t Code Ann. § 2003.021 (Vernon); Yvette N. Diamond, “OAH - What’s It All About?” Maryland Bar Journal Jan. /Feb. 2006, at 4, 6 (identifying the Office of Administrative Hearings in Maryland as “a centralized panel of ALJs in a separate and independent agency under the executive branch of the Maryland state government”). See generally James F. Flanagan, “An Update on Developments in Central Panels and ALJ Final Order Authority” (2005) 38 Ind L Rev 401

<sup>73</sup> The system might seem strange to the uninitiated for any number of reasons. First, one of the litigants in front of the administrative judge is often the judge’s employer. Second, opposing counsel may be the administrative judge’s co-worker. Third, the agency’s experts may also be co-workers of the judge. Finally, the administrator of one of the litigants will control the judge’s budget. Moliterno, *supra* note 21 at 1195.

<sup>74</sup> Antonin Scalia, “The ALJ Fiasco—a Repris” (1979) 47 U Chicago L Rev 57 at 79.

<sup>75</sup> Allen C. Hoberg, “Administrative Hearings: State Central Panels in the 1990s” (1994) 46 Admin L Rev 75 at 76).

was rejected.<sup>76</sup> Moreover, despite the language quoted above, Justice Scalia is more opposed to the option than in favour of it.<sup>77</sup> Why? Some scholars question whether administrative judges need or require greater independence. The Constitution granted Article III judges life tenure in order to ensure that they could function independently of the executive and legislative branches and, therefore, could provide a check on the powers of those branches.<sup>78</sup> Administrative judges do not perform that same function.<sup>79</sup> As one commentator noted, “administrative judges are meant to make impartial decisions, but not to be independent... in the sense of that word that connotes the usual judge’s attribute. They were meant to be impartial decisionmakers and advancers of agency policy, not independent ones.”<sup>80</sup> To some degree, the central panel and federal administrative court options attempt to transform ALJs into Article III judges who are free to police the executive branch and either advance or even hinder executive policies.<sup>81</sup> “[I]nsofar as [these options] further the rupture of the administrative judiciary from the executive branch, they are an undesirable development in the law.”<sup>82</sup>

Another disadvantage of these options would be that some regulatory schemes are highly specialized, and ALJs may need special expertise to adjudicate effectively under those schemes. In other words, it is not clear that an ALJ could hear an Environmental Protection Agency case one day, a Nuclear Regulatory Commission case the next, and a Securities and Exchange Commission case on the third day and rule competently in each. The current system allows ALJs to work within their particular areas of expertise. Having said that, we note that there is no similar concern with Article III judges exercising expertise in a variety of regulatory areas. For example, the D.C. Circuit regularly hears all kinds of administrative law cases, yet it has no special expertise in any of the underlying substantive areas.<sup>83</sup>

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<sup>76</sup> Verkuil *et al.*, *supra* note 40.

<sup>77</sup> He argued that the central panel would only be valuable if it did not alter the role of the administrative judiciary. Scalia, *supra* note 74 at 79.

<sup>78</sup> Moliterno, *supra* note 21 at 1215 (“Congress intended that the provisions of the [APJA] secure a certain amount of independence for administrative judges as a means toward impartiality of decisionmaking, whereas for Article III judges it is a means both for impartiality and the maintenance of a separate branch of government.”).

<sup>79</sup> *Ibid* at 1191.

<sup>80</sup> *Ibid* at 1210-11, 1232 (“Administrative judges are not meant to be checks on out-of-bounds exercises of legislative and executive power.”).

<sup>81</sup> *Ibid* at 1230.

<sup>82</sup> *Ibid* at 1230.

<sup>83</sup> Chief Justice John Roberts talked about the expertise of the D.C. Circuit before he joined the Supreme Court:

The first decision to give administrative jurisdiction to the D.C. Circuit in 1870, as well as a handful of similar decisions in the early twentieth century, became prototypes for a succession of legislative grants of authority to re-view decisions of the FCC, the Federal Power Agency (later FERC), the EPA, the NLRB, the FTC, and the FAA. Whatever combination of letters you can put together, it is likely that jurisdiction to review that agency’s decision is vested in the D.C. Circuit. Even when the jurisdiction is concurrent, as it often is—decisions of the NLRB, for example, can be reviewed in the D.C. Circuit, in the circuit where the petitioner resides, or in the circuit where the events giving rise to the matter took place—lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other circuits.

John G. Roberts, Jr., “What Makes the D.C. Circuit Different? A Historical View” (2006) 92 Va L. Rev 375 at 388-89.

There remains a more fundamental problem with the central panel option, which might not be true of the federal administrative court option: the agency would still be the final decisionmaker under the *APA* and could freely substitute its judgment for that of the ALJ. If the agency retains the final say in the case, there is perhaps less reason to be concerned about the need for administrative judges to function independently since they are simply rendering the initial decision. Of course, the *APA* could be altered to vest final decisionmaking authority in administrative judges rather than in the head of the agency. However, if that change were made, administrative judges would assume a much greater policy role within the agency than they have currently. As they interpret and apply regulatory provisions, they would assume greater responsibility for “saying what those provisions mean,” and, therefore, give content to the scheme itself. As a result, the agency would have less control over its regulatory scheme and its regulatory law.

In addition, establishing a federal administrative court, in particular, would likely be very expensive and require a complete change to the current system. Thus, while the central panel and federal administrative court options have some advantages, ultimately, neither approach provides a panacea to the deficiencies of the present system.

### C. Establishing More Article I Courts

Another option would be for Congress to create more Article I courts. Article I, or legislative, courts are created by Congress pursuant to its Article I powers,<sup>84</sup> and Congress has created such courts to review the final administrative decisions of some agencies. Two such examples include the Tax Court,<sup>85</sup> which hears appeals from Internal Revenue System’s tax decisions, and the U.S. Court of Appeals for Veterans Claims, which hears appeals of benefits decisions made by the Board of Veterans Appeals.<sup>86</sup> These courts take many forms and vary in their level of independence from the executive and legislative branches. For example, judicial protection is generally limited. While Article III judges enjoy lifetime tenure and protected salaries, Article I judges are not subject to these protections. Yet most, if not all, Article I courts are both separately located from their agencies and have the power to issue final decisions.

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<sup>84</sup> The legitimacy of Article I courts has been controversial and subject to challenge. See e.g. *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511 (1828) (holding that a territorial court established under Article I of the Constitution could not exercise federal judicial power because the judges did not have lifetime tenure; therefore, the law that placed admiralty cases within their jurisdiction was unconstitutional). But that battle appears to be over. The Supreme Court has held that Article I courts are constitutional; however, their power is limited. When there is an allegation regarding the potential deprivation of an interest in life, liberty, or property, Article I court decisions must be subject to review by an Article III court. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

<sup>85</sup> The Tax Court was established to address both independence and impartiality: [I]t would never be possible to give to the taxpayer the fair and independent review to which he is of right entitled as long as the appellate tribunal is directly under, and its recommendations subject to the approval of, the officer whose duty it is to administer the law and collect the tax. As long as the appellate tribunal is part and parcel of the collecting machinery it can hardly maintain the attitude essential to a judicial tribunal. Report of Tax Simplification Board: Hearing on H.R. Rep. No. 68-103, at 4 (1st Sess. 1923).

<sup>86</sup> The U.S. Court of Appeals for Veterans Claims was created by Congress in 1988 to exercise exclusive jurisdiction over the decisions of the Board of Veterans' Appeals on the motion of claimants. The Court has a very heavy caseload. The U.S. Court of Appeals for the Federal Circuit has limited appellate review.

There are advantages to a decision to create more such courts. First, judicial independence and impartiality would both increase; as with central panels and the federal administrative law court, administrative judges would be housed outside of the agencies for which they work and would not be subject to agency oversight. Additionally, Article I judges would be the final agency decisionmakers. While their decisions are appealable to Article III courts, agencies would have no ability to overrule the Article I court's decision. Importantly, however, unlike these other options, expertise would not be sacrificed; Article I judges would have expertise within their assigned areas and would likely make better decisions in areas that are legally complex and that involve highly technical facts.

But the potential costs in establishing many more Article I courts would likely be staggering, likely even more so than establishing one, federal administrative court system. Another potential disadvantage would be that agencies would no longer be able to formulate policy via adjudication;<sup>87</sup> rather, all policy would have to be made via legislative and non-legislative rulemaking.<sup>88</sup> Under current case law, agencies have discretion about whether to articulate new policy legislatively or adjudicatively.<sup>89</sup> While some commentators criticized this legal development,<sup>90</sup> the choice has remained the agency's for more than sixty years. Certainly, agencies should strive to articulate broadly applicable policy via rulemaking rather than adjudication, but choice furthers flexibility.<sup>91</sup> Even if agencies wanted to articulate all policy by using rulemaking procedures, it would be impossible for them to do so; case-by-case development is a necessary and inevitable part of administrative policymaking.<sup>92</sup> Hence, any change to the adjudicative structure that would effectively require agencies to articulate policy exclusively via legislative procedures would be undesirable.

<sup>87</sup> *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947); See generally, Russell L. Weaver & Linda D. Jellum, "Chenery II and the Development of Federal Administrative Law" (2006) 58 Admin L Rev 815 (arguing that agencies should have the choice of whether to develop law via rulemaking or adjudication).

<sup>88</sup> Arzt, *supra* note 34 at 280-81 ("When an agency no longer formulates policy through its adjudication function but does so only through rulemaking ... supervision of the appellate administrative adjudicators and review of their decisions by policy-making political appointees has no reason to continue. At that point, there is no reason to keep the adjudicatory function within the agency.")

<sup>89</sup> *S.E.C. v. Chenery Corp.*, *supra* note 87.

<sup>90</sup> See e.g. Arthur E. Bonfield, "The Federal APA and State Administrative Law" 72 Va L Rev 297, 325-34 (1986) (suggesting that states should choose rulemaking over formal adjudication); Cornelius J. Peck, "The Atrophied Rule-Making Powers of the National Labor Relations Board" (1961) 70 Yale LJ 729 at 730 (criticizing the National Labor Relations Board [NLRB] for not exercising its rulemaking powers enough); Glen O. Robinson, "The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform" (1970) 118 U Pa L Rev 485 at 486 (recognizing broad concern that agencies engage in adjudication at the expense of rulemaking); David L. Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy" (1965) 78 Harv L Rev 921 at 922 (questioning agencies' choice of weapons in making policy); Peter L. Strauss, "Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law" (1974) 74 Colum L Rev 1231 at 1233 (reviewing the Department of Interior's choices between rulemaking and adjudication in implementing the General Mining Law); Russell L. Weaver, "Chenery II: A Forty Year Retrospective" (1988) 40 Admin L Rev 161 at 161; J. Skelly Wright, "The Courts and the Rulemaking Process: The Limits of Judicial Review" (1974) 59 Cornell L Rev 375 at 376 (suggesting that agencies must engage in rulemaking and not adjudication when Congress has adopted a regulatory solution).

<sup>91</sup> For a more thorough discussion of this topic, See generally, Weaver & Jellum, *supra* note 87 (arguing that *Chenery II* was rightly decided).

<sup>92</sup> *Ibid* at 826-27.

Finally, the more the new system looks like the old Article III system, the more likely the new system will become more adversarial, more expensive, and more protracted for litigants and agencies.

Professors Michael Asimow and Jeffrey Lubbers have argued for a slightly different formulation of this idea.<sup>93</sup> They suggest creation of “a single adjudicating tribunal, referred to as a Benefits Review Tribunal [BRT]” which would handle benefits review cases from Social Security, the Veterans Administration, and perhaps benefits programs administered by the Department of Labor. Their proposed system finds its roots in the Australian Administrative Appeals Tribunal. In the abstract, the proposal might draw strong support from ALJs because it places them outside of the agencies for which they adjudicate cases and helps ensure their independence. However, ALJs would be subject to the governing agencies “hard” law and “soft” law. In other words, at least in theory, the ALJs in this new tribunal would not be expected or allowed to “make law.” We suspect that ALJs will strongly oppose the proposal because professors Asimow and Lubbers hope that the new tribunal would exercise greater control over ALJ hiring, supervision, compensation, case-assignment, evaluation, and discharge. For example, they suggest a peer review procedure for evaluating work product, and many ALJs object to the notion of performance reviews. In addition, we are not certain that this new tribunal will be able to successfully decide benefits cases without venturing into the arena of policy creation.

#### D. Changing the *APA* Process

Another possibility would be to alter the *APA* review process to prohibit agencies from reviewing the decisions of administrative judges. Currently, the head of an administrative agency serves as the court of last resort for the administrative process and has the power to issue the agency’s final decision.<sup>94</sup> Hence, the agency reviews all ALJ findings *de novo*.

The current system could be altered in a variety of ways. First, Congress could amend the *APA* and mandate that the head of the agency be more deferential to the administrative judge’s decision. For example, Congress might provide that the agency head can only review the administrative judge’s findings for “clear error” or for an “abuse of discretion.” This higher standard could apply to all ALJ findings or just to a subset of findings such as findings of fact. Currently, the agency head should give some weight to credibility findings based on demeanor, but may review all other findings of fact *de novo*.<sup>95</sup> In contrast, Article III courts can set aside lower court findings of fact only when those findings are “clearly erroneous.”<sup>96</sup> A higher standard of review for factual findings would give ALJs greater independence and authority. If the standard for reviewing agency policy and legal decisions remained the same *-de novo-* then the agency would retain its ability to formulate policy and interpret statutes while ALJs would play a role more like that of a trial judge. The disadvantages of this change are not readily apparent. But the change would be so minor, it may not be worth the effort to amend the *APA*.

A second approach would be to provide for finality of ALJ (and, for that matter, administrative judge) decisions. This approach is popular among those who support

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<sup>93</sup> See Asimow & Lubbers, *supra* note 48.

<sup>94</sup> 5 U.S.C. § 557(b) (2009) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision....”).

<sup>95</sup> *Penasquitos Village v. Nat. Labor Relations Bd.*, 565 F.2d 1074 (9th Cir. 1977).

<sup>96</sup> Fed. Rule Civ. Pro. 52(a)(6).

the central panel system, which usually includes the idea of finality.<sup>97</sup> While finality is not an essential attribute of a central panel system, the model act creating a state central hearing agency specifically provides that administrative judges can issue either initial or final decisions.<sup>98</sup> An advantage of this option would be that administrative judges could play a much stronger, more independent, and final role in the adjudicative process. Indeed, the decisions of administrative judges (and ALJs) would become the final decision of the agency and would not be subject to reversal by the agency litigant.

The disadvantage of this second approach would be that agencies heads, who are both politically accountable and often experts in the field, would lose control over their agencies' decisions, which can create agency policy. Giving ALJs finality would transform administrative judges into something like Article III judges, meaning that ALJs would be able to render judgments on the actions of the executive branch without any review from that branch. "That is not the role for which administrative judges were created."<sup>99</sup> As one commentator noted,

Administrative judges, unlike Article III judges, exist in order to further the policies of the executive branch, specifically the agency for which they judge, through the impartial adjudication of disputes. Allowing administrative judges final authority over policy and perhaps even over fact findings, however, would thwart that end.... Administrative judges would be rendered *cAPABLE* of deciding cases in contradiction with the stated policies of the executive branch.<sup>100</sup>

Additionally, inconsistencies could be created between an agency's articulated policies and ensuing adjudications. This might create uncertainty in the law, result in loss of political accountability, and nullify agency experience in formulating policy under its statutory mandate.<sup>101</sup> Adjudicative policymaking is inherent in an effective regulatory regime.

An additional problem might result from a lack of flexibility for policy-making. As we mentioned earlier, agencies can choose to articulate regulatory policy either legislatively or adjudicatively.<sup>102</sup> At times, case-by-case policy development is the best choice.<sup>103</sup> To the extent that this change could preclude agencies from articulating policy via adjudication, then it is less than ideal.

## V. CONCLUSION

<sup>97</sup> Moliterno, *supra* note 21 at 1231.

<sup>98</sup> Christopher B. McNeil, "The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change" (2001) 53 Admin L Rev 475 at 497.

<sup>99</sup> Moliterno, *supra* note 21, at 1231 (quoting Flanagan, *supra* note 13, at 1388. "Another argument made in support of ALJ finality is that it protects ALJ independence. The argument that ALJ finality enhances ALJ independence is true, in the sense that final order authority does make the ALJ completely independent of the agency. The argument, however, confuses the means with the end. ALJ independence is an important factor in administrative adjudication when it eliminates improper agency influence, but certainly, it is not the purpose of agency adjudication to make ALJs independent."). *Ibid.* (footnotes omitted).

<sup>100</sup> *Ibid* at 1226.

<sup>101</sup> *Ibid* at 1227.

<sup>102</sup> *S.E.C. v. Chenery Corp.*, *supra* note 87.

<sup>103</sup> Weaver & Jellum, *supra* note 87 at 826-27.

Is there a better way to structure the modern administrative adjudicatory system? Probably, but the way is not clear. While, the *APA*'s ALJ protections could be expanded to include more administrative judges, it would certainly be unrealistic, and likely counter-productive, to elevate all administrative judges to ALJ status. Cases such as *Goldberg v. Kelly*<sup>104</sup> and *Goss v. Lopez*<sup>105</sup> greatly expanded the number of hearings agencies must now provide. With more formality comes added expense and delay, for both sides. As the Supreme Court made clear in *Mathews v. Eldridge*,<sup>106</sup> the interest of litigants in more procedure and formality must be balanced against the agency's interest in quicker, more streamlined, and less expensive procedures. Yet, the current system favors expediency over judicial independence. Including more administrative judges within the umbrella of protection might tilt the balance back.

Additionally, altering the deference standard would similarly increase judicial independence in a relatively small way, but at little cost to the agency. So long as the agency remains free to decide policy issues *de novo*, perhaps even legal issues, the agency retains its ability to formulate policy. But even combined, these two changes are likely only to have a minimal impact on improving judicial independence. And while creating more Article I courts would increase independence more dramatically, this option would be unduly expensive and unlikely to garner much support in Congress during these tough economic times. While an Article I court could be structured like the Australian Administrative Appeals Tribunal, as professors Asimow and Lubbers suggest, that proposal is likely to draw intense ALJ opposition.

The remaining options present a more fundamental question: whether the administrative adjudicative structure should be fundamentally reshaped. These proposals (the central panel system, the notion of ALJ finality, and the idea for an administrative court) all contemplate that administrative judges would play a much greater role in shaping and formulating agency policy. Through their decisions, administrative judges would construe and apply regulatory provisions. And at least some of the proposals contemplate that there should be no review of these decisions within agencies. Long ago, Congress decided that this loss of control would be undesirable. The choice remains a reasonable one.

Thus, while it might be time to reform our current administrative adjudicatory system, it is not clear which, if any of these options, would best balance the competing interests and further the administrative agenda.

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<sup>104</sup> 397 U.S. 254 (1970) (holding that the recipient of certain government benefits (welfare) must receive a hearing before they can be deprived of such benefits).

<sup>105</sup> 419 U.S. 565 (1975) (holding that a public school must conduct a hearing before suspending a student).

<sup>106</sup> 424 U.S. 319 (1976).



## THE MERITS OF “MERITS” REVIEW: A COMPARATIVE LOOK AT THE AUSTRALIAN ADMINISTRATIVE APPEALS TRIBUNAL

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*This article compares several systems of administrative adjudication. In the U.S., adjudication is typically performed by the same agency that makes and enforces the rules. However, in Australia, almost all administrative adjudication is performed by the Administrative Appeals Tribunal [AAT], a non-specialized adjudicating agency, and several other specialized tribunals that are independent of the enforcing agency. These tribunals (which evolved out of concerns about separation of powers) have achieved great legitimacy. In the U.K., recent legislation [the Tribunals, Courts and Enforcement Act] merged numerous specialized tribunals into a single first-tier tribunal with much stronger guarantees of independence than previously existed. An upper tribunal hears appeals from the first tier and largely supplants judicial review. The article concludes by asking whether the U.S. could learn anything from the Australian and U.K. experience and suggests that a single tribunal to adjudicate federal benefits cases might be a significant improvement over the existing model.*

*Cet article compare un certain nombre de systèmes de règlement judiciaire de différends dans le domaine administratif. Aux Etats-Unis, typiquement, le règlement de différends est effectué par la même agence qui établit les règles et qui les met en application. Toutefois, en Australie, presque tous ces règlements sont effectués par le Administrative Appeals Tribunal [AAT], une agence non-spécialisée de règlement de différends, ainsi qu'un certain nombre d'autres tribunaux spécialisés qui sont indépendants de l'agence qui met les règles en application. Ces tribunaux (qui émanent de préoccupations au sujet de la séparation des pouvoirs) ont atteint un niveau élevé de légitimité. Au Royaume-Uni, une loi récente [la Tribunals, Courts and Enforcement Act] a fusionné plusieurs tribunaux spécialisés en un seul tribunal de première instance ayant des garanties d'indépendance bien plus fortes qu'auparavant. Un tribunal supérieur juge les appels des décisions du tribunal de première instance et supprime largement la révision judiciaire. L'article se termine en posant la question à savoir si les Etats-Unis pourraient apprendre quelque chose de l'expérience australienne et britannique et suggère qu'un seul tribunal pour juger les cas de bénéfices fédéraux pourrait constituer une amélioration importante par rapport au modèle existant.*

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## I. INTRODUCTION

Modern governments have to decide many disputes arising out of regulation or benefit schemes. There are various models of administrative dispute resolution available. The disputes can be adjudicated by a national court system or within the agency that made the initial decision but subject to judicial review. A third way is adjudication by specialized courts or tribunals. The United States relies heavily, but not exclusively, on adjudication within its agencies, while Australia and the United Kingdom rely on national administrative appeal tribunals. This article discusses these different approaches.

## II. U.S., AUSTRALIAN AND U.K. APPROACHES TO ADMINISTRATIVE ADJUDICATION

### A. Administrative Adjudication in the U.S.

At the federal level, the U.S. has generally avoided establishing specialized courts, although a few have been created and some continue to exist.<sup>1</sup> Most disputes involving the government are resolved within regulatory and benefit agencies, not by courts. The U.S. Supreme Court upheld administrative adjudication in 1932,<sup>2</sup> and in 1946 Congress responded by enacting the *Administrative Procedure Act* [APA]. At that time, administrative adjudication was viewed largely as the vehicle for agency implementation of regulatory statutes such as those relating to energy, transportation, communications, securities, or labour law. Such policy-oriented adjudication still continues, although most of it has been supplanted by agency rules that resolve the issues across-the-board rather than through case-by-case decisionmaking. Today, the great majority of federal agency adjudication relates to benefit statutes such as social security.

The APA contains provisions for trial-type procedures for on-the-record agency hearings required by statute. Specially qualified, quasi-independent adjudicators, who are now called administrative law judges [ALJs], preside over these formal adjudications.<sup>3</sup> The APA calls for separation of functions between decisionmakers and agency prosecutors or investigators. Although the rules of evidence are relaxed and cross-examination may be limited, these hearings resemble courtroom trials. The ALJ writes the initial decision in the case but there may be internal agency appellate review (by the agency head or a delegate of the agency head). Judicial review (on legal, factual, and discretionary issues) is available in the federal courts, but such review is deferential and is based on the administrative record, not on a new record made in court. In this manner, a fair hearing is provided *inside* the agency.

Federal agencies also conduct a vast range of “informal” adjudication that is not governed by the APA. Some of it (such as immigration disputes) entails relatively formal trial-type hearings that are presided over by an administrative judge [A],

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<sup>1</sup> See Paul R. Verkuil & Jeffrey S. Lubbers, “Alternative Approaches to Judicial Review of Social Security Disability Cases” (2003) 55 Admin L Rev 731 at 744-48 (discussing past and existing specialized courts).

<sup>2</sup> *Crowell v. Benson*, 285 U.S. 22 (1932), discussed further at text accompanying notes 54-55.

<sup>3</sup> As of September 2008, there were 1469 federal ALJs, 1219 of them employed by the Social Security Administration. Office of Personnel Management chart, “CDPF Status Report as of September 2008,” on file with the authors.

rather than an ALJ. Even in informal adjudication, agencies generally craft "some kind of hearing"<sup>4</sup> and judicial review proceeds in a similar way.

## B. Administrative Adjudication in Australia

### 1. Internal Review

In Australia, adjudication by Commonwealth ministries and agencies is not governed by an *APA*-like code, but instead by provisions in individual statutes and by the common law principles of "natural justice," roughly similar to U.S. due process. As with U.S. informal adjudication, the variety of first-level decisions is so great that it makes any generalization about the application of natural justice principles difficult.

Commonwealth agencies maintain a variety of different systems of internal review of decisions unfavorable to private parties under regulatory or benefit statutes.<sup>5</sup> Most (but not all) of the internal review systems are provided for by statute. Generally, agencies provide an opportunity for an internal merits review by an official who was not involved in the initial decision. The review process often furnishes an opportunity for written submission and sometimes involves an opportunity for an oral contact in person or over the phone between the private party and the reviewer, although not a formal hearing. In addition, reviewers usually contact the primary decisionmaker to discuss the facts and reasons for the decision. Reviewers will inform the private party of the outcome of the review decision and of the availability of external review. In many cases, it is necessary for the private party to exhaust the internal review process before seeking external review before a tribunal.

For example, in social security cases, claimants are encouraged (but not required) to request reconsideration from the primary decisionmaker. If that fails, they must seek review of the disputed decision by the Authorized Review Officer [ARO] before proceeding to a tribunal – in this case the specialized Social Security Appeals Tribunal [SSAT]. Review by the ARO generally involves a meeting (or at least a phone conversation) with the applicant, the opportunity to submit additional evidence, and a statement of the reasons why the ARO has refused to change the decision.

### 2. External Review in Tribunals<sup>6</sup>

Australian administrative tribunals at the federal level are independent of the primary decisionmaker. Their task in conducting "merits review" is to "examin[e] whether a decision is substantively correct, after consideration of all relevant issues of law, fact, policy and discretion."<sup>7</sup> Merits review means that the tribunal "stands in the

<sup>4</sup> See *Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("some kind of hearing" required before short-term suspension of student from school). A fair hearing is required by the due process clause of the Fifth Amendment whenever agency action deprives a person of life, liberty or property.

<sup>5</sup> The material in this paragraph and the following one is drawn from: Administrative Review Council, *Report to the Attorney General: Internal Review of Agency Decision Making* (Report No. 44, Nov. 2000).

<sup>6</sup> For useful authorities see Peter Cane, *Administrative Tribunals and Adjudication* (Oxford and Portland, Oregon: Hart, 2009); Peter Cane, "Understanding Administrative Adjudication" in Linda Pearson, Carol Harlow & Michael Taggart, eds, *Administrative Law in a Changing State* (Portland: Hart, 2008) 273 [Cane chapter]; Linda Pearson, "Fact-Finding in Administrative Tribunals" in *Administrative Law in a Changing State* 301; Robin Creyke, "Administrative Tribunals" in Matthew Groves & H.P. Lee eds, *Australian Administrative Law: Fundamentals, Principles, and Doctrines* (Cambridge: Cambridge University Press, 2007) 77; and Robin Creyke & John McMillan, *Control of Government Action: Text, Cases and Commentary* (Sydney: LexisNexis Butterworths, 2005) at 114-179. For an early description, see Mark Aronson & Nicola Franklin, *Review of Administrative Action* (Sydney: Law Book, 1987) at 221-240.

<sup>7</sup> Creyke & McMillan, *ibid* at 114.

shoes”<sup>8</sup> of the agency and is empowered to substitute the “correct or preferable” decision for that of the agency. Its power extends to substituting decision on issues of fact, law, and discretion. “Correct” in this formula refers to situations in which the tribunal considers that there is only one acceptable decision, and “preferable” refers to situations where it considers that there is more than one acceptable decision.<sup>10</sup> Tribunal review often entails creation of a fresh evidentiary record including evidence of facts arising after the original agency decision and it allows the tribunal to reweigh the relevant factors in exercising discretion.<sup>11</sup>

At the federal level, the “peak” merits review tribunal is the Administrative Appeals Tribunal [AAT] created in 1976.<sup>12</sup> However, there are more specialized tribunals in the area of benefits and immigration, including the SSAT, the Veterans’ Review Board [VRB], the Migration Review Tribunal [MRT], and the Refugee Review Tribunal [RRT].<sup>13</sup> In addition, in the economic regulatory area, the Takeovers Panel reviews decisions by the Australian Securities and Investments Commission involving corporate takeovers<sup>14</sup> and the Australian Competition Tribunal [ACT, formerly the Trade Practices Tribunal] reviews decisions of the Australian Competition and Consumer Commission.<sup>15</sup>

The AAT “falls within the portfolio of the Attorney General,”<sup>16</sup> while the specialized tribunals are within those of the relevant department ministers. Most of the states have an AAT counterpart and some specialized tribunals as well.<sup>17</sup>

<sup>8</sup> The oft-used “stands in the shoes” metaphor was expressed by Smithers, J. in an important Federal Court decision. *Minister for Immigration & Ethnic Affairs v. Pochi*, (1980) 31 ALR 666, 671.

<sup>9</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; 24 ALR 577 (Bowen C.J. and Deane J.) 149.

<sup>10</sup> Cane, *supra* note 6 at 149.

<sup>11</sup> *Sbi v Migration Agents Registration Authority*, (2008) 248 ALR 390, 397-403 (Kirby J), is typical of cases that spell out the principles of merits review [*Sbi*]. *Sbi* was a professional license revocation case. It held that the Administrative Appeals Tribunal [AAT] is permitted to consider new evidence and determine the “correct or preferable” result based on a fresh factual record including facts arising after the Authority’s decision. Moreover, the AAT is empowered to exercise its discretion as to the appropriate sanction (rather than to remand to the Authority for reconsideration of the sanction). In *Sbi* the AAT decided to “caution” the licensee rather than revoking his license. It also imposed a scheme of probation; the power to impose the probationary condition on the caution arose from an amendment to the statute enacted after the date the Authority acted but before the AAT acted. *Ibid* at 403-07.

<sup>12</sup> It was created by the *Administrative Appeals Tribunal Act* 1975, current version available online: Comlaw <<http://www.com-law.gov.au/Com-Law/management.nsf/current/by-title/54DB-558856AEE672CA256F-710006F886?OpenDocument>>.

<sup>13</sup> See Creyke & McMillan, *supra* note 6 at 121. There is also a National Native Title Tribunal, whose function is to determine initial eligibility and then provide a forum for mediation of applications for native title that have been filed in federal court. If no agreement is reached, the application may have to be determined by the court following a trial. See online: National Native Title Tribunal <<http://www.nn-tt.gov.au/What-Is-Native-Title/Pages/Approaches-to-Native-Title.aspx>>.

<sup>14</sup> See online: Australian Government <<http://www.takeovers.gov.au/about.aspx#role>>; *Attorney-General v. Alinta Ltd.* (2008) 233 CLR 542, discussed in *infra* note 76 [*Alinta*].

<sup>15</sup> See online: Australian Government <<http://www.competitiontribunal.gov.au/>>; *Tasmanian Breweries* decision, discussed in *infra* notes 69, 75.

<sup>16</sup> See “About the AAT” online: Australian Government <<http://www.aat.gov.au/About-The-AAT/Introduction-ToTheAAT.htm>>.

<sup>17</sup> Creyke & McMillan, *supra* note 6 at 123-26.

**(a) The AAT**

As of January 27, 2010, there were 89 "Members" of the AAT, representing a mix of part-time and full-time judges, lawyers and lay persons with "expertise in a range of areas, including accountancy, aviation, engineering, law, medicine, pharmacology, military affairs, public administration and taxation."<sup>18</sup> There were 154 staff persons serving the AAT as of June 30, 2009. The AAT President must be a judge of the Federal Court. There are nineteen other part-time "Presidential Members" – eight Federal Court judges and five judges of the Family Court of Australia, and six full-time Deputy Presidents who must have been enrolled as legal practitioners for at least five years. There were 63 other members, some of who were senior members and most of whom were part time. Not all of the non-judicial members need be lawyers. The AAT achieves some specialization because it is split up into four divisions.<sup>19</sup>

Formally, appointments to the AAT are made by the Governor-General (the Queen's representative in Australia), though in practice they are made on the advice of the Attorney General.<sup>20</sup> The appointments process is based primarily on informal and largely unregulated consultation within government and between departments and tribunals. Federal tribunal members serve for fixed terms of three, five or seven years with possibility of reappointment. The informal appointments process and the relative shortness of terms obviously have a bearing on the independence of the tribunals. AAT members may be removed by Parliament "for 'proved misbehavior or incapacity' and must be dismissed for bankruptcy" and salaries are set "by an independent remuneration tribunal." This mix of provisions leads Professor Cane to conclude that the independence of the members of the AAT is better protected than that of members of the specialist federal merits review tribunals, but much less well protected than that of court judges.<sup>21</sup> AAT members are also less well protected than U.S. ALJs, although better protected than most U.S. AJs.

The AAT can review a decision only if a statute so provides but there are over 400 such enactments.<sup>22</sup> The AAT received 6226 applications for review in the 2008-09 year.<sup>23</sup> During that period, it provided 1393 hearings. Of these, 390 decisions set aside the decision appealed from, 96 varied the decision, and 907 affirmed the decision.<sup>24</sup> The most important of the AAT's jurisdictions are second-tier hearings in

<sup>18</sup> The material in this paragraph is drawn from "About the AAT," *supra* note 16.

<sup>19</sup> The divisions are the General Administrative, Security Appeals, Taxation Appeals, and Veterans' Appeals Divisions. Presidential members can exercise powers in any of the Tribunal's divisions, while other Senior Members and Members may exercise powers only in the division or divisions to which they have been assigned.

<sup>20</sup> The material in this paragraph is drawn from Cane, *supra* note 6 at 100, 111-12.

<sup>21</sup> Cane points out that originally immigration cases were in the bailiwick of the AAT, but "[g]overnment dissatisfaction with the patterns of immigration decision-making by the AAT in the 1980s" led to the creation of the two specialist immigration-related tribunals with no right of appeal to the AAT. Moreover, these tribunals are "more closely integrated into" the department of immigration, "a greater proportion of the members lack legal training than is the case in the AAT," and their work is "actively managed (by the imposition of performance targets, for instance) in a way that the work of the members of the AAT is not." Cane chapter, *supra* note 6 at 298-99.

<sup>22</sup> See online: Australian Government <<http://www.a-a-t.gov.au/Legislation-And-Jurisdiction/Jurisdiction-List.htm>>.

<sup>23</sup> AAT, 2008-09 *Annual Report*, ch. 3, online: AAT <<http://www.a-a-t.gov.au/Corporate/Publications/annual/Annual-Report-2009.htm>>. The vast majority of the cases lodged with the AAT are resolved without a hearing through a negotiated settlement or a successful ADR proceeding (usually a pre-hearing conference with the judge) or because the applicant chose to discontinue them or the AAT dismissed the case. See text *infra* notes 109-13.

<sup>24</sup> *Ibid.*

Social Security and veterans' benefits cases (after such matters were heard initially in the SSRT and VRB) as well as workers' compensation and tax disputes.<sup>25</sup>

There are a number of specialized adjudicatory tribunals whose decisions cannot be reviewed by the AAT (including the MRT, RRT, ACT, Takeovers Panel, and National Native Title Tribunal).<sup>26</sup>

Although not a court, the AAT functions like one with a full array of prehearing, ADR, and, if necessary, hearing processes.<sup>27</sup> At the "hearing" stage, while the parties can agree to a decision "on the papers," there is a right to a formal adversarial proceeding, with testimony under oath and a right to be represented by lawyers. While the tribunal may perform some research on legal issues, it relies on the parties to elicit the facts, rather than on its own research.<sup>28</sup> However, the ordinary rules of evidence do not apply, neither party bears the burden of proof, and the respondent agency must forward a statement of reasons and all relevant documents to the tribunal. Decisions are supposed to be based on the civil standard "the balance of probability," similar to the preponderance-of-the-evidence standard in the U.S.<sup>29</sup> The AAT can set decisions aside for error of law (subject to judicial review). Tribunal decisions on legal issues do not constitute binding precedent in subsequent tribunal cases. However, the managerial staffs of tribunals circulate such decisions and strive for consistency.<sup>30</sup> On the other hand, with respect to fact findings, issue estoppel may apply if an earlier court or tribunal made a final ruling on an issue of fact.<sup>31</sup>

Finally, section 44 of the *AAT Act* specifies that "[a] party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding."<sup>32</sup> This means, of course, that either party may appeal. After 1999, some of these cases may be transferred first to the lower Federal Magistrates Court.<sup>33</sup> A further appeal is possible to the High Court if special leave is granted.<sup>34</sup>

### (b) The SSAT

The largest specialized Commonwealth tribunal is the SSAT, a statutory body that conducts merits review of administrative decisions made under the social security law,

<sup>25</sup> Together these four areas comprise about 85% of the cases heard by the AAT. *Ibid.* Although the AAT provides hearings under about 400 different statutes, most of them give rise to very few actual cases lodged with the AAT.

<sup>26</sup> See text accompanying *supra* note 13.

<sup>27</sup> See online: AAT <<http://www.aat.gov.au/ApplyingToTheAAT/ApplicationProcess.htm>>.

<sup>28</sup> See Creyke & McMillan, *supra* note 6 at 156.

<sup>29</sup> See text at notes 107-09.

<sup>30</sup> See Creyke & McMillan, *supra* note 6 at 175.

<sup>31</sup> See *ibid* at 176.

<sup>32</sup> *AAT Act* para. 44(1).

<sup>33</sup> However, an amendment to the *Administrative Appeals Tribunal Act*, para. 44AA, provides that the Federal Court may not transfer an appeal from the AAT to the Federal Magistrates Court if the appeal is from a Tribunal decision by a member or a panel containing a member who was a Presidential Member. See Australian Government <<http://www.f-m-c.gov.au/servi-ces/html/administrative.html>>.

<sup>34</sup> The scope of judicial review is a complex issue that is far beyond the scope of the present article. Suffice it to say that review is usually limited to questions of law or violations of procedural norms; however, the entire absence of evidence to support the determination is considered to be an error of law as is a completely irrational decision. For an excellent discussion of these complexities, see Pearson, *supra* note 6.

the family assistance law and other related laws.<sup>35</sup> The SSAT operates as the first tier of external merits review in the social security appeals system. Further rights of appeal for all parties to a social security appeal include a full merits review by the AAT as well as judicial review.<sup>36</sup>

On June 30, 2009, the SSAT had 230 members (41 full-time and 189 part-time).<sup>37</sup> Most hearing panels consist of two members depending on the nature and complexity of the application. "The SSAT is 'inquisitorial' in its approach. Each SSAT panel takes a fresh look at the matter, including the consideration of events which might have occurred since the decision being appealed was made."<sup>38</sup>

Applications to the SSAT in 2008-09 totaled 16,319 lodged and 16,668 finalized. About 25-30% of all appeals lead to a reversal or change. Average time for decision was about 10 weeks. Appeals to the SSAT are free and travel and accommodation costs are borne by the Tribunal, with a total average cost per applicant of nearly \$32,700AUS.

### 3. Contrast to the U.S.

In summary, there is a sharp contrast between the U.S. and Australian systems of administrative adjudication. The U.S. generally provides a hearing *inside* the agency that made the initial determination, often but not always before an ALJ. The final administrative decision is usually reserved to the head of the agency or to an appellate body within the agency. In contrast, Australian adjudication is provided by an internal review procedure, followed by a merits review consisting of a trial-type hearing provided *outside* the adjudicating agency. Most such hearings are provided by the SSAT, VRB, RRT, MRT, or the AAT. The AAT is a centralized administrative tribunal providing review of the decisions of hundreds of agencies (and which provides a second tier review of SSAT and VRB decisions). Both countries provide for judicial review of agency or tribunal adjudicatory decisions, but in Australia judicial review is generally limited to questions of law.

### C. Administrative Adjudication in the U.K.

The design of the Australian tribunal system (prior to its redesign in 1976) closely resembled the U.K. tribunal system. Administrative tribunals date from the dawn of the British welfare state in the early years of the Twentieth Century (particularly the *National Insurance Act 1911*).<sup>39</sup> Policymakers felt that resolution of the huge number of

<sup>35</sup> See the SSAT's home page online: SSAT <<http://www.ssat.gov.au>>.

<sup>36</sup> Most SSAT appeals are now heard by the Federal Magistrates Court. See accompanying text *supra* note 33.

<sup>37</sup> Material in this paragraph and the following one is drawn from *Social Security Appeals Tribunal, Annual Report 2008-2009*, available online: SSAT <[http://www.s-s-a-t.gov.au/iNet/ssat.nsf/1a2f57-b7c6453c8fca-256cb6001-c5def/cdc071f19d8533b3ca25770a000b9831/\\$FILE/SSAT-%20AR-%202008-09.pdf](http://www.s-s-a-t.gov.au/iNet/ssat.nsf/1a2f57-b7c6453c8fca-256cb6001-c5def/cdc071f19d8533b3ca25770a000b9831/$FILE/SSAT-%20AR-%202008-09.pdf)>. This comprehensive report, along with those from previous years, is on the SSAT website, *supra* note 35.

<sup>38</sup> SSAT Annual Report, *ibid* at 19.

<sup>39</sup> See R. E. Wraith & P. G. Hutchesson, *Administrative Tribunals* (London, Allen & Unwin, 1973) at 33-42; Paul Craig, *Administrative Law* 6th ed (London, Sweet and Maxwell, 2008) at 64-69. In fact, various forms of ad hoc tribunals have existed for centuries in British law. During the 1800s, some combined-function agencies emerged, but they mostly evolved into tribunals whose only responsibility was to adjudicate disputes arising out of regulatory legislation. Wraith & Hutchesson, at 17-28. Yet some still remain that have administrative tasks along with adjudicatory ones. See Craig at 61 (describing the Gaming Board which has substantial rulemaking and law enforcement functions along with adjudication of licensing disputes), and *ibid.* at 72 (describing the Civil Aviation Authority, which is mostly an administrative body but also adjudicates licensing issues).

disputes arising out of this legislation should not be assigned to the courts, both because of the sheer numbers of cases and because the courts were perceived as being hostile to social legislation.<sup>40</sup> Instead, the dispute resolution function was assigned to tribunals, meaning administrative units engaged exclusively in adjudication and outside the regular court system. These tribunals were often staffed with a mix of lawyers, specialists, and lay people and their proceedings tended to be quite informal.<sup>41</sup>

In general, British tribunals have always provided a form of merits review, meaning that they conduct a *de novo* hearing of a matter under dispute and issue a decision on the merits with little or no deference to the prior departmental decision (or lower level tribunal decision). Unsurprisingly, Australian lawyers, judges, and policymakers, who were steeped in British practice, followed suit when they came to organize their own system of administrative adjudication. It seemed most natural to them to follow the British practice by creating a new tribunal to deal with the adjudication generated by each new regulatory or welfare program.

This adaptation from existing British institutions illustrates the “path dependence” phenomenon in which institutions are built to resemble those already in existence.<sup>42</sup> It is often more natural and efficient to copy what already exists and seems to be working tolerably well than to redesign and rebuild institutions from scratch. This is true even if the older model evolved more or less serendipitously and the older model is decidedly suboptimal.

In most cases, the disputes adjudicated by British tribunals arose from the decisions of a specific department of government. Prior to the recent amendments discussed below, most tribunals were organizationally part of the department whose decisions they reviewed. The tribunals thus were reliant on that department for services and other resources. Nevertheless, tribunal members typically regarded themselves as independent of the department and they did not engage in functions other than adjudication.

Each new piece of welfare or regulatory legislation created a new tribunal. The result was a hodgepodge of different tribunals with varying jurisdictions, each with its own system of appointment of members and procedures. Especially after World War II, the number of specialized tribunals continued to increase rapidly with little attempt to achieve consistency either in the organization or procedures of the tribunals or in the details relating to judicial review of their decisions.<sup>43</sup>

In 1955, the Franks Committee took a fresh look at tribunals.<sup>44</sup> It recommended the establishment of a Council on Tribunals and also promoted a judicialized model of tribunal procedure as well as openness, fairness, and impartiality of tribunal decisionmaking. It recommended that tribunals be required to state reasons for their decisions. And it favored appeal to a superior tribunal and judicial review on points

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<sup>40</sup> The experience with assigning disputes over workers' compensation to the courts in the 1890's was quite unsuccessful. See Wraith & Hutchesson, *ibid* at 28.

<sup>41</sup> *Ibid* at 129-31.

<sup>42</sup> See generally Oona A. Hathaway, “Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System” (2001) 86 Iowa L. Rev 601 at 606-22. Path dependence is often referred to as the “qwerty” phenomenon. Although the traditional layout of the typewriter and now computer keyboard is undoubtedly suboptimal, the costs of switching to a new one outweigh the benefits of doing so. Moreover, someone who introduces a new and much superior keyboard will fail if customers refuse to adopt the innovation (because the existing keyboard works well enough) and other competitors make the rational decision to stick with the old keyboard on their products. *Ibid* at 611-13.

<sup>43</sup> See Wraith & Hutchesson, *supra* note 39 at 43-44.

<sup>44</sup> See Craig, *supra* note 39 at 259-61.

of law. The *Tribunals and Inquiries Act 1958* implemented many of the recommendations of the Franks Committee; although it applied only to certain tribunals and left many unregulated, it improved tribunal procedure and adopted a requirement that tribunals give reasons for their decisions. The *Tribunals and Inquiries Act* created the Council on Tribunals, which conducted studies of tribunal procedures and issued numerous recommendations. Meanwhile, the courts began to intensify judicial review of tribunal decisions.<sup>45</sup> This created a generally satisfactory situation which remained stable until the close of the century.

The movement toward centralization and upgrading of the U.K. tribunals took a great leap in 2007 with the enactment of the *Tribunals, Courts and Enforcement Act [TCEA]*,<sup>46</sup> an epochal event in the history of British administrative law. The *TCEA* must have been significantly influenced by the successful Australian experiment with a single centralized administrative tribunal, although it did not go as far in that direction as the Australian model.

Under the *TCEA*, the existing tribunals were brought under a single Tribunals Service. The Tribunals Service provides the necessary resources (such as engaging staff and acquiring property), thus breaking the long-standing pattern of dependence of tribunals on the departments whose decisions they reviewed.<sup>47</sup> The *TCEA* requires that the Judicial Appointments Commission recommend the appointment of judges and lay members of tribunals; the actual appointments are made by the Lord Chancellor. This appointment system thus supplants the prior practice under which appointments to tribunals were made by departments or ministers. The *TCEA* also protects the independence of tribunal members and provides for a Senior President of Tribunals, a position to be held by a judge who represents the views of tribunal members to Parliament and the various ministers responsible for specific departments. The Senior President also is empowered to promulgate practice directions.

The *TCEA* grouped the jurisdictions of many (though not all) of the formerly free-standing specialized tribunals into several "chambers." These chambers are referred to as "first-tier tribunals."<sup>48</sup> The first-tier tribunals adjudicate disputes between private parties and government under a wide range of regulatory and welfare statutes. First-tier tribunals can reconsider and correct their own decisions on their own initiative or on petition of a party.

The *TCEA* also provide for an Upper Tribunal (which is treated as a court of record) and is also divided into chambers. The Upper Tribunal provides for appeals on a point of law from first-tier tribunals (with leave from either the first-tier tribunal or the Upper Tribunal).<sup>49</sup> The Upper Tribunal can reconsider its own decisions and

<sup>45</sup> See Wraith & Hutchesson, *supra* note 39 at 44-45.

<sup>46</sup> Most of the important innovations of the *TCEA* were recommended by the Leggatt Report of 2000. See Craig, *supra* note 39 at 261-63. Craig provides an excellent and complete discussion of the *TCEA* reforms. *Ibid* at 263-283.

<sup>47</sup> The Tribunal Service maintains an excellent website, <<http://www.tribunals.gov.uk>>. Along with a wealth of information and updates, it contains the text of the *TCEA*. In 2010, Asylum and Immigration chambers were established at both the first-tier and Upper Tribunal levels, in place of the former Asylum and Immigration Tribunal. The Tribunal Service also administers the Employment Tribunals which are otherwise not within the first and upper tier structures.

<sup>48</sup> There are, at present, five chambers (most consisting of several "jurisdictions"). See website, *ibid*. The Upper Tribunal has four chambers.

<sup>49</sup> The Upper Tribunal has first-instance jurisdiction in complex cases and cases raising issues of general significance. In British practice, the term "point of law" covers unreasonable applications of law to fact as well as procedural violations and also may well cover unfair and unreasonable factual and

grant judicial review of tribunal decisions in the form of a prerogative writ. It can also award monetary damages.<sup>50</sup> The *TCEA* provides for a further appeal on an important point of principle from the Upper Tribunal to the Court of Appeal (but only if the Upper Tribunal or the Court of Appeal gives leave to appeal).<sup>51</sup>

The *TCEA* thus brings tribunals and courts into a single integrated adjudicatory system for the dispensation of procedural justice in administrative law. It severed the connection between tribunals and the departments whose decisions they review. For all practical purposes, the *TCEA* seems to abolish any distinction between tribunals and courts. In this respect, the *TCEA* goes much further than Australia in integrating its tribunals into the judicial system; as we are about to see, Australians would raise serious constitutional objections to such a move. On the other hand, the Australian AAT centralizes adjudicatory power into a single adjudicating entity (as opposed to the multiple chambers that remain under the *TCEA*).

### III. SEPARATION OF POWERS UNDER THE AUSTRALIAN CONSTITUTION

Australia chose a tribunal model of adjudication, rather than a combined-function model, largely because it was heavily influenced by British practice. However, another reason for the development of the Australian tribunal system was the approach taken by the Australian High Court to constitutional separation of powers. The Australian constitution drew heavily on the separation-of-powers provisions of the U.S. constitution (while preserving British-style parliamentary supremacy). For that reason, Australia might have chosen to follow the American “combined functions” model for administrative adjudication. However, Australia did not and could not adopt the combined-function model because it maintains a much stronger version of separation of powers than does the U.S. Under the Australian approach to separation of powers, the judicial branch cannot exercise executive functions (sometimes referred to as “administrative functions”) and the executive branch cannot exercise judicial functions.<sup>52</sup> Of course, the terms “executive,” “administrative,” and “judicial” are hardly self-defining and the application of these vague criteria has caused much difficulty.

#### A. The American Approach toward Delegation of Adjudicatory Power to Non-Article III Judges

American constitutional law takes a more pragmatic approach to separation of powers than does Australian law. American doctrine tolerates statutory arrangements by which the powers of the three branches are shared with the others, but guards against statutes that enable Congress to broaden its own powers at the expense of other branches or that unduly impair the ability of other branches to carry out their assigned functions.

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discretionary decisions as well. Craig, *supra* note 39 at 269-71; see also Sir William Wade Christopher Forsyth, *Administrative Law* 10<sup>th</sup> ed. (Oxford: Oxford University Press, 2009) at 793-800. Further explication of the scope of review by the upper Tribunal and by the courts is beyond the scope of this article.

<sup>50</sup> See Craig, *supra* note 39 at 271-73; Wade & Forsyth, *ibid.* at 780.

<sup>51</sup> See Timothy Endicott, *Administrative Law* (Oxford: Oxford University Press, 2009) at 435-38, 451-52. In addition, there is the possibility of judicial review through prerogative writ in the High Court if appeal to the Court of Appeal is denied.

<sup>52</sup> *R v. Kirby; Ex Parte Boilermakers' Society of Australia*, (1956) 94 CLR 254, 271 [*Boilermakers*], *aff'd* by Privy Council, *Attorney General (Commonwealth) v The Queen* (1957) 95 CLR 529.

Thus it has long been clear that Congress can delegate judicial power to an administrative agency, at least with respect to so-called "public rights." Broadly speaking, "public rights" involve disputes between private parties and the United States.<sup>53</sup> Typical public rights disputes involve claims to government benefits or enforcement of the tax laws, as well as federal law enforcement against private parties and enforcement of the immigration laws.

In the leading case of *Crowell v. Benson*,<sup>54</sup> the Supreme Court upheld the delegation to a federal agency to adjudicate a case of "private rights," meaning a private-versus-private dispute. *Crowell* involved an employee's claim against the employer for workers' compensation in a maritime dispute.<sup>55</sup> This was a statutory right of action as opposed to a traditional common law claim. It remained unclear whether Congress could assign the adjudication of such traditional tort or contract claims to a non-Article III adjudicator. In *Northern Pipeline*, the Court held that the adjudication of a traditional private-versus-private contract dispute could not be delegated to a non-Article III adjudicator.<sup>56</sup> Clearly, the Court was concerned that Congress might strip the federal courts of large portions of their traditional jurisdiction by assigning broad swatches of it to agencies or other non-Article III bodies and might even preclude judicial review of their determinations.

*Northern Pipeline* was swiftly undermined by later decisions. In *Thomas*, the Court upheld a system of agency-operated binding arbitration of claims by a prior pesticide registrant for compensation arising out of the use by a later registrant of the prior registrant's data.<sup>57</sup> The key was that the private right was newly created and closely integrated into a public regulatory scheme. Finally, in *Schor*, the Court approved a delegation to an agency of the power to decide a contract counterclaim that was ancillary to a statutory system of reparations in favour of customers who claimed that their brokers had violated the rules.<sup>58</sup> If the agency could not adjudicate the contract counterclaim asserted by the broker, the entire system of reparations would have collapsed. The language of the *Schor* decision stresses pragmatism and the balancing

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<sup>53</sup> However, it may be that "public rights" include "a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989).

<sup>54</sup> *Supra* note 2.

<sup>55</sup> *Crowell* also held that "jurisdictional" facts determined by the agency in a private-rights case were subject to *de novo* redetermination in federal court. Within short order, however, this portion of the *Crowell* decision was quietly abandoned, although it has never been formally overruled. See Reuel E. Schiller, "The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law" (2007) 106 Mich L Rev 399 at 410-12, 438-39.

<sup>56</sup> *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The statute assigned the trial of all issues in a bankruptcy case, including breach of contract issues, to bankruptcy judges who lack life tenure. Subsequently, the Court applied the *Northern Pipeline* ruling to a case challenging the constitutionality of bankruptcy court jurisdiction to adjudicate preferential transfer claims. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

<sup>57</sup> *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985).

<sup>58</sup> *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). In *Schor*, the statute empowered an agency to award reparations to customers from commodity brokers for violations of the statute or regulations. The agency adopted regulations providing that brokers could submit counterclaims against their customers when the customer sought reparations. An alternative ground for the decision in *Schor* is that the customer waived the right to have the counterclaim tried in federal court. *Ibid* at 849-50.

of all factors in determining whether the assignment of a particular type of private right claim is improper.<sup>59</sup>

### B. Australian Agencies Cannot Exercise Judicial Powers

In the remarkable *Wheat* case of 1915,<sup>60</sup> the High Court of Australia firmly committed the country to strict separation of judicial and executive powers. The *Australian Constitution* of 1900 provided for an Inter-State Commission [ISC] to regulate trade between the states and it explicitly provided that the ISC would have “such powers of adjudication and administration as the Parliament deems necessary.”<sup>61</sup> The American Interstate Commerce Commission (created in 1887) was clearly one of the models for the ISC along with some British regulatory agencies. However, the High Court held that the ISC could not exercise judicial power. If an agency could not be given judicial powers by an *explicit constitutional provision*, Parliament certainly lacked authority to delegate such powers by a statute. The *Wheat* case sounded the death knell in Australia for the combined function approach to administrative adjudication.<sup>62</sup>

In the leading *Boilermakers’* case,<sup>63</sup> the Court made clear that judicial and non-judicial powers could not be combined in the same body. The case concerned the Court of Conciliation and Arbitration, a labor arbitration body created by Parliament under a specific constitutional authority.<sup>64</sup> The High Court held that the Court of Conciliation and Arbitration could render arbitral awards, as arbitration is not a judicial function.<sup>65</sup> However, that Court could not be given the power to *enforce* its own awards through an injunction or a contempt order, since enforcement of an arbitral award against a union is a judicial function.<sup>66</sup> Apparently the court that is called upon to enforce an arbitral award is not expected to retry the merits; the arbitral decision established the “factum” on which judicial enforcement depends.<sup>67</sup>

*Wheat* seemed to rule out adjudication by a combined-function agency and *Boilermakers* indicated that an agency could not be given power to enforce its own decisions. As a result, Australian legislators designed specialized adjudicatory *tribunals* that are independent of the department that made the underlying disputed decision

<sup>59</sup> The Court stated “we have also been faithful to our Article III precedents, which counsel that bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. . . . Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.” *Ibid* at 857. For discussion of the incoherence of the U.S. law relating to delegation of adjudicatory powers, see Richard E. Levy & Sidney A. Shapiro, “Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review” (2006) 58 Admin L Rev 499 at 507-24; Richard Fallon, “Of Legislative Courts, Administrative Agencies, and Article III” (1988) 101 Harv L Rev 916 at, 918-33.

<sup>60</sup> *New South Wales v Commonwealth*, (1915)20 C.L.R. 54.

<sup>61</sup> Australian Constitution. paras.101, 102.

<sup>62</sup> Cane remarks that the Australian version of separation of powers effectively prevented the creation of combined function agencies. As a result, adjudication by agencies engaged in regulatory functions is unknown in Australia. Cane, *supra* note 6 at 58.

<sup>63</sup> *Supra* note 52.

<sup>64</sup> See *Australian Constitution*. para. 51(xxxv) (empowering Parliament to make laws with respect to “Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”).

<sup>65</sup> See *Waterside Workers’ Federation of Australia v JW Alexander Ltd.* (1918)25 CLR 434, 464-65.

<sup>66</sup> Similarly, see *R v Davison*, 90 CLR 353 (1954), holding that the decision that a person is bankrupt is a judicial function that cannot be delegated to the registrar of the bankruptcy court.

<sup>67</sup> See *Boilermakers’*, *supra* note 52.

and that lack enforcement power. After *Boilermakers*, Australian courts had to decide precisely what executive agencies could not do. As *Boilermakers* suggests, an agency cannot have the power to enforce its own judgment through the normal process of judicial execution. The clearest authority to this effect is the *Brandy* case involving anti-discrimination law.<sup>68</sup> Under the law prior to 1992, the Human Rights and Equal Opportunity Commission [HREOC] could adjudicate discrimination cases but its decisions were not legally enforceable. A victim of discrimination had to make a fresh application to the Federal Court which, after a rehearing, could make such orders as it thought fit. In 1992, Parliament amended the *Act* so that HREOC's determination could be "registered" with the Federal Court. If the losing party sought review, the court "may review all issues of fact and law" but no new evidence could be introduced. If the losing party did not seek judicial review (or if the Federal Court affirmed HREOC's decision), the HREOC decision (which might call for monetary damages or specific relief) became enforceable like any other judgment.

In *Brandy*, the High Court invalidated these amendments, holding that a proceeding is inevitably judicial if the tribunal that renders it has the power to enforce it by execution or otherwise.<sup>69</sup> Consequently, the case would have to be retried in federal court before the decision could be enforced. The *Brandy* decision immobilized Australian anti-discrimination law and, if it were read broadly, could have cast doubt on the constitutional validity of other administrative adjudicatory tribunals whose decisions are more or less self-enforcing.

To an American reader, the *Brandy* decision seems hopelessly formalistic. Given that *Boilermakers* accepted the idea that an executive arbitral decision could be the factum on which judicial enforcement rested, the rejection of HREOC's registration mechanism seems unfounded. The *Brandy* decision appears to reflect a judicial distaste for anti-discrimination law (or perhaps doubts about the impartiality of HREOC) and it may reflect judicial disinclination to part with jurisdiction over a type of case that resembles traditional tort litigation.

Both before and after *Brandy*, the High Court has repeatedly been forced to answer the question of whether a particular package of adjudicatory and enforcement powers delegated to a particular agency adds up to an exercise of judicial power.<sup>70</sup> This unfortunate result is inevitable, since the decisions are defending a distinction that does not exist. The realities of modern administration have forced the High Court to retreat steadily from the absolutist separation of powers rhetoric of cases like *Wheat*, *Boilermakers* and *Brandy*. In the contemporary world, government agencies are empowered to adjudicate a huge range of regulatory and welfare disputes between private parties or between private parties and government. Administrative adjudication of such disputes is clearly necessary to the functioning of modern society.<sup>71</sup> Courts could not remotely handle this enormous body of adjudicatory

<sup>68</sup> *Brandy v Human Rights and Equal Opportunity Commission*, (1995)183 CLR 245.

<sup>69</sup> 183 CLR at 267-71 (rejecting the argument that the registration provision should be interpreted so that the decision subject to enforcement was made by the Federal Court rather than HREOC).

<sup>70</sup> As the Court remarked in the *Tasmanian Breweries* decision: "The uncertainties that are met with arise, generally if not always, from the fact that there is a 'borderland in which judicial and administrative functions overlap' . . . so that for reasons depending upon general reasoning, analogy, or history, some powers which may be appropriately be treated as administrative when conferred on an administrative functionary may just as appropriately be seen in a judicial aspect and be validly conferred upon a federal court." *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Proprietary Ltd.*, (1970) 123 CLR 361, 373 (op. of Kitto, J).

<sup>71</sup> As the High Court recognized in 1926, "[I]f a legislative provision of the present nature [for a taxation tribunal] be forbidden, then a very vast and at present growing page of necessary

work. Administrative decisions are largely self-enforcing but the enforcement process sometimes requires judicial assistance. Given this array of administrative dispute settlement and enforcement mechanisms, it is impossible to say which adjudicatory decisions are “administrative” and which are “judicial.”

Notwithstanding cases like *Boilermakers* and *Brandy*, the High Court has in fact approved various administrative adjudication schemes that are largely self-enforcing. Some of these cases involve schemes in which the primary agency decision is in question; others involve merit review schemes. But all of them are enforceable (either against private parties or against government) without the need for de novo judicial consideration. Thus agencies can remove a trademark from the registry of trademarks.<sup>72</sup> They can adjudicate tax disputes.<sup>73</sup> They can adjudicate pension disputes.<sup>74</sup> They can establish child support obligations.<sup>75</sup> Most importantly, administrative tribunals can invalidate contracts or order relief against unfair business practices such as monopolization. Under the *Trade Practices Act*, the ACT can declare a contract unenforceable or restrain a practice if the contract or practice is “contrary to the public interest” and such decisions have the force of law.<sup>76</sup> The Takeovers Panel can invalidate a corporate acquisition. Courts are prohibited from affording judicial remedies but have jurisdiction to enforce the Panel’s decisions.<sup>77</sup> At this point, an outside reader is baffled; how, if at all, are such responsibilities and enforcement powers different from those involved in *Brandy* or *Boilermakers*?

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constitutional means by which Parliament may in its discretion meet . . . the requirements of a progressive people, must, in my opinion, be considered as substantially obliterated. . . .” *Federal Commissioner of Taxation v Munro*, (1926) 38 CLR 153, 178 [*Munro*] (opinion of Isaacs, J. upholding the validity of the taxation Board of Review), affirmed by Privy Council *sub. nom. Shell Co. of Australia Ltd. v Federal Commissioner of Taxation* (1930) 44 CLR 530.

<sup>72</sup> *R v Quinn; Ex Parte Consolidated Foods Corp.* (1977)138 CLR 1, 12.

<sup>73</sup> *Munro*, *supra* note 71. Only a year earlier the High Court had invalidated a very similar tax tribunal. Parliament immediately acted to create a new tribunal. The primary difference between them was that no “appeal on law points” to the High Court was provided for. Thus, Parliament managed to transfer tax adjudication from the judicial to the administrative branch by reducing the ability of taxpayers to obtain judicial review of the tribunal’s decision.

<sup>74</sup> *Attorney-General v Breckler*, (1999)197 CLR 83, 110-12. The decision turned on several factors. The pension plan provided that the trustees would be bound by a decision of the Superannuation Complaints Tribunal, so it was not necessary to rely on judicial enforcement. Moreover, it was possible to collaterally attack the tribunal’s decisions in court.

<sup>75</sup> *Luton v Lessels*, (2002) 210 CLR 333, 360 (the administrative determination of liability creates a “factum” by reference to which the statute creates rights for the future which then are enforced by resort to courts).

<sup>76</sup> *Tasmanian Breweries*, *supra* note 69, at 372-78 (Kitto, J. – the “public interest” standard is too subjective to be characterized as judicial); 401-03 (Windeyer, J. – the public interest standard is remote from standards courts apply, relying on American authorities upholding judicial delegations to agencies) 408-09; (Owen, J. - Tribunal lacks enforcement powers).

<sup>77</sup> *Alinta*, *supra* note 14. Although the High Court was unanimous in this case, there are six separate opinions that rely on an uneasy combination of different reasons for finding the Panel’s power to be non-judicial. These include the fact that the Panel takes account of policy considerations that are different from the kind of policy determinations made by common law courts; that the Panel’s order creates “new rights and obligations;” that historical analysis shows that it would be inappropriate for a court to undertake review of takeovers; that the displacement of contract rights from a takeover agreement is different from what happens in a contract case in court; that the Panel’s order provides the “factum” which courts would then be required to enforce; and numerous other factors that strike an outside reader as wholly lacking in analytical substance.

### C. Australian Courts Cannot Exercise Executive Power

As discussed above, Australian executive departments cannot exercise judicial power. Just as importantly, a federal court cannot exercise executive power. Providing merits review of the factual or the discretionary aspects of a government decision is considered an executive power. Consequently, a court is precluded from providing such review. Australians believe that it would be deeply improper for a court to interfere in the substance of executive decisionmaking by substituting its judgments about factual or discretionary matters for the judgment of an agency. Yet it is plain that some form of merits review of the factual and discretionary basis of the adjudicatory decisions of government agencies must be provided. Since courts cannot supply merits review of factual or discretionary determinations because of separation of powers constraints, such review must occur within the executive branch.

The epochal Kerr Committee report of 1971 explicitly determined courts could not provide merits review of administrative decisions. Consequently, it recommended adoption of a peak merits review tribunal and the creation of the AAT implemented that recommendation.<sup>78</sup>

## IV. THE AAT IN PRACTICE

The Australian AAT is an attractive model. It has attained a high degree of legitimacy in Australia, as shown by the spread of tribunals in both the Commonwealth and in the Australian states. Before considering whether the Australian model might be transplanted to the U.S., a more detailed examination of the pros and cons of the AAT is in order.

### A. The AAT's Procedures

The AAT's organic statute states that "[i]n carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick."<sup>79</sup> Of course, as Professor Creyke has pointed out, "[c]omplying with this litany of adjectives has created difficulties...not least because they are internally inconsistent."<sup>80</sup> The procedures are supposed to be "conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit"; moreover, "the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate."<sup>81</sup> But as the famous *Mathews v. Eldridge* balancing test for measuring due process in the U.S. implicitly acknowledges, accuracy, fairness and efficiency values are often at odds.<sup>82</sup>

<sup>78</sup> See Cane, *supra* note 6 at 60-67, 145-49. He argues that the Kerr Commission missed the mark, because the vast majority of administrative decisions do not involve determinations of policy or applications of discretion. Instead, they involve application of specific detailed and formal principles to the facts. In that respect, they are just the same as the kinds of decisions courts make and review all the time. So judicial review of the vast majority of administrative decisions would not have offended separation of powers. When the AAT does confront important issues of policy, it generally defers to the executive, which further undercuts the reasoning of the Kerr Committee. See discussion in the text, *infra*, at notes 118-24.

<sup>79</sup> *AAT Act* para. 2A.

<sup>80</sup> Creyke, *supra* note 6 at 94.

<sup>81</sup> *AAT Act* paras. 33(1)(b)&(c).

<sup>82</sup> See 424 U.S. 319, 335 (1976).

## 1. AAT's Mix of Adversarial and Inquisitorial Procedures

As mentioned before, the AAT provides a blend of adversarial and inquisitorial process,<sup>83</sup> while the specialized tribunals tend to be closer to the inquisitorial end of the spectrum.<sup>84</sup>

### (a) Pro-activity in Obtaining Evidence

One issue is whether the AAT sufficiently uses its inquisitorial powers to require submission of material documents from the parties or even to gather other information, especially where the applicant is unrepresented.<sup>85</sup>

Professor Cane concludes that the AAT could do more: “on the whole...it seems that Australian merits tribunals rarely obtain information other than from or through the applicant and the decision-maker.” In part, as he acknowledges, this is a resource issue, and without the availability of staff to find witnesses or information not produced by the parties, “the most that tribunals are likely to do is to invite, encourage, or perhaps, require, parties to provide additional evidence.”<sup>86</sup> At any rate the law does not require more at this point: although Creyke and McMillan point to several tribunal decisions that have been held invalid for failing to consider whether additional evidence was needed, or seeking clarity on matters deemed unclear or obscure,<sup>87</sup> they conclude that “the settled principle is...that there is no general legal duty on a tribunal to conduct inquiries.”<sup>88</sup> A discussion paper for the Australian Law Reform Commission proposed an amendment to the *AAT Act* to require the tribunal to be take a more proactive investigative role in cases involving unrepresented parties, but the proposal was never formally recommended.<sup>89</sup>

<sup>83</sup> See the High Court's description in of the AAT's procedures in *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424-5:

Proceedings before the A.A.T. may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or to test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the Board and the A.A.T. is an administrative decision-maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it. If the material is inadequate, the Commission, the Board or the A.A.T. may request or itself compel the production of further material. The notion of onus of proof, which plays so important a part in fact-finding in adversarial proceedings before judicial tribunals, has no part to play in these administrative proceedings.

<sup>84</sup> Examples of inquisitorial practices in the specialized tribunals include the RRT's research unit, which compiles “country information” reports, briefings prepared by the MRT's “case officers,” and the appointment to the SSAT of medical specialists and former departmental officials. Creyke & McMillan, *supra* note 6 at 156. For a concise discussion of the differences between adversarial and inquisitorial processes, see Margaret Allars, “Neutrality, the Judicial Paradigm and Tribunal Procedure” (1991) 13 Sydney L Rev 377 at 381-85. For a comparison of adversarial and inquisitorial approaches in environmental assessment of land development, see Andrew Edgar, “Participation and Responsiveness in Merits Review of Polycentric Decisions: A Comparison of Development Assessment Appeals” (2010) 27 Environmental & Planning Law Journal 36.

<sup>85</sup> See the *AAT Act*, paras. 37, 38 (describing the Tribunal's powers to require the submission of documents and other materials).

<sup>86</sup> Cane, *supra* note 6 at 241.

<sup>87</sup> Creyke & McMillan, *supra* note 6 at 163, citing *Azzi v Minister of Immigration and Multicultural Affairs* (2002) 125 FCR 48, and *Budworth v Repatriation Commission* (2001) 33 AAR 48.

<sup>88</sup> Creyke & McMillan, *supra* note 6 at 163, citing *Minister for Immigration and Ethnic Affairs v Singh* (1997) 44 ALD 487. See also Creyke, *supra* note 6 at 93 (“Courts, too have been slow to impose an obligation on a tribunal to undertake independent inquiries, even given tribunals' ostensible inquisitorial role.”).

<sup>89</sup> *Ibid.*, citing “Managing Justice”, Report No 89, 2000, paras. 9.53-9.55.

### (b) Handling of Expert Evidence

Since it is not a court, the AAT can be more flexible in its receipt of expert evidence. Some tribunal members obviously have expertise of their own, and "it is generally accepted that tribunal members should be freer than judges to draw on their own personal knowledge and to 'take notice' of information not presented by the parties."<sup>90</sup> However, parties need to be given a chance to object to the taking of official notice or information obtained from third parties.<sup>91</sup> This is no different from the *APA*'s rules on ALJ hearings in the U.S.<sup>92</sup> However, tribunals sometimes have been creative in arranging for concurrent presentation of expert evidence in so-called hot tubs; instead of experts presenting evidence individually, a number of experts are brought together in one session at which areas of agreement and difference can be explored and developed by discussion and questioning between the experts themselves.<sup>93</sup>

### (c) Other Rules of Evidence

The AAT Act states that "the Tribunal is not bound by the rules of evidence, but may inform itself in such manner as it thinks appropriate"<sup>94</sup> – a standard that is even more unrestrictive than that of the U.S. *APA*.<sup>95</sup>

### (d) New Evidence

It is commonplace for new evidence to arise during the period between the agency decision and the tribunal hearing. Merits review tribunals review the facts as they exist at the time of the review, not at the time of the agency decision.<sup>96</sup> This "contemporaneous review" presents its own set of problems. By the time of the review, the agency may have changed its "administrative outlook," but, in contrast to the U.S., the agency cannot revise its decision, because it has already become the responsibility of the tribunal.<sup>97</sup> Or the facts may have changed, and in many cases the applicant can produce new evidence that was not before the decisionmaker below. This "open record" concept also exists in U.S. social security and veterans' benefit cases, and it has been criticized for creating incentives to hold back evidence. The

<sup>90</sup> Cane, *supra* note 6 at 240, n.114, citing J.A. Smillie, "The Problem of 'Official Notice': Reliance by Administrative Tribunals on the Personal Knowledge of Their Members," (1975) Public Law 64.

<sup>91</sup> See Pearson, *supra* note 6 at 311 ("Procedural fairness requires the disclosure of information coming from [a tribunal member's expertise] where the tribunal proposes to reach a conclusion based on the knowledge of a member of a particular fact, or relying on a particular expertise."). She cites *Tisdall v Health Insurance Commission* [2002] FCA 97, for this proposition, but adds that "It is troubling to note that this does not always occur." *Ibid* at n. 47.

<sup>92</sup> See 5 U.S.C. para. 556(e).

<sup>93</sup> Cane, *supra* note 6 at 243-244 (citing a survey of AAT members that indicated satisfaction with the procedure, *An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal* (Nov. 2005), available online: AAT <<http://www.a-a-t.gov.au/Speeches-Papers-And-Research/Research/AAT-Concurrent-Evidence-ReportNovember2005.pdf>>)

<sup>94</sup> *AAT Act*, para. 33(1)(c).

<sup>95</sup> The *APA*'s provision states: "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or repetitious evidence." 5 U.S.C. para. 556(d).

<sup>96</sup> See Creyke & McMillan, *supra* note 6 at 144; *Sbi*, *supra* note 11.

<sup>97</sup> *Ibid*.

same concerns have been raised about the tribunals' open record policy.<sup>98</sup> It should be noted that intervening changes in the *law* may or may not be applied by the tribunal, depending on whether the law itself states whether the change applies to pending proceedings.<sup>99</sup>

## 2. Role of the Agency Decisionmaker as a Party before the AAT

The responding agency must provide a statement of findings and reasons for its decision and disclose any other document that it has (or controls) that is relevant to the review.<sup>100</sup> Somewhat surprisingly, its overall responsibility is to "assist the Tribunal to make its decision," not to act in an adversary fashion.<sup>101</sup> This is consistent with the AAT's merits review responsibility to make the "correct or preferable" decision, but it must be difficult for the agency representative to undergo this "attitudinal adjustment."

On the other hand, in *Hayes* the Federal Court overturned an AAT ruling in a workers' compensation case that a *subsequently discovered* agency video of the applicant should have been disclosed to the applicant prior to its introduction in the hearing so as to allow sufficient time to prepare for cross-examination.<sup>102</sup> Subsequent decisions of the AAT, however, have distinguished this Federal Court decision, one of which commented that "the principal of trial by ambush ... has never held sway in this Tribunal and I hope it never will."<sup>103</sup>

## 3. Burden-of-Proof Considerations

Given the roles of the parties, how do burden-of-proof considerations factor into the AAT's decision? Even though, "as a practical matter...it is in the interest of a party to [present] evidence to persuade the tribunal,"<sup>104</sup> it seems to be the case that with respect to the tribunals, "it is not appropriate to talk in terms of a formal onus or burden of proof," unless an underlying statute contains one.<sup>105</sup> This is because "the AAT is required...to make its own decision in place of the administrator."<sup>106</sup>

But this rationale tends to beg the question, and Professor Pearson explains that the question of how tribunals "proceed when left in a state of uncertainty" is that they generally "turn to the applicable legislation, which will usually be worded in terms requiring the decision-maker to reach a state of satisfaction on a particular issue..."<sup>107</sup> Evaluating whether this requirement has been met obviously requires the

<sup>98</sup> *Ibid* at 145 (suggesting that "an agency is likely to be disgruntled where a decision is set aside, or a hearing is held unnecessarily, as a result of fresh evidence that might as easily have been presented to the decision-maker").

<sup>99</sup> *Ibid* at 146. See also *Sbi*, *supra* note 11 (holding that the AAT is permitted to consider new evidence).

<sup>100</sup> *AAT Act* para. 37 (1AAA).

<sup>101</sup> *Ibid* at para. 33(1AA). See also Cane, *supra* note 6 at 244. In the SSAT and MRT, the government does not appear as a party (similar to many U.S. benefits adjudications). Creyke, *supra* note 6 at 92.

<sup>102</sup> *Australian Postal Commission v Hayes* (1989) 23 FCR 320; excerpted in Creyke & McMillan, *supra* note 6 at 164-65. The court determined that the *AAT Act* para. 37 requirement that all relevant material be disclosed before the hearing did not require the disclosure of subsequently discovered evidence that was not before the decisionmaker.

<sup>103</sup> *Re Taxation Appeals NT94-281-NT94-291* (1995) 21 AAR 275, excerpted in Creyke & McMillan, *supra* note 6 at 166.

<sup>104</sup> *Ibid* at 171.

<sup>105</sup> See Pearson, *supra* note 6 at 309.

<sup>106</sup> *McDonald v Director-General of Social Security* (1984) 1 FCR 354 excerpted in Creyke & McMillan, *supra* note 6 at 172).

<sup>107</sup> See Pearson, *supra* note 6 at 309-10.

tribunal to give careful attention to the findings and reasons provided by the decisionmaker, but it can be especially difficult for the tribunal to "balance assessment of credibility based on oral evidence with what might at first appear to be more 'reliable' documentary material such as...information prepared by government agencies."<sup>108</sup> In the end, the "balance of probability" standard is "ordinarily the appropriate standard to be applied by an administrative tribunal."<sup>109</sup>

#### 4. Alternative Dispute Resolution [ADR] Techniques

The AAT and other tribunals rely heavily on techniques to avoid formal hearings. To begin with, occasionally the tribunal may determine that the papers filed by the respondent agency allow for a favorable decision for the applicant "on the papers."<sup>110</sup> The AAT may also decide to proceed on the papers with both parties' consent.<sup>111</sup>

Many cases also settle, through party conferences with an AAT member, or through other ADR processes such as mediation.<sup>112</sup> In 2008-09, the AAT resolved 5838 cases without a hearing and provided only 1393 hearings.<sup>113</sup> Thus only 19% of the cases lodged in the AAT actually resulted in a hearing. But the AAT must agree to the disposition because "[o]nce an application for review has been made, the AAT alone can bring the proceedings to an end."<sup>114</sup> This also prevents an agency from trying to "pull back" an appeal.

#### 5. Decisionmaking and Opinion-Writing

The AAT's decisions from 1976 to the present are available on line on the Australasian Legal Information Institute website.<sup>115</sup> According to Professor Creyke, decisions of the AAT, because it is not a court, are not precedential.<sup>116</sup> However, issues of consistency and following precedent can occur with respect to prior tribunal rulings on both legal and factual questions. Although AAT decisions on legal interpretation questions are subject to judicial review, sometimes a case will involve a legal issue that has been decided in an earlier unappealed AAT case. The AAT's Deputy President has opined that in that situation the AAT should follow the decision in the earlier case, especially if the decision was made by a presidential member, although the member deciding the later case could note his or her disagreement with the result.<sup>117</sup>

#### 6. Generalized vs. Specialized Expertise

Given that over 400 statutes provide for AAT jurisdiction, and that its members are a mix of lawyers and non-lawyers and full-timers and part-timers, one might legitimately wonder whether the Tribunal can handle cases from agencies that present difficult and technical issues. This objection has also been leveled at federal judges in

<sup>108</sup> *Ibid* at 311.

<sup>109</sup> Creyke & McMillan, *supra* note 6 at 171.

<sup>110</sup> *Ibid* at 157.

<sup>111</sup> *AAT Act*, para. 34J.

<sup>112</sup> *Ibid* at para. 34A. See also Cane, *supra* note 6 at 246-49.

<sup>113</sup> AAT Annual Report 2008-09, App. 3, *supra* note 22.

<sup>114</sup> Cane, *supra* note 6 at 246-47.

<sup>115</sup> See online: Australasian Legal Information Institute <<http://www.aust-llii.edu.au/au/cases/cth/A-A-T-A>>.

<sup>116</sup> See Creyke, *supra* note 6 at 98.

<sup>117</sup> See *Re Ganchoy and Comcare* (1990) 19 ALD 541 (Decision of Deputy President Todd), excerpted in Creyke & McMillan, *supra* note 6 at 176.

the United States who hear appeals from a multitude of agencies. But the difference is that U.S. judicial review of disputes about fact findings and exercises of discretion is limited to a “reasonableness” form of review (the substantial evidence test for formal adjudication and the arbitrary and capricious test for informal adjudication). Similarly, in the U.S., judicial review of questions of law is also usually quite deferential to the agency’s interpretation of statutes and of its own regulations.

The literature on Australia’s tribunals does not appear to view this as a serious concern even though AAT members are not provided with legal or technical assistants. Perhaps the AAT’s ability to call on the decisionmaking agency for additional documents and to call upon the agency’s counsel to assist the tribunal in making the “correct or preferable” decision is regarded as giving the AAT members the tools they need. In addition, the AAT does not review tribunal decisions relating to takeovers and trade practices that might present issues beyond the ken of many AAT members<sup>118</sup> nor does it review most decisions relating to immigration and refugee policy, which may reflect political considerations. Finally, note that several high volume specialized tribunals (the SSAT and VRB) siphon many cases away from the AAT (although the AAT provides merits review of challenged SSAT and VRB decisions that are unfavorable to the applicant).

## 7. Following Governmental Policy

Whether tribunals must follow agency policy presents an important and recurring issue. This is also a question that confronts U.S. ALJs. In Australia, an influential AAT decision, *Drake No. 2*<sup>119</sup> held that the AAT should apply a presumption in favour of relevant government policies (assuming that the “policy” does not conflict with “hard law” such as a statute or regulation). The AAT should depart from policy only for “cogent reasons,” such as injustice in an individual case, but not because it disagrees with the policy in general. One reason for deference to policy is to achieve consistency between unappealed decisions and AAT decisions.<sup>120</sup> Another is to keep the AAT out of politics and avoid clashes with government departments; its job is to adjudicate, not set government policy.<sup>121</sup>

These generalities leave open questions about whether the tribunal’s duty to depart from government policy only for cogent reasons is affected by the level of the policymaker (ministerial, departmental, or lower) or the procedure used to issue the policy (after public consultation or not). Andrew Edgar has focused on the distinction, often suggested by academic commentators and found in case law, between “high” and “low” policy. High policy comes from the minister, is subject to “ministerial responsibility” and is scrutinized by Parliament; *Drake 2* requires the AAT to follow high policy. Low policy, on the other hand, comes from soft law issued by the department. The AAT either ignores or considers but feels free to redetermine low policy. Edgar criticizes this distinction and suggests that the AAT should defer to both high and low policy, because the failure to defer to soft law results in inconsistent decisionmaking by different AAT panels and the substitution

<sup>118</sup> See accompanying text in *supra* note 33.

<sup>119</sup> *Drake and Minister for Immigration & Ethnic Affairs* (No. 2) (1979) 2 ALD 634. *Drake No. 2* was written by High Court Justice Brennan sitting as AAT president.

<sup>120</sup> See Andrew Edgar, Tribunals and administrative policies: Does the high or low policy distinction help? (2009) 16 Australian Journal of Administrative Law 143

<sup>121</sup> See Cane, *supra* note 6 at 169 (suggesting that reweighing factors in reviewing a discretionary decision is something the AAT does cautiously as it could be seen as making policy and creating conflict with government departments).

of a less informed for a more informed determination of appropriate policy.<sup>122</sup> He argues that the AAT lacks the relevant information to make proper judgments about policy because often the rationale for the policy is not articulated in the department's decision, which is specific to the facts of the case. Moreover, he contends that lack of deference produces an accountability problem because the AAT's decision on policy is not reviewable either in court or as a political matter (other than through parliamentary legislation).

Nor is Edgar any more enamored of a distinction based on whether or not the policy was developed after public consultation. He observes that where consultation has taken place, agencies can "cherry-pick" from among the comments that are "consistent with their pre-determined view and ignore other submissions," and that tribunals would not know when this sort of "charade" had taken place.<sup>123</sup> He also opines that some agency policies promulgated without consultations (including interpretive rules) are quite legitimate and should be followed by tribunals.

Professor Cane takes a more positive view of tribunal review of policy that is only reflected in soft law. He believes that these policies are certainly relevant considerations for the tribunal, but they are not binding. More broadly, in his view, the AAT is entitled to refuse to apply a lawful policy not only because the policy leads to injustice in the particular case but also because the AAT believes the policy is not sound or wise. Moreover he goes on to say the AAT would also be "entitled to enunciate a new policy, inconsistent with an existing policy, as the basis for varying a decision or making a substitute decision."<sup>124</sup> He bases this conclusion on the fact that the power to undertake merits review includes the power to substitute a correct or preferable decision, and that must encompass the power to act inconsistently with government policy. But he tempers his point by suggesting that the differences between high and low policy or policies developed with and without consultation are appropriate factors for the Tribunal to consider.<sup>125</sup>

## V. WOULD THE AUSTRALIAN TRIBUNAL MODEL WORK IN THE U.S.?

Could the U.S. borrow from the Australian experience? We believe that something like the Australian tribunal model might work in the area of federal benefits adjudication. These are mass justice systems in which decisionmakers must deal with a heavy caseload of individual cases that largely turn on medical and vocational issues and are not used as vehicles for the announcement of policy.

For purposes of this article, we limit our proposal to an independent U.S. Social Security Tribunal [SST], which would be similar to the Australian SSAT. However, we also believe that policymakers should consider whether the SST might be expanded to cover adjudication arising under some or all of the other federal benefit programs, including schemes administered by the Department of Veterans Affairs and the Department of Labor. If that were to occur, the result would be a federal benefits tribunal of generalized jurisdiction, much like the AAT. Our discussion does

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<sup>122</sup> See Edgar, *supra* note 120 at 149, 150-51. Interestingly, on this point, he invoked K.C. Davis's criticism of merits review, *ibid* at 150, citing K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 142.

<sup>123</sup> *Ibid* at 146.

<sup>124</sup> Cane, *supra* note 6 at 159.

<sup>125</sup> *Ibid* at 160.

not include the judicial review stage, but we also believe that policymakers should consider establishing a Social Security Court to review SST decisions.<sup>126</sup>

The hearing stage of the social security adjudication system has encountered deep problems. Most importantly, it struggles with an overwhelming caseload. A combative atmosphere between the Social Security Administration [SSA] and its ALJs has lingered for years. SSA must manage its ALJs to improve the efficiency, accuracy, and consistency of the decisionmaking process. In the past, however, some of these management decisions were explicitly (and wrongly) designed to reduce the number of beneficiaries on the disability rolls and to reduce the percentage of ALJ decisions in favor of claimants.<sup>127</sup> This has given ALJs and lawyers that represent claimants a basis for condemning SSA management initiatives as subversive of ALJ independence.<sup>128</sup>

On the other hand, it must be recognized that many of the problems of SSA adjudication arise out of problems with the ALJ program itself. The general process by which ALJs are hired and managed has often been criticized.<sup>129</sup> Under the *APA*, ALJs are hired without a probationary period and receive indefinite tenure. Application of the veterans' preference laws effectively excludes many non-veterans and creates gender and racial disparities. The Office of Personnel Management [OPM] runs the hiring process which is cumbersome and bureaucratic; OPM has often neglected or mismanaged this task. The system requires a hiring agency to choose from among the top three on the list offered to it by the OPM, thus foreclosing any exercise of judgment by the agency. This rigid ALJ selection system is circumvented by many agencies which cherry-pick from the judges already working for the SSA. Alone among all federal civil servants, ALJs are exempt from performance evaluations and it is extremely difficult to discipline or discharge them, especially for low productivity.

The ALJ selection and disciplinary protections arise from explicit provisions of the *APA*. The *APA* struck many political compromises, one of which was to leave the judges housed within agencies for which they decide cases while constructing a set of protections for their independence within that agency. However, if the ALJs functioned within a tribunal separate from the agency that made the decision under review, many of those protections would become unnecessary.<sup>130</sup>

<sup>126</sup> Lubbers has written in favour of a specialized Social Security court to remove the vast number of Social Security appeals from federal district courts. Lubbers & Verkuil, *supra* note 1. The newly created English Upper Tribunal, which is treated as a court of record and provides for an appeal of the decisions of first-tier tribunals, is a move in the direction of a specialized court that the U.S. would do well to study. See accompanying text at notes 48-50.

<sup>127</sup> See *Ass'n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132 (D.D.C.1984), *amended* 1985 WL 71829 (July 2, 1985) (finding SSA program of reviewing decisions of administrative law judges with high rates of allowing disability benefit claims to be of dubious legality).

<sup>128</sup> See generally Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, (1990) *BYUL Rev* 461 at 497-502.

<sup>129</sup> See e.g. Paul R. Verkuil, Daniel Gifford, Charles Koch, Richard Pierce, & Jeffrey Lubbers, "The Federal Administrative Judiciary" 1992 *Reports and Recommendations of the Administrative Conference of the U.S.* 773; Paul R. Verkuil, "Reflections Upon the Federal Administrative Judiciary" (1992) 39 *UCLA L Rev* 1341; Jeffrey S. Lubbers, "The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs" (1994) 7 *Admin L J Am U* 589.

<sup>130</sup> Many have urged procedural reforms of Social Security adjudication and judicial review. Levy, for example, proposes legislation that would remove Social Security ALJs from the SSA and make them an independent corps; he also proposes replacing federal district court review of ALJ decisions with an Article I court of disability appeals that is similar to the Court of Veterans' Appeals. See Levy, *supra* note 128 at 528-37. Similarly, Lubbers & Verkuil propose an Article I Social Security Court, *supra* note 1 at 778-82. This article takes no position on whether the existing system of judicial review

An SST would be independent of the SSA.<sup>131</sup> Its judges could continue to provide informal, inquisitorial methods when that is appropriate. At present, the SSA is unrepresented in disability cases, so the ALJ wears multiple hats (making sure that both the SSA and applicant's position is properly presented, then deciding the case). Of course, the SST judges would be required to follow SSA regulations as well as properly issued soft law policy statements or interpretations propounded by the Commissioner. Decisions by the SST would be final administrative decisions.<sup>132</sup> The next step would be judicial review, possibly limited to questions of law. Of course, both the applicant for benefits and SSA would seek judicial review of SST decisions.

Creation of the SST would enable a reconsideration of the various management issues currently plaguing the system of social security adjudication. Judges would work for the SST, not for the SSA. As a result, there would be no need for the *APA's* rigid controls on the hiring, supervision, compensation, evaluation, and discharge of ALJs. The SST could hire its own judges using a rational, judgment-based scheme to get the very best people available, as opposed to the wooden system now used by the OPM.<sup>133</sup> There could be probationary employment, to weed out unsuitable judges early in their career. Judges' terms would be lengthy but not indefinite and they could be removed only for good cause. There could be a series of grades, so judges could work toward promotion and higher compensation. More difficult cases could be assigned to more experienced judges. Some form of peer review might be instituted to evaluate the work product of the judges. The chief judge of the SST would manage the evaluation process. And if that evaluation established that judges fell below reasonable standards of productivity, misbehaved on the bench, or systematically ignored agency policies, appropriate remedial measures could be put into place from mentoring or performance agreements, all the way to dismissal after an appropriate hearing.

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of benefits decisions should be altered, but the creation of a Social Security court should be seriously considered.

<sup>131</sup> About half of the states and a number of large cities have adopted the central panel model. See Chris Guthrie, Jeffrey J. Rachlinski, & Andrew Wistrich, "The 'Hidden Judiciary': An Empirical Examination of Executive Branch Justice" (2009) 58 Duke L.J. 1477 at 1484 n. 29. Under that approach, the judge hearing a case is independent of the agency that brings it. The judges are hired, assigned, managed, and evaluated by an independent central panel agency. Our impression is that central panels have worked well and are considered by the public and by lawyers to be more legitimate than administrative judges embedded in the agency that is a party to the dispute. The central panel has often been proposed and just as often rejected at the federal level, largely because of doubts that central panel judges could effectively handle technical and difficult regulatory problems from numerous agencies. See e.g. Jeffrey Lubbers, "A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level" (1981) 65 *Judicature* 266. However, we are proposing a centralization of adjudication only for Social Security, so that the judges would need to master the law and practice only from a single benefit program. Were the SST to be expanded to other federal benefit agencies, such as those run by the VA and DOL, there would be an additional learning curve, but all of these cases come down to medical and vocational issues, so any competent judge should be able to decide cases accurately under any of the benefit schemes with only modest additional training.

<sup>132</sup> In considering this proposal, Congress should decide whether to provide for an administrative appeal of SST decisions, such as the AAT provides for SSAT decisions, the Upper Chamber provides in the U.K., or the Appeals Council presently provides for a relatively small fraction of ALJ decisions in Social Security cases. Our preliminary assessment of this issue is that a single administrative decision by an independent ALJ is sufficient and a second level of administrative hearings absorbs resources and causes delay without sufficient countervailing advantage. See Charles H. Koch & David A. Koplou, "The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council" (1990) 17 *Fla St U L Rev* 199 at 296-98.

<sup>133</sup> For obvious practical reasons, the existing ALJs working for the SSA would be grandfathered into the new system. However, the existing ALJs would be subject to the new scheme of performance evaluation.

This proposal presents important issues of scale. Obviously the U.S. SST would require a vastly larger corps of judges than the Australian AAT (with its 89 members) or SSAT (with its 230 members). Yet the judges who would staff the SST are already in place – the approximately 1200<sup>134</sup> skilled, experienced and conscientious Social Security ALJs. They would be the nucleus of the SST.

The issue of consistency of decisions is always problematic in mass justice situations. As Mashaw pointed out long ago, the only way to achieve reasonable consistency of decisions among vast numbers of judges in a mass justice situation is through management initiatives, not through an appeals council or through judicial review of the procedure or the substance of such decisions.<sup>135</sup> Those management initiatives would be far more practicable and acceptable to the judges if they came from an independent SST rather than from the SSA. For example, the SSA would have to issue more regulations and high-level policy statements than it does today to furnish guidance to SST judges. In addition, the SST might designate important decisions by SST judges as precedent decisions that judges in later cases would be required to follow.

The political feasibility of this proposal can be questioned. It is certainly possible that ALJ organizations would dig in their heels against it, opposing anything that might diminish their *APA* protections, or reduce the number of ALJs in their ranks. Yet many ALJs have favored the creation of a federal, central panel that would remove them from control of the agency that is party to the dispute. The SST would produce exactly that form of independence, but it could be achieved only if the ALJs were willing to accept a change to a new status as SST judges with whatever tailored protections seemed most salient to that position.

Needless to say, many practical issues would arise in so radically changing the structure of federal benefits adjudication, and there will be many compromises along the way. Of course, the hearing process is just one step in a complex state/federal process of disability claim adjudication and cannot be viewed in isolation from all the other stages. This briefly sketched proposal does not address the details or the entire process from state examiner scrutiny of a disability claim through federal court of appeals review. We seek only to point out the advantages of an independent tribunal structure in addressing some of the pathologies of the existing system of social security adjudication.

## VI. CONCLUSION

The Australian model shows that a generalized or specialized merits-review tribunal can work efficiently and achieve legitimacy. It can command the respect of all parties. It presents a successful alternative approach to the U.S. system of embedded adjudicators. The fact that the U.K. has adopted a close variant of it is evidence of its success. Whether the tribunal system could be adapted to the U.S. is obviously debatable. However, in the area of mass adjudication of social benefits programs, where policy matters rarely arise in individual cases, a centralized and independent tribunal provides an intriguing and possibly adaptable model. This experience should be carefully considered by American policymakers as they address the seemingly intractable problem of federal benefits adjudication.

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<sup>134</sup> See Office of Personnel Management chart, *supra* note 3.

<sup>135</sup> Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1985) at 104-06, 148-49, 185-90.

## A WAVERING COMMITMENT? ADMINISTRATIVE INDEPENDENCE AND COLLABORATIVE GOVERNANCE IN ONTARIO'S ADJUDICATIVE TRIBUNALS ACCOUNTABILITY LEGISLATION

Laverne Jacobs\*

*In December 2009, the Ontario Legislative Assembly enacted the Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009 [ATAGAA]. This new legislation offers a unique approach to ensuring that adjudicative tribunals in the province are transparent, accountable and efficient in their operations while preserving their decision-making independence. This approach aims to bring the executive branch of government and tribunals together in achieving effective and accountable internal tribunal governance. Through the use of illustrative cases, the author argues, however, that the statute does not address many of the contemporary concerns about administrative independence and accountability that tribunals experience on the ground. She argues further that the legislation is inconsistent in its underlying commitment to the concept of accountability itself as it fails to contemplate the importance of government accountability to tribunals and overlooks opportunities to foster sustained internal cultures of accountability. Finally, the approach taken by the legislation must be channeled properly to avoid disintegrating from one of collaborative governance to one of command and control.*

*En décembre 2009, l'Assemblée législative de l'Ontario a adopté la Loi de 2009 sur la responsabilisation et la gouvernance des tribunaux décisionnels et les nominations à ces tribunaux. Cette nouvelle loi présente une approche tout à fait particulière pour assurer que les tribunaux décisionnels de la province sont transparents, tenus de rendre compte et efficaces dans leur fonctionnement tout en préservant leur indépendance décisionnelle. Cette approche vise à rapprocher l'autorité exécutive du gouvernement et les tribunaux pour en arriver à une gouvernance interne efficace et responsable des tribunaux. En utilisant des cas pour l'illustrer, l'auteure soutient, toutefois, que la loi n'aborde pas plusieurs des préoccupations contemporaines au sujet de l'indépendance administrative et l'obligation de rendre compte dont les tribunaux font l'expérience sur le terrain. Elle soutient de plus que la loi est inconsistante dans son engagement sous-jacent envers le concept lui-même de l'obligation de rendre compte puisqu'elle ne contemple pas l'importance de tenir le gouvernement responsable envers les tribunaux et néglige les occasions de favoriser des cultures internes soutenues de rendre compte. Finalement, l'approche que prend la loi doit être dirigée convenablement pour éviter de se*

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*désintégrer d'une approche de gouvernance collaborative en une de commandement et de contrôle.*

## I. INTRODUCTION

The *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*<sup>1</sup> [ATAGAA] forms part of a modernization initiative of the current Ontario Liberal government. This initiative aims to strengthen Ontario's laws, regulations and systems by increasing transparency, accountability and efficiency within the province without compromising administrative independence.<sup>2</sup> The statute is unique in Canada. Ontario is the only jurisdiction that has attempted to address the major public concerns about the accountability of administrative tribunals through one comprehensive, tailored statute.<sup>3</sup>

This paper offers a critique of ATAGAA. Through it, I suggest that the legislation has opened the door to certain avenues of ensuring accountability that are potentially quite promising. Specifically, the statute shows an approach to tribunal governance that is collaborative in nature, by providing room for input on a range of tribunal accountability matters from the tribunals that are being governed. ATAGAA fails, nevertheless, to address many critical contemporary concerns relating to tribunal accountability and independence, especially those regarding the accountability of the executive branch of government to administrative tribunals to ensure that the public is adequately served. Of equal concern is that ATAGAA presents an underlying philosophy to accountability that is inconsistent. Despite its attempt at promoting a collaborative governance approach, the statute tends to favour the idea of enforcing accountability from the outside rather than fostering elements of internal tribunal culture that could lead to more authentic and durable measures of accountability.

This paper proceeds in three parts. Part II provides an overview of ATAGAA, highlighting its most salient aspects. Accountability and independence are often interwoven in Canadian administrative law. Because their relationship is at the heart of the discussion in this paper, Part III defines these two concepts and discusses the connection between them, placing them within the broader context of the Canadian administrative state. Part IV outlines some of the most significant concerns about administrative accountability that have surfaced in Canadian legal academic literature and recent case law. In this part, I take a focused look at ATAGAA. I examine the

<sup>1</sup> S.O. 2009, c. 33 Schedule 5 ["ATAGAA," "the Act"]. ATAGAA received Royal assent on December 15, 2009. It has been coming into force in stages since then. At the time of writing, only the provisions relating to clustering had come into force and no general proclamation date had been set for the rest of the provisions.

<sup>2</sup> See Ontario, Legislative Assembly, Ontario Hansard, 179 (27 October 2009) at 1520 (Hon. Christopher Bentley). See also Ontario Attorney General, Press Release, "McGuinty Government Increasing Transparency, Accountability And Effectiveness," (October 27 2009) online: Government of Ontario <<http://www.news.ontario.ca/mag/en/2009/10/modernizing-provincial-laws.html>>. See also ATAGAA, *ibid.* s. 1.

<sup>3</sup> This is not to discount the existence of other statutes in Canada that address, as part of a larger collection of administrative law issues, specific questions of accountability. Of note is Québec's *An act respecting administrative justice*, RSQ 1998 c J-3, which speaks to certain questions of ethics and accountability. In particular, Title III, ss. 165 – 198, deals with the establishment of a council (*Le Conseil de la Justice Administrative*) that is responsible for creating a code of ethics for members of the Administrative Tribunal of Québec, for receiving and investigating complaints against members of the Tribunal and for examining issues constituting a lapse in the exercise of administrative office which may lead to the removal of Tribunal members or the Tribunal's President.

statute's possibilities and limitations with respect to its ability to address contemporary concerns about accountability without encroaching on the equally important value of administrative independence.

## II. *ATAGAA*: - AN OVERVIEW

Outside of provisions dedicated to introductory and general matters, *ATAGAA* addresses the following four main topics:<sup>4</sup> a) the creation of public accountability documents by adjudicative tribunals and amendments to these documents, b) the creation of governance accountability documents by adjudicative tribunals, c) ensuring merit-based appointments and d) adjudicative tribunal clustering. The following is an overview of how the legislation deals with each of these four topics. Overall, one sees a definite shift towards a sharing of governance between the executive branch of government and adjudicative tribunals. This is a positive step: if properly channelled, it can open the door to allowing for input by a broader spectrum of interests including those of the adjudicative tribunals involved and through them, their users. At the same time, the collaborative governance approach taken by the legislation evidences important gaps that may have an impact on its effectiveness.

### A. Public Accountability Documents

The Public Accountability Documents part of the statute is dedicated to the public face of the adjudicative tribunal. It is concerned with: how the tribunal will conduct itself on a day-to-day basis with the public it serves, how it will handle public complaints, its mission and mandate statements, its ethics plan, and its financial, staffing and training arrangements. These are issues that affect public confidence in how efficiently an administrative tribunal will function and, more indirectly, in the tribunal's adjudicative capacity.

Under *ATAGAA*, every adjudicative tribunal is required to develop a mandate statement and a mission statement, both of which must be approved by the tribunal's responsible minister. However, there is no definition of these statements, no specific content identified for inclusion and there are no guidelines for developing them. Similar provisions are outlined for:

- the tribunal to create a policy for consultation with the public when changing its rules or policies;<sup>5</sup>
- the creation of a service standard policy which indicates the tribunal's intended standard of service and the process for making and responding to complaints about tribunal service;<sup>6</sup>

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<sup>4</sup> Although it addresses only four main topics, *ATAGAA* comprises six parts. These six parts are: "Public Accountability Documents" (ss. 3 - 7); "Publication, Amendment and Review of Public Accountability Documents" (ss. 8-10); "Governance Accountability Documents" (ss. 11 - 13); "Appointment to Adjudicative Tribunals" (s. 14); "Tribunal Clustering" (ss. 15 - 19) and "General Matters" (ss. 20 - 22). The legislation ends with a section entitled "Regulations" (ss. 23-25), in which one finds provisions dedicated to the creation of regulations by the Lieutenant Governor in Council and to housekeeping matters such as the coming into force date and short title. The statute, which is short, can be accessed online: Service Ontario e-laws <[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_09a33\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_09a33_e.htm)>.

<sup>5</sup> *ATAGAA*, *supra* note 1 at s. 4.

<sup>6</sup> *Ibid* at s. 5.

- the development of an ethics plan, which must be approved by the public service's Conflict of Interest Commissioner;<sup>7</sup> and
- the establishment of a member accountability framework.<sup>8</sup>

The last of these, the member accountability framework, would appear to be one of the most onerous statements to prepare. It requires the tribunal to provide a description of the functions of all members, vice-chairs and the chair of the tribunal, their skills, knowledge, experience, other attributes and qualifications and that it create a code of conduct for tribunal members. It does not specify what will happen if the code of conduct is breached. It is possible that the tribunal may create its own sanctions, but this is not clear from the statute. The code of conduct requirement is revisited more closely below.

Once drafted, all documents created under the Public Accountability Documents portion of the statute can be amended by the tribunal and must be reviewed every three years by the tribunal to determine if amendments are required.<sup>9</sup> The Public Accountability Documents part of the statute does not provide explicit rationales or discussion of the underlying goals to be satisfied by each of the various documents required. This is unfortunate as it may render the experience of creating these documents a chore, delegated to the administrative management of the tribunal, rather than a consensus-building exercise among the members and staff of the tribunal.

## **B. Governance Accountability Documents**

The Governance Accountability Documents provisions of the statute deal with the development of memoranda of understanding between the tribunal and its responsible minister, as well as the creation of business plans and annual reports. *ATAGAA* requires every adjudicative tribunal to enter into a memorandum of understanding with its responsible minister.<sup>10</sup> The memorandum should address both the tribunal's internal governance matters and its external relationship with the responsible minister. With respect to internal matters, the memoranda aim to seek agreement between tribunal and minister on questions relating to the financial, staffing and administrative arrangements, committee structure and the recruitment and training of tribunal members.<sup>11</sup> Such issues are typically left to the discretion of the administrative tribunal. Problems can arise, however, if the executive branch of government interjects without welcome on the tribunal's understanding of how to do things best. One can therefore see how maintaining a pre-established set of guiding norms through a memorandum of understanding can be useful in navigating or avoiding conflicts between tribunals and the executive branch of government. As for the tribunal's external relationship with its responsible minister, *ATAGAA* merely specifies that the accountability relationships of the tribunal, including its duty to

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<sup>7</sup> *Ibid* at s. 6.

<sup>8</sup> *Ibid* at s. 7.

<sup>9</sup> *Ibid* at ss. 9, 10.

<sup>10</sup> *Ibid* at ss. 11 (1).

<sup>11</sup> *Ibid* at ss. 11 (2) (a), (c), (d), (e).

account to its responsible minister should be addressed in a memorandum of understanding.<sup>12</sup>

The preparation of business plans and annual reports are similarly subject to this part of the statute. Every adjudicative tribunal is required to develop a business plan for the public, the contents of which will be prescribed and/or found in a directive of the Management Board of Cabinet<sup>13</sup> (a committee of the Executive Council which is charged with efficient running of the public service in the province<sup>14</sup>). As for annual reports, *ATAGAA* sets out the timeframe within which annual reports must be submitted to the tribunal's responsible minister, indicates their contents and that they will be tabled in the Legislative Assembly.<sup>15</sup> Interestingly, the executive branch of government, by way of the Management Board of Cabinet, is able to specify additional matters that should be included in almost every document to be produced by the tribunal in relation to public and governance accountability under the statute.

### C. Appointments to Adjudicative Tribunals

Undoubtedly in response to persistent concerns about partisanship appointments in the administrative justice system, this part of the statute outlines criteria for ensuring meritorious appointments to adjudicative tribunals. Candidates will be assessed for any tribunal-specific qualifications indicated in enabling legislation, as well as for their experience and knowledge of the law and subject matter, their aptitude for impartial adjudication and their aptitude for applying any alternative adjudicative practices and procedures that may be set out in the tribunal's rules. The recruitment requirements and selection process will be made public.<sup>16</sup> The chair of the tribunal will be consulted for his or her assessment of a candidate's qualifications and recommendation of appointment. The chair also plays a prominent role in reappointments: he or she will be consulted for an evaluation of current members'

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<sup>12</sup> *Ibid* at ss. 11 (2) (b).

<sup>13</sup> *Ibid* at s. 12.

<sup>14</sup> See *Management Board of Cabinet Act*, RSO 1990, c M.1 [*Management Board of Cabinet Act*]. The main purpose of the Management Board of Cabinet is to ensure the efficient operation of the public service in Ontario. The duties of the Management Board of Cabinet are: a) to approve organization and staff establishments in any part of the public service; b) to establish, prescribe or regulate any policies and procedures that the Board considers necessary for the efficient and effective operation of any part of the public service; c) to initiate and supervise the development of management practices and systems for the efficient operation of any part of the public service; and d) to report to the Executive Council on matters concerning general administrative policy in any part of the public service, either on its own initiative or because the matter has been referred to it by the Executive Council (See *Management Board of Cabinet Act*, ss. 3(1)). The public service is defined broadly to include all Ministries, Crown agencies, corporations owned, operated or controlled by the Crown and all other boards, commissions, authorities or unincorporated bodies of the Crown. Administrative tribunals are generally understood to be independent of the Crown, and at arm's length from central government (which would include ministries of the executive), it is therefore unusual that Management Board, which is fundamentally responsible for Crown operations, would be responsible for creating the directives to guide administrative tribunals in this context. One can certainly surmise that there may be important differences in the way that the regular public service and an arm's length administrative tribunal deal with many of the matters over which Management Board of Cabinet has directive making power. These matters include tribunal mandate and mission statements, public consultation policies, service standard policies, ethics plans and member accountability frameworks.

<sup>15</sup> *ATAGAA* also indicates that if there is a conflict between it and another statute respecting the tabling of annual reports for a particular tribunal, the tribunal-specific statute should prevail. See *ATAGAA*, *supra* note 1 at s. 13.

<sup>16</sup> See *Ibid* at s. 14.

performance of duties and reappointments will only be made upon the chair's recommendation.<sup>17</sup>

#### D. Tribunal Clustering

The idea for tribunal "clustering" in Ontario first emerged as part of a study done in 2007 sponsored by the Ministry of Government and Consumer Services.<sup>18</sup> "Clustering" is defined in the study as a way of sharing best practices among tribunals that work in related areas and deal with related subject matter. The study sought to examine how tribunals could maximize their existing pools of resources to provide the highest level of public service while strengthening individual tribunal mandates. While clustering is not a means of merging or integrating different tribunals into one generic agency and although the aim is not cost-cutting, clustering was seen to be a valuable tool for preserving scarce public resources while retaining specialized expertise. The study looked into the feasibility of clustering certain tribunals dealing with a land use. In 2009, the first tribunal cluster in Ontario was established, the Environment and Land Use Planning cluster. This cluster includes the Assessment Review Board, the Board of Negotiation, the Environmental Review Tribunal and the Ontario Municipal Board.

Through *ATAGAA*, the government has furthered the foundational basis of clustering by setting out guidelines for the designation, governance structure and accountability of clusters. The statute provides that two or more adjudicative tribunals may be designated as a cluster if the Lieutenant Governor in Council (i.e. Cabinet) is of the opinion that they can operate more effectively and efficiently in that way.<sup>19</sup> No consultation with the affected ministries or tribunals is contemplated in the *Act*. The *Act* has provision for an executive chair to be appointed who would be responsible for the entire cluster, as well as for the appointment of various associate-, alternate- and vice-chairs.<sup>20</sup> The executive chair possesses all of the powers, duties and functions of the chair of each tribunal within a cluster.<sup>21</sup> As for accountability, the tribunals in a cluster are to participate jointly in the creation of the public and governance accountability documents required under *ATAGAA*.

#### E. Challenges Arising from *ATAGAA*'s Choice of Tools and Actors

With the exception of the tribunal clustering provisions, *ATAGAA* clearly shows a shift towards a shared model of governance in which both the executive branch of government and administrative tribunals participate in the goal of holding adjudicative tribunals accountable. However, the central question of whether the statute will accomplish its task of assuring the accountability of adjudicative tribunals raises doubts. There are significant gaps in the legislation that reveal conflicting approaches to the legislation's underlying philosophy of collaboration. Four aspects of the legislation reveal its shortcomings. These aspects all centre around the presence or absence of appropriate tools and agents for realizing the statute's objectives.

<sup>17</sup> See *Ibid* at ss. 14 (4).

<sup>18</sup> *Final Report of the Agency Cluster Facilitator for the Municipal, Environment and Land Use Planning Tribunals* (Toronto: Agency Cluster Project, August 22, 2007) (Facilitator: Kevin Whitaker), online: Ministry of Government and Consumer Services <<http://www.gov.on.ca/mgs/graphics/166283.pdf>> [*Ontario Agency Cluster Report*].

<sup>19</sup> See *ATAGAA*, *supra* note 1 at s. 15.

<sup>20</sup> See *Ibid* at ss. 16, 17.

<sup>21</sup> See *Ibid* at s. 17(1).

The weaknesses in the legislature's choice of tools and agents of governance appear most readily in the instruments adopted for achieving accountability. These instruments include the public accountability documents and the governance accountability documents. How exactly will the mandate and mission statements, consultation policies, service standard policies, and member accountability frameworks work to ensure that litigants, users and other concerned citizens will be able to hold adjudicative tribunals to account? Many of these instruments are merely descriptive in nature. For example, the mission statements, consultation policies, and member accountability frameworks primarily provide a means for the tribunal to outline functions, skills and policies. Missing are tools that would allow a person alleging that the tribunal has not been accountable to push for some sort of corrective action. It is not clear if these documents are simply bureaucratic instruments or whether they will provide for change.

Even where the legislation does provide instruments that could theoretically engender change, the legislation is silent as to the concrete steps that are to be used to move a tribunal to become more accountable. Discussed briefly above, the provisions requiring adjudicative tribunals to create a code of conduct are illustrative of this shortcoming. Left unstated in *ATAGAA* is what will happen if a code of conduct, once developed, is breached by a tribunal member. It may be that, in an effort to respect tribunal independence, the legislature has been silent, intending to allow each tribunal to determine whether sanctions should be imposed at all.<sup>22</sup> If corrective action is contemplated, it is not clear whether the code of conduct is to work with sanctions enforced by an external body such as the responsible minister or the province's Conflict of Interest Commissioner, or to implement penalties developed by the tribunal itself. Some may argue that self-sanctioning is not an effective method; others may suggest that only those within the realm of expertise of the administrative tribunal are in a position to understand well the industry and its workings and to fashion effective disciplinary measures. A final argument might be that the source of any type of penalty is a matter best addressed on a case-by-case basis depending on the nature of the tribunal and the issue in question. All of these options are possible but it is necessary for these and other debates to take place about their merits. *ATAGAA* does not indicate, however, if or how such discussions will fit into the tribunal's creation of a code of conduct; it merely indicates that a code of conduct must be produced. Finally, sanctions contemplated for noncompliance with the code may be introduced by way of regulation.<sup>23</sup> If the government chooses to create such regulations, it may be helpful for it to provide tribunals with at least some programmatic guidance on implementation of sanctions, after consultation with the tribunals concerned.

A third shortcoming of the legislation is found in the lack of express rationales for the accountability documents that *ATAGAA* requires. As mentioned briefly earlier,

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<sup>22</sup> Legislation that provides remedial or disciplinary measures for tribunal member misconduct may, alternatively, provide for an independent mechanism to deal with sanctions. Under the *Canadian Human Rights Act*, for example, the Chair of the Canadian Human Rights Tribunal may request the Minister of Justice to decide if a tribunal member should be subject to remedial or disciplinary measures for pre-specified issues of misconduct. The Minister of Justice's options under the statute include holding a public inquiry led by a Superior Court judge and mediation. See the *Canadian Human Rights Act*, R.S., 1985, c. H-6, s. 48.3.

<sup>23</sup> Subsections 23 (h) and 23(i) provide that the Lieutenant Governor in Council may make regulations that prescribe other matters to be addressed or included in any public accountability documents or governance accountability documents, and regulations that prescribe the form and format of these two types of documents.

such rationales would be useful for any tribunal as it goes about determining how to reach outcomes in developing these instruments. One would hope that the best way to ensure accountability would be to seize the moment when the tribunal has to think through its mandate, mission, service standards etc. and use this moment to foster a consensus-building, reflective exercise among those in the tribunal itself. This would be helpful in encouraging an ethos of accountability among the members of a given tribunal, which could lead to more durable change. If those who must be accountable do not have a meaningful way to engage with the underlying purpose of the accountability instruments they are creating, then the exercise may be a lost opportunity in terms of its resonance within the tribunal itself. Explanations of why the various documents required are necessary may assist in fostering authentic dialogue within the administrative tribunals themselves and in capitalizing on opportunities for the development of an ethos of accountability. As it currently stands, the lack of express rationales comes across as top-down and formalistic, in sharp contradistinction to the collaborative governance philosophy of most of the statute.

It is clear that the legislature's tools of governance leave some quizzical gaps. The same is also true of the choice of agents used to assure *ATAGAA*'s functioning. Every public accountability or governance accountability document that the tribunals are required to produce is subject to additional directives by the Management Board of Cabinet. Moreover, the responsible minister's approval is required for all documents. These two oversight mechanisms present the opportunity for an unusual amount of control by the executive branch of government. Why does this possibility for executive control exist? One falls into a dichotomous conceptual gap in answering this question, as the premises animating the statute's design are difficult to identify. In creating this statute, was the legislature's intention to touch on matters over which it saw itself capable of legislating or simply to facilitate closer policing of daily tribunal activities in an attempt to prevent and remedy accountability gaps more quickly? Backed with legislative intent, both approaches may be seen to be legally valid. If the main goal, however, is to bring about greater scrutiny over areas that are usually within the administrative control of tribunals then regardless of whether it is legally valid, the statute will suffer from concerns about its legitimacy within the administrative tribunal community.

There are ten main documents that *ATAGAA* requires tribunals to prepare.<sup>24</sup> An examination of the language surrounding each one suggests that the legislature still views some of the matters with which the documents deal as areas governed by tribunal discretion, irrespective of the statute's oversight. For instance, each adjudicative tribunal to which *ATAGAA* applies is required to indicate the standard of service "that the tribunal intends to provide"<sup>25</sup>. Similarly, it is difficult to see how a tribunal mission statement<sup>26</sup> could be created by the legislature, as mission statements are generally auto-reflective documents that project the values and aspirations developed at the tribunal level.<sup>27</sup> These elements of *ATAGAA* suggest that the statute

<sup>24</sup> These are the : mandate statement (ss. 2(a)), mission statement (ss. 2(b)), consultation policy (s. 4), member accountability framework (s. 7), service standard policy (s. 5), ethics plan (s. 6), business plan (s. 12), annual report (s. 13), memorandum of understanding (s. 11) and review and amendments to the public accountability documents (ss. 9-10).

<sup>25</sup> See *ATAGAA*, *supra* note 1 at ss. 5(2).

<sup>26</sup> See *Ibid* at ss. 3(2)(b).

<sup>27</sup> Similarly, the consultation policy required by the tribunal is dependent on the tribunal chair's opinion as to who should be consulted. See *Ibid* at ss. 4(2).

aims to preserve areas of tribunal discretion that fall commonly within the realm of administrative independence<sup>28</sup> while simultaneously permitting responsible ministers the right to supervise these discretionary realms.<sup>29</sup> In light of this, it is not surprising that concerns have already been raised by members of the administrative justice community.<sup>30</sup>

Caution should therefore be taken so that approval by the responsible minister, which is required for most of the accountability instruments, does not disintegrate into a command and control exercise over the tribunal's internal governance. Many of the spheres that the statute has now entered were previously fully within the tribunal's administrative control at common law. These include its decisions relating to staffing, training, codes of conduct, service standards and many others. It can be useful to have ministerial input, particularly where this might bring about a more levelled approach to accountability issues among the various adjudicative tribunals in the province.<sup>31</sup> There may be administrative tribunals who currently have few accountability mechanisms in place and others who have already put much time and effort into transparency and accountability. It would be encouraging, however, to see more of a legislated commitment to guard against the possible collapse of the collaborative governance approach proposed in the statute into one of close executive control.

Finally, although *ATAGAA* aims to make administrative tribunals more accountable, it does not address the countervailing question of the accountability of government to adjudicative tribunals. This accountability is important so that adjudicative tribunals can adequately serve the public. This is a particularly

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<sup>28</sup> Within the realm of administrative independence, it is administrative control - that is, a tribunal's decision over the daily activities its operation, including managing resources and caseload - which figures most prominently here. For a discussion of the concept of administrative control, see *R. v. Valente* [1985] 2 S.C.R. 673.

<sup>29</sup> The legislature clearly has left room for the tribunal's discretion (or the discretion of the tribunal chair) yet also required ministerial approval for the following documents: the service standard policy (see, in particular ss. 5(2) (a)), the consultation policy (s. 4), review and amendment of public accountability documents (ss. 9-10). By contrast, the legislatures are quite unequivocal in indicating the documents for which contents shall be prescribed. These are: the ethics plan (s.6), the business plan (s. 12) and the annual report (s. 13). For these documents, it seems clear that the legislature believes that it could have created legislation on the matter. Finally, there is a gray zone of subjects over which the legislature could take full responsibility but it is not clear from reading the statute that it intended to do so. These include the mandate statement (s. 3) and the member accountability framework (s. 7). The memorandum of understanding (s. 11) is by nature a document of shared responsibility between the tribunal and the responsible minister.

<sup>30</sup> See e.g. Ontario Bar Association, "*Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009-Cause for Concern: The Independence Issue*" (August 25, 2010), online: Ontario Bar Association <[http://www.oba.org/En/publicaffairs\\_en/Submissions/Submissions.aspx](http://www.oba.org/En/publicaffairs_en/Submissions/Submissions.aspx)>. The author discloses being a member of the committee that drafted the report. Some may argue that a responsible minister should have the control of items such as mission statements and consultation policies as part of his or her portfolio. It is hard to reconcile this view of the minister's role, however, with the understanding of an administrative tribunal as an arm's-length agency that is independent of government. As an independent, arm's-length body, the tribunal has been removed from the departments of the executive government and charged with overseeing the management of an industry or sector through its understanding of its enabling statute and its expertise. Documents such as a mission statement or consultation policy emerge from an understanding of the legislation and the day-to-day dealings with the industry or sector that develop over time. Given that the minister is removed from this day-to-day work, it is hard to see how his or her view of documents emerging from a mixture of statutory interpretation and daily tribunal operation can be more appropriate than the perspective of the tribunal itself.

<sup>31</sup> *ATAGAA* currently applies to 37 tribunals in Ontario. The tribunals are listed in the regulation: General O. Reg. 126/10.

unfortunate failing of the accountability statute. Many concerns about government accountability to administrative tribunals speak directly to tribunal independence. If the legislation had engaged with concerns such as the removal of appointees and budgetary resources, it would have shown a much stronger commitment to balancing accountability and independence in the often politicized operational context of the administrative state. I turn next to a more detailed discussion of the nature of the Canadian administrative state, the values of accountability and independence, and the tense relationship between them, in an effort to show where *ATAGAA* needs to be strengthened in order to be a truly effective accountability statute.

### III. DEFINING ADMINISTRATIVE ACCOUNTABILITY AND INDEPENDENCE

#### A. Institutional Framework - The Canadian Administrative State

To situate the discussion, it is useful to have a better sense of the bodies with which *ATAGAA* is concerned. Broadly speaking, the Canadian administrative state refers to the collection of administrative boards, agencies, commissions, tribunals and other similar bodies established at arm's length from the federal, provincial or territorial executive branch of government. These bodies generally receive their mandates through legislation<sup>32</sup> and their purpose is to help implement government policies and programs. The administrative state aims to "provide a forum that is more specialized, less costly and easier to use than the courts."<sup>33</sup>

Administrative bodies are said to be "independent" because of the absence of close control over their decision-making by the executive branch of government. "Independence," however, does not indicate a total lack of connection to the executive or legislative branches of government. On the contrary, administrative bodies usually have a designated Minister of Cabinet who is responsible for reporting on their activities to the legislature. The responsible minister also tends to be involved in the appointment of members of the administrative agency and its chair. With respect to legislative connections, administrative bodies are susceptible to having their mandates, structures, and other aspects of their work modified through the legislative process. They may even be abolished through legislative enactment or repeal.<sup>34</sup>

One thing that is clear about the Canadian administrative state is that the term "administrative body" can refer to a wide variety of administrative actors. These actors may vary in their decision-making output. For example, they may produce binding orders (e.g. human rights tribunals), non-binding recommendations (e.g. provincial ombudsman), policy reports (e.g. Royal Commissions) or no reports at all

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<sup>32</sup> Non-statutory administrative bodies also exist although they are less common. An example is the Anishinabek Police Services, which is an autonomous, self-governing First Nations police service created by agreement among the federal government, the Ontario Government and a number of First Nations groups (the Anishinabek Police Service Agreement 1992). See the discussion of the Anishinabek Police Service in *McDonald v. Anishinabek Police Service* (2006), 53 C.C.E.L. (3d) 126. Non-statutory administrative bodies are generally described as being created through Crown (executive) prerogative.

<sup>33</sup> Ontario, *Everyday Justice: Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies* (Toronto: Queen's Printer for Ontario, 1998) at 3.

<sup>34</sup> See e.g. *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 in which a member of a public utilities board lost his position and pension rights when the Newfoundland government restructured the board and terminated his appointment. The Supreme Court of Canada held that the member was entitled to compensation from the government for the breach of its obligations.

(e.g. a body with no statutory duty to give reasons may refrain from doing so<sup>35</sup>). Administrative bodies are also not distinguished by the nature of the disputes they hear. They hear disputes between private parties (e.g. labour boards), between individuals and government (e.g. social benefit tribunals) or larger polycentric matters that address issues such as government planning and energy distribution. External structure is yet another factor that is not consistent among administrative bodies. Although most are created as extensions of the executive branch of government, some are agents of the legislature.<sup>36</sup> Similarly, the structure of administrative bodies may range from multimember organizations to a single cabinet minister.<sup>37</sup> The appointment process and terms of appointment may also cover a broad range of options, varying as to whether all of the political parties have a say in the appointment of the chair or members or whether it is an appointment by the government of the day; whether the appointment is for a fixed length of time or is an appointment at the pleasure of the government; and whether there is a statutory procedure for removing an appointee.<sup>38</sup> As for the internal structure of administrative tribunals, this element often depends on the discretion of the chair of the agency in conjunction with those who work there. The internal organization of administrative bodies (e.g. how many departments there are, how the departments will divide the work, etc.) is not uniform, owing largely to the differences in function of various tribunals. Even tribunals with similar policy goals across the country may have very different internal structures. Empirical evidence shows that the internal structure and internal culture (the norms or ethos that guide the work that is done at the tribunal) similarly manifest themselves in large variety.<sup>39</sup>

Finally, the procedures of administrative bodies may be vastly different. Some administrative bodies have court-like processes, others may decide disputes in a much less formal manner, still others may provide the opportunity to be heard through a written hearing and some employ inquiry powers. Reflective of this broad and seemingly unwieldy array is that among the many official names for administrative actors, one will find “agencies,” “boards,” “commissions,” and “tribunals” although no one name denotes any particular mixture of decision-making output, nature of dispute, structure or procedure.

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<sup>35</sup> However, the common law duty to give reasons may apply if the decision will have a significant impact on the individual(s) affected. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

<sup>36</sup> The most typical examples of administrative actors that have been established as officers of the legislature are the ombudsman, which exist in nine of the provinces and territories, and access to information and privacy commissioners which exist in eleven provinces and territories as well as at the federal level. See e.g. the *Ontario Ombudsman Act* R.S.O. 1990, c. O.6 and the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165.

<sup>37</sup> See generally on the wide definition of the term “administrative actor,” W. A. Bogart, “The Tools of the Administrative State and the Regulatory Mix” in Colleen M. Flood & Lorne Sossin eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) [*Administrative Law in Context*].

<sup>38</sup> Terms of appointment and removal may require a formal review by Parliament or the legislature and approval by a percentage of Parliament or the legislature. See e.g. *An Act respecting Access to documents held by public bodies and the protection of personal information*, RSQ c A-2.1, ss. 104, 107 which indicates that a member of Québec's access to information and privacy commission may be appointed and dismissed only on a resolution of the legislature that is approved by not less than two-thirds of the Québec legislative assembly. Most administrative contexts do not require such formal review.

<sup>39</sup> Laverne Jacobs, *Fashioning Administrative Independence at the “Tribunal” Level: An Ethnographic Study of Access to Information and Privacy Commissions in Canada* (Ph.D. dissertation, York University, Osgoode Hall Law School, 2009) [unpublished] [*Fashioning Administrative Independence*].

A few distinct responses to the diversity of the administrative state have emerged in administrative law theory. The courts, certain legal academics and some commentators have developed a classification of administrative bodies according to their degree of resemblance to the courts. This school of thought proposes that administrative bodies should be conceived as running along a spectrum.<sup>40</sup> Considered to be at the adjudicative end of the spectrum are administrative actors that make decisions affecting individual rights, that serve primarily to determine a *lis* between parties by adjudicators who are appointed by government and then chosen by the chair to preside alone or on panels, and that employ procedures that are quasi-judicial nature (i.e. that involve oral hearings, the exchange of evidence, submission of legal argument, etc.). The spectrum theory maintains that adjudicative bodies should provide the highest degree of procedural fairness for the parties who appear before them.<sup>41</sup> Some also maintain that the expression “tribunal” be reserved for bodies that fit this end of the spectrum.<sup>42</sup> At the opposite end of the spectrum are administrative bodies that primarily produce governmental policy. These bodies may hear from a multitude of perspectives in determining how government should act in cases that are not individual but systemic. Individuals appearing before policy oriented bodies are said to require less procedural fairness. Between the two polar ends of the spectrum run a range of tribunals that vary in their mixture of policy and adjudicative functions. The spectrum approach to categorizing the actors of the administrative state has captured the attention of certain policymakers. Indeed, in some jurisdictions such as Ontario, these concepts have been adopted as organizational tools. The Public Appointments Secretariat of Ontario, for example, classifies agencies into eight different types, drawing distinctions, among other things, between “advisory agencies” which create policy and “adjudicative agencies” which are quasi-judicial dispute resolution bodies.<sup>43</sup>

The spectrum school of thought has been challenged by those who argue for a less disaggregated understanding of the work of administrative bodies. In its most robust form, the theory put forth by these scholars maintains that instead of focusing on what appears to be the most dominant function that an administrative body performs, a more authentic understanding of the administrative state would

<sup>40</sup> See e.g. David J. Mullan, “Administrative Tribunals: Their Evolution in Canada from 1945 to 1984” in Ivan Bernier and Andrée Lajoie, eds, *Regulations, Crown Corporations and Administrative Tribunals* (Royal Commission on the Economic Union and Development Prospects for Canada, vol. 48) (Toronto: University of Toronto Press, 1985); Canadian Bar Association, *Task Force Report, Independence of Federal Administrative Tribunals and Agencies in Canada* (Ottawa: Canadian Bar Association, 1990) (Chair: Edward Ratushny, Q.C.); *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 [*Bell Canada*]. That the notion of a spectrum underpins much administrative law theory can be gleaned from authors who seek to build upon the theory such as S. Ronald Ellis, “The Justicizing of Quasi-Judicial Tribunals Part I” (2006) 19 Can J Admin L & Prac 303, and others who denounce the theory such as Roderick A. Macdonald, “The Acoustics of Accountability: Towards Well-Tempered Tribunals” chapter 6 in András Sajó (ed.) *Judicial Integrity* (Leiden: M. Nijhoff Publishers, 2004) at 141-180.

<sup>41</sup> See e.g. the Supreme Court of Canada’s assertions to this effect in *Bell Canada, ibid.* and in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623.

<sup>42</sup> See e.g. the use of the term in Kaye Joachim, “New Models in Administrative Hearings: The Human Rights Tribunal of Ontario” in Ronald Murphy & Patrick A. Molinari, eds, *Doing Justice: Dispute Resolution in the Courts and Beyond* (Montréal: Canadian Institute for the Administration of Justice, 2009) at 87-110.

<sup>43</sup> See “What Is an Agency” online: Ontario Public Appointments Secretariat <<https://www.pa.s.gov.on.ca/scripts/en/general-Info.asp>>. Similarly, in Québec, the word “tribunal” is reserved for designated entities including “any person or agency exercising quasi judicial functions.” See *Charter of human rights and freedoms* R.S.Q., c. C-12 at ss. 56.

acknowledge that every administrative body performs a range of tasks, often incorporating some form of decision-making, policy-making and many other functions such as investigation, education, auditing etc..<sup>44</sup> The implications of this approach are felt most significantly when considering the issues of procedural fairness and accountability. Those who critique the spectrum approach, are generally wary of associating degrees of procedural fairness and accountability with only the most dominant function of an administrative body. Instead, they propose that issues such as procedural fairness and accountability are best addressed through a close understanding of the nature and work of each individual agency. Most recently, there has also been emerging literature which posits that each agency's internal culture and informal normative order can play a significant role in establishing barometers for fairness and accountability.<sup>45</sup>

Quite in conformity with Ontario's general adoption of the spectrum theory, *ATAGAA*'s focus is on adjudicative tribunals. The statute itself does not define "adjudicative tribunals;" rather, the administrative bodies to which it applies are named in a schedule.<sup>46</sup>

### **B. The Concepts of Administrative Accountability and Independence**

The aim of the *ATAGAA, 2009* is to strike an appropriate balance between accountability measures imposed on adjudicative tribunals and non-interference with the tribunal's decision-making. The desire to strike this balance is reflected in the *Act's* first section which reads:

The purpose of this Act is to ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making.<sup>47</sup>

The public and the administrative tribunal community have expressed an enormous amount of concern over the accountability and independence of administrative actors.<sup>48</sup> Accountability speaks to the requirement that an agency and its members show responsibility for their actions. A general understanding is that there should be some way to ensure that administrative actors are not misusing public funds and that they are using their resources efficiently. The notion of administrative accountability extends past financial and timeliness concerns, however, to address other qualitatively important areas such as the ethics, subject-matter competency and performance results of appointees. The central questions surrounding accountability are: to whom should an administrative body and its members be held accountable? For what

<sup>44</sup> See Macdonald, *supra* note 40.

<sup>45</sup> See Macdonald, *ibid.*; Jacobs, Fashioning Administrative Independence, *supra* note 39.

<sup>46</sup> See *ATAGAA*, *supra* note 1, s. 2 and Ontario Reg. 126/10.

<sup>47</sup> *ATAGAA*, *supra* note 1.

<sup>48</sup> There have been numerous reports written on reforming the administrative justice system that touch on accountability and independence. In Ontario, these reports include: *Directions: Review of Ontario's Regulatory Agencies* (Report prepared for the Management Board of Cabinet) (Toronto: Queen's Printer for Ontario, 1989) (Chair: Robert Macaulay) and *Everyday Justice*, *supra* note 33. There have also been documents produced by tribunal member associations dedicated to professionalization and professional development that address these issues from a tribunal perspective. See e.g. British Columbia Council of Administrative Tribunals, *Report on Independence, Accountability And Appointment Processes In British Columbia Tribunals*, *British Columbia Council of Administrative Tribunals Policy and Research Committee Report* by Philip Bryden and Ron Hatch, 2009, online: British Columbia Council of Administrative Tribunals <<http://www.bccat.net/assets/downloads/indrep.pdf>>.

activities should they be held accountable? And through what mechanisms should accountability be measured?

Ensuring that the tools used to garner accountability do not simultaneously infringe on the administrative actor's independence is another crucial concern that arises often in the context of Canadian administrative law and policy. The concept of administrative independence refers to safeguarding decision-makers from improper interference or influence. The theory goes that by ensuring this freedom, there is a greater likelihood that decisions will be based solely on the law and evidence. Independence is therefore a tool for guaranteeing impartiality. Placed in the context of arm's length administrative bodies, independence is usually considered in light of the degree to which adjudicators have the promise of security of tenure, financial security, institutional control and freedom in their adjudicative deliberations. Interference by the executive branch of government, another tribunal member, staff, litigants or any other entity is held to arise when a reasonable person would perceive one or more of these factors to be compromised.<sup>49</sup> Regardless of what the reality may be, the reasonable person test requires only that a reasonable perception of lack of independence exist for there to be a breach of procedural fairness.<sup>50</sup> As well, while the factors of security of tenure, financial security, institutional control and adjudicative independence are similar for both the judiciary and administrative bodies, a key distinction between judicial and administrative independence is that the degree to which independence is required for administrative bodies can vary, depending on the intention of the legislature and the institution's nature and functions.<sup>51</sup>

#### IV. EXPLORING TENSIONS BETWEEN ADMINISTRATIVE ACCOUNTABILITY AND INDEPENDENCE: ILLUSTRATIVE CASES

Situations in which accountability and independence conflict often stem from the *de facto* development of on-the-ground relationships between the administrative body and the branch of government to which it is required to report; they may also arise between members of the administrative body itself. To demonstrate how conflicts between accountability and independence emerge, I use the three central questions identified earlier – namely, “accountability to whom?” “accountability for which activities?” and “accountability through what measures?” as a framework for examining illustrative examples of problems that have occurred recently in the jurisprudence or on the ground. These illustrations also serve as a backdrop to my analysis of *ATAGAA*'s potential as an administrative accountability tool. I argue that *ATAGAA* could be a statute of greater impact if it were to draw on lessons learned from these past situations.

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<sup>49</sup> See the seminal cases of *R. v. Valente*, *supra* note 28 at paras. 24-26 and *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at para. 21. On the test for reasonable perception of partiality, see *Committee for Justice and Liberty v. National Energy Board* [1978] 1 S.C.R. 369 at 394-5. The test, although formulated in dissent, has since been applied consistently by the Supreme Court as the appropriate approach to be taken.

<sup>50</sup> For greater discussion of the concept of independence, see Laverne Jacobs, “Independence, Impartiality and Bias” in *Administrative Law in Context*, *supra* note 37 and Laverne Jacobs, “Tribunal Independence and Impartiality: Rethinking the Theory after *Bell* and *Ocean Port Hotel*: A Call for Empirical Analysis” in Laverne A. Jacobs & Justice Anne L. Mactavish, eds., *Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice (2001-2007)* (Montreal: Les Éditions Thémis, 2008) at 43-66.

<sup>51</sup> See *Ocean Port Hotel Ltd. v. British Columbia (Gen. Manager Liquor Control)*, [2001] 2 S.C.R. 781.

## A. Administrative Accountability: Accountability to whom?

Administrative actors are generally said to be accountable to four entities: to the branch of government through which they report to the legislature,<sup>52</sup> to the legislature itself, to the public, and to themselves. The first of these contexts has offered the most challenge in the jurisprudence and on the ground.

### 1. Accountability to the executive branch of government

As for accountability to government, *ATAGAA*'s framework does not capture some of the most problematic situations. Such circumstances of accountability have arisen when the executive branch of government has attempted to assume control over the administrative body's decisions. These instances raise the delicate question: to whom is the agency rightfully accountable? In these cases, authority for the interference by the minister or the executive branch of government can seldom be linked legitimately to a legislative enactment. Frequently, legislation has been misused in a thinly disguised attempt to assert executive control; alternatively, the inappropriate situation arises simply from an informal, on-the-ground relationship that an agency and the executive have developed.

One of the sharpest examples of attempted executive control occurred in 2007 when the President of the Canadian Nuclear Safety Commission, Linda Keen, was removed from her position following a decision that had plainly displeased the Minister of Natural Resources.<sup>53</sup> The Canadian Nuclear Safety Commission regulates all nuclear facilities and activities in Canada with the purpose of ensuring their compliance with health, safety, security and environmental standards as well as fulfilment of Canada's international obligations.<sup>54</sup> In 2007, the Commission decided to keep closed a nuclear power plant that had been temporarily shut down for routine maintenance because of its failure to meet safety standards. This nuclear reactor, however, was also a primary source for the production of medical isotopes used in health care in the country and around the world. The closure therefore caused a shortage of isotopes. Eventually, in order to circumvent the effects of this decision, Parliament enacted legislation reopening the reactor. This was an appropriate legal avenue to take given the doctrine of parliamentary supremacy. This legislative step was taken, however, only after the Minister had attempted to use other means to influence the President and Commission's decision.

The chronology set out by the Federal Court in *Keen* indicates that the Minister participated in a Saturday conference call with the President and members of the Commission in which he requested a hearing be convened immediately in order to approve the restart of the reactor.<sup>55</sup> This followed a prior conference call between the Minister, the Commission and the operators of the reactor at which the Minister urged the Commission and the licensee to work together to resolve the issue. Finally, the Minister took advantage of a directive power provided in the Commission's enabling statute to craft a directive that appeared specifically tailored, by its wording and timing, to force the Commission to decide in favour of the licensee. Under the enabling statute, the directive power allows only for directives of "general application

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<sup>52</sup> I will use the term "legislature" to denote both provincial legislatures and the federal parliament for ease of convenience.

<sup>53</sup> See *Keen v. Canada* (Attorney General), [2009] F.C.J. no. 402 [*Keen*].

<sup>54</sup> See *Nuclear Safety and Control Act*, S.C. 1997, c. 9, s. 9. More information about the Canadian Nuclear Safety Commission can also be found online: Canadian Nuclear Safety Commission <<http://www.nuclearsafety.gc.ca/eng/>>.

<sup>55</sup> See *Keen*, *supra* note 53.

on broad policy matters" to be issued to the Commission.<sup>56</sup> Yet, this directive, which was prepared by the Minister two days after the Saturday conference call, required the Commission to take into account "the health of Canadians who, for medical purposes, depend on nuclear substances produced by nuclear reactors" in the course of its regulation.<sup>57</sup> In light of the ongoing live litigation, one could argue that it was invalidly created. The Bill requiring the reactor to be reopened was enacted the next day and was enacted before the President of the Commission had even received the directive.

About two weeks after all of these events had occurred, the Minister wrote to the President of the Commission, asking her to explain why certain evidence had not been taken into account in the Commission's decision-making and why the directive issued by his office had been ignored.<sup>58</sup> He also expressed disappointment in her leadership of the Commission and indicated a loss of confidence in her abilities. Finally, his letter indicated that he was considering asking for her removal as President before her term was up.<sup>59</sup> This, in fact, is what eventually happened. Although she responded to the Minister's letter, Ms. Keen was removed by Order-in-Council before she had an opportunity to respond to the concerns at a Parliamentary investigation set up for this purpose. Her removal was upheld on judicial review in the Federal Court.<sup>60</sup>

Overall, the Minister's interaction with Ms. Keen was set in tones that revealed a strong misperception of the relationship between his office and the Commission. While the Minister is responsible for reporting to Parliament on behalf of the Commission, the Commission as an arm's length independent body is not responsible for accounting to the Minister for the decisions that it makes. One of the reasons for the establishment of administrative tribunals was to remove political influences on decision-making, leaving decision-making to those with expertise in a particular subject matter. Even if the Commission's decision had inappropriately overlooked evidence, that was a matter for judicial review, not for review by the executive branch of government. There were no provisions for any type of review by the executive in the Commission's enabling statute. Finally, it is plain that there may be situations where it is in the public interest to remove the head or a member of an administrative tribunal. It would be more appropriate, however, for the parameters surrounding

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<sup>56</sup> With respect to directives from Cabinet to the Canadian Nuclear Safety Commission, s. 19 is the relevant provision. It reads:

DIRECTIVES

19. 1) The Governor in Council may, by order, issue to the Commission directives of general application on broad policy matters with respect to the objects of the Commission.  
 (2) An order made under this section is binding on the Commission.  
 (3) A copy of each order made under this section shall be  
 (a) published in the Canada Gazette; and  
 (b) laid before each House of Parliament.

<sup>57</sup> See *Keen*, *supra* note 53 at para. 25.

<sup>58</sup> See Letter from Minister Lunn to Linda Keen (on file with author) and partial reproduction of the letter in *Keen*, *ibid* at para. 29.

<sup>59</sup> See *Keen*, *ibid*.

<sup>60</sup> *Ibid*. The Federal Court held that Ms. Keen's appointment as President was an at pleasure appointment and that her opportunity to respond to the minister's letter satisfied any procedural fairness obligation that may have been owed to her.

removal to be governed clearly by legislation or memoranda of understanding that has put a process in place proscriptively.

In *Keen*, the Minister simply took it upon himself to get involved in the Commission's decision-making process on this one particular file. This is an example of what I earlier described as a *de facto* relationship that developed on the ground. It is not the only instance in which there has been a clash between the executive branch of government and an administrative body over decisions made by a tribunal.<sup>61</sup> Unfortunately, these improper callings to account undermine confidence in the government of the day and generate confusion over what is and is not appropriate behaviour for the tribunal (i.e. should the President of the Nuclear Safety Commission have had medical treatment as a top priority in considering what to do about the unsafe reactor?) which can also affect public confidence in the administrative justice system.

If a situation like this were to occur in Ontario, *ATAGAA* might offer some recourse but only if management at an astute tribunal had found a way to incorporate preventive measures in a memorandum of understanding that gained approval by the responsible minister. What is clear is that the legislative branch of government in Ontario has not taken it upon itself to flag this type of behaviour as an issue. It has not highlighted possible attempts by the executive branch of government to interfere with tribunal decision-making under the guise of tribunal accountability to the executive as a concern – even though the stated purpose of the *Act* is to increase administrative accountability while avoiding conflict between accountability and independence.

## 2. Accountability of the executive branch of government to administrative tribunals

In what ways can a lack of accountability by the executive branch of government hinder the work of administrative tribunals? Accountability on the part of the executive branch of government implies respecting the express or implied commitments that host ministries have towards their arm's length agencies and fulfilling them in good faith. The ultimate concern that the public be adequately served by administrative tribunals depends on the fulfillment of such commitments. Building on the discussion of removals from the last section, one should note that even in circumstances when a chair or member of a tribunal has been statutorily removed through non-renewal of his or her term of appointment, one may wonder if ministerial discretion has been exercised in good faith. An example that speaks well to this idea deals with the Military Police Complaints Commission, an administrative body which has been prominent in the media of late.<sup>62</sup> A second example examines the detrimental effects of providing insufficient budgetary resources through a look at a recent situation with the Commission for Public Complaints against the Royal Canadian Mounted Police [RCMP].

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<sup>61</sup> See generally Lorne Sossin, "The Puzzle of Independence" (2009) 26 NJCL 1 in which he discusses some of the major incidents in recent years.

<sup>62</sup> Another example that deals with the removal of tribunal members relates to the Saskatchewan Labour Relations Board. However, in the Saskatchewan case, legislation had been enacted that explicitly allowed for the changing of tribunal members upon the election of a new government. See *Saskatchewan Federation of Labour v. Saskatchewan (Attorney General, Department of Advanced Education, Employment and Labour)* 2010 SKCA 27, aff'd 2009 SKQB 20.

### (a) Military Police Complaints Commission

The Military Police Complaints Commission [MPCC] is a federal adjudicative administrative tribunal. Its mandate is to provide civilian oversight of police matters by investigating complaints made about the conduct of military police, to hold public hearings, to report on its findings, and make recommendations to senior officers in the Canadian Forces, the Deputy Minister of National Defence and/or the Minister of National Defence.<sup>63</sup>

Peter Tinsley chaired the MPCC from September 12, 2005 to December 12, 2009. When his appointment, which was for a four-year term, ended, it was not renewed. During the time of his appointment, he was instrumental in having an investigation started into the question of whether the Canadian Forces had transferred detainees to Afghanistan despite the risk of torture. The federal government, which was a respondent to the allegations, refused to cooperate in providing the relevant documents for the hearing to proceed, claiming national security privilege. This led to a protracted ongoing debate.<sup>64</sup> A new chair, Glenn Stannard, was appointed to continue the hearing. Yet, his appointment raised questions about continuity of the process as he had not participated in the initial part of the proceedings.<sup>65</sup> He also did not have the legal background that the former chair possessed.

The fact that the government of the day was both in charge of the appointment and removal process for members of the MPCC and concurrently appearing as a party before the MPCC, cast doubt over the neutrality of Cabinet in replacing Mr. Tinsley. Even if Cabinet's actions were legal under the enabling legislation, a reasonable person who takes into account the battle that the MPCC has had to obtain the relevant documents from the government party, including being taken on judicial review, may have a reasonable apprehension of bias. Circumstances seem even more unusual, when one takes into account that the new chair has no legal training, in contrast to Mr. Tinsley.

It seems that in cases such as these where the independence of the decision-making body has the potential to be influenced indirectly, it would be best to have a mechanism put in place that helps neutralize the reappointment process. In this regard, *ATAGAA* shows a positive, first step. One recalls that *ATAGAA* requires the executive to seek the chair's recommendation of members who are up for reappointment. In this way, *ATAGAA* shows a commitment to shared governance in the appointments process. However, a fuller commitment would also provide the tribunal with the opportunity to give input when the executive branch of government is considering whether to reappoint the current chair. This input could be given by a

<sup>63</sup> See *National Defence Act*, R.S., 1985, c. N-5, Part IV. More information about the Military Police Complaints Commission can also be found online: Military Police Complaints Commission <<http://www.mpcc-cppm.gc.ca>>.

<sup>64</sup> At the time of writing, hearings had resumed with a new Chair at the helm. As for the history of the proceedings, on Oct. 30, 2008, the government filed for judicial review, arguing that the MPCC did not have jurisdiction over general military operations but only over "policing duties and functions." It argued that transferring detainees was a general military operation and therefore not subject to scrutiny by the Commission. On March 24, 2010, the Commission ruled that the hearings would continue. The new Chair, Glenn Stannard, who had been interim chair after Peter Tinsley's appointment was not renewed, was appointed to this position on May 14, 2010. A parallel proceeding in Parliament is also taking place which currently has led to the sharing of the relevant documents amongst a contingent of members of Parliament who represent all parties in the House of Commons.

<sup>65</sup> See transcript of proceedings, October 14, 2009, which lists those present at the hearings, available online: Military Police Complaints Commission <<http://www.mpcc-cppm.gc.ca/300/afghan/index-eng.aspx>>.

designated committee of the tribunal and could be offered automatically whenever a chair's term faces the possibility of renewal under the enabling legislation. A further useful procedure could be to require that reasons be given by the executive branch of government on the replacement or reappointment of the chair. This would offer greater transparency and accountability to the process. Reasons would also assist if judicial review were sought of the executive's decision. Again, while *ATAGAA* shows the beginning of a collaborative governance approach, strengthening the legislation in this way would provide a more engaged commitment to accountability by both the tribunals and the executive branch of government. It may also stave off some of the ill-effects that have already occurred to the public's confidence in the administrative state.

### **(b) Commission for Public Complaints against the RCMP**

A second brief example relating to the accountability of the executive to administrative tribunals concerns the obligation to provide sufficient funding for tribunals to do their work. Although it may seem obvious, situations have occurred in which funding has been removed part way through a project, causing the project to be disbanded. This occurred recently to the Commission for Complaints against the RCMP [Commission] which is a federal oversight body that takes complaints against the RCMP. The Commission conducts investigations and also has research and policy-making functions.<sup>66</sup> After several tragic incidents had occurred involving the use of conducted energy weapons (or "tasers") by RCMP officers, the Commission initiated an inquiry into taser use by the RCMP. It received money from the government for a long-term study and produced two reports. However, its funding was cut quite suddenly in 2009. Some commentators have linked the funding cut to the critical stance that the Commission has taken of the RCMP.<sup>67</sup> Regardless of whether some sort of reprisal might have been involved, the point is that by not living up to its funding commitment and not explaining itself, the government engendered a loss of public confidence in the administrative justice system.

*ATAGAA* may not speak directly to the specifics of ensuring budgetary resources but it does require the "financial, staffing and administrative arrangements for the tribunal"<sup>68</sup> to be addressed in a memorandum of understanding with the responsible minister. This is definitely a useful step that can be further developed by tribunals and ministers on a case-by-case basis. It will be up to the tribunals to ensure that they have sufficient resources and it would be wise for them to create measures that allow them to receive additional resources easily should they find themselves short in the middle of a fiscal year. Ideally, having a clear and transparent mechanism in place should also avoid potential apprehensions of inappropriate contact, especially when the government is a party before the tribunal or somehow subject to the tribunal's scrutiny.

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<sup>66</sup> See *Royal Canadian Mounted Police Act* R.S.C., 1985 c. R-10, Part VI. Section 45.32 of the *RCMP Act* addresses the duties of the commission. However, these duties are set in very broad parameters. There is no specific indication of all duties in the statute.

<sup>67</sup> See e.g. "Report slams RCMP in airport Taser death," *CBC News* (8 December 2009) online: CBC news <<http://www.cbc.ca/canada/british-columbia/story/2009/12/08/bc-kennedy-vancouver-airport-taserreport.html#ixzz0iwj7uv4d>>.

<sup>68</sup> *ATAGAA*, *supra* note 1. ss.11 (2).

### B. Administrative Accountability: Accountability for what Activities?<sup>69</sup>

Do administrative tribunals have an obligation to provide feedback to the executive branch of government about how the legislation it administers has been faring? This question speaks to the very nature and purpose of administrative tribunals. In *Ocean Port Hotel*, the Supreme Court of Canada held that administrative tribunals exist primarily to implement the policies of the executive branch of government. As Chief Justice McLachlin held in discussing the distinction between administrative tribunals and courts, "[a]dministrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy."<sup>70</sup>

If tribunals are created to further the policies of the executive branch of government as set out in legislation, it would seem sensible that establishing channels of feedback to the executive on the success and challenges of the legislation should not be problematic. However, this issue came to a head in 2004 when the Alberta government sought the input of the Alberta Labour Relations Board on legislative amendments that it was making to the *Alberta Labour Relations Code*.<sup>71</sup> In the case of *Communications, Energy and Paper Workers Union of Canada, Local 707 v. Alberta (Labour Relations Board)*<sup>72</sup> several unions and the Alberta Federation of Labour applied for judicial review alleging that there had been inappropriate contact between the executive branch of government and the labour board. The unions believed that the legislative changes had a negative impact on collective bargaining rights. Further complicating matters was that the legislation had been developed by the government in what seemed to be a shroud of secrecy, as there was no consultation with the unions.

The fact that the executive branch of government had consulted with the labour board during the creation of the legislative amendments was not revealed directly to the unions. The unions and the Federation of Labour discovered what had occurred by way of freedom of information requests. The scope of the application for judicial review was also unusual - the applicants sought certiorari of *all* current and future decisions pertaining to the legislation. The ground of review invoked was reasonable perception of insufficient independence and impartiality on the part of the Board vis-à-vis the executive.

The Alberta Queen's Bench held that the consultation did not give rise to a reasonable apprehension that the Board lacked independence or impartiality in its decision-making. The court fixed particularly on the fact that there were no live cases dealing with the legislation taking place at the time of the consultation. This was not enough for the Alberta Federation of Labour, however, which understandably suffered a grave loss of confidence in the Alberta labour relations regime. In the end, the Labour Board developed guidelines setting ground rules for any future legislative consultations it may have with the executive.<sup>73</sup> The guidelines touch both on the

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<sup>69</sup> This section draws from an earlier work – see Laverne Jacobs, "Reconciling Independence and Expertise within the Expert Multifunctional Tribunal" (unpublished paper).

<sup>70</sup> *Ocean Port Hotel*, *supra* note 51 at para. 24. See also *Bell Canada*, *supra* note 40, in which the Supreme Court of Canada attempted to classify certain tribunals as having greater or lesser policy-making functions.

<sup>71</sup> R.S.A. 2000, c. L-1.

<sup>72</sup> 2004 ABQB 63.

<sup>73</sup> See Alberta Labour Relations Board, *Labour Relations Board Guidelines for Consultation on Legislation* (29 March, 2007).

process that will be taken in its relationship with the executive and to the ways in which affected parties will be notified.

There is certainly a legitimate role for administrative tribunals to play in the ongoing development of the legislation they administer. Nonetheless, they should be accountable to their public users for the manner in which they interact with the executive branch of government on legislative consultations. Lessons can be learned from the guidelines developed by the Alberta Labour Relations Board. The guidelines stress the importance of using legislated channels, such as any provisions that may exist in enabling legislation allowing for the Minister to ask the tribunal to conduct research on a specific matter, before turning to informal contact.<sup>74</sup> The guidelines also emphasize transparency and provide that consultation responses will be made publicly available.<sup>75</sup> The fact of consultation will equally be revealed by any member who was involved at the beginning of a hearing in which the legislation is at issue so that the parties may decide if the board member's recusal is necessary.<sup>76</sup> At the moment, *ATAGAA* deals only with consultation between a tribunal and public users with respect to changes in policies and procedures. Given that the enabling legislation for various tribunals may be piecemeal in addressing the concerns that arise around consultation between the executive branch of government and an administrative tribunal on legislative changes, it would be helpful for *ATAGAA* to incorporate some of the guidance from the Alberta Labour Relations Board experience.

### C. Administrative Accountability: Through what Measures?

The discussion thus far has looked at the potential misuse of *de facto* relationships that develop between a tribunal and the executive branch of government. This final section considers *de facto* relationships of accountability that may emerge between the chair of the tribunal and tribunal members and considers ways to safeguard against the encroachment on adjudicative independence that could arise. A particular way that this challenge has occurred in Canadian administrative law jurisprudence is through the use of internal performance evaluations.

Outside of asking for reasons for a decision, there has been an increased interest in evaluating the performance of members through performance assessments. At present, some tribunal chairs conduct internal assessments of individual members, although there is no uniform approach to the issue. *ATAGAA* speaks of an assessment to be done by the chair at the time when members' appointments are up for renewal. This information is shared with the responsible minister. Indeed, reappointment cannot take place unless the chair has done this assessment and provided a positive recommendation to the minister.

However, problems relating to independence have occurred in the context of member performance evaluations. The leading case on this issue in Canada is *Barreau de Montréal v. Québec (Procureure Générale)*<sup>77</sup> which dealt with mandatory performance evaluations for members of the Administrative Tribunal of Québec [TAQ] that once existed under the Québec *Act respecting administrative justice*.<sup>78</sup> TAQ is an adjudicative

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<sup>74</sup> *Ibid* at s. 6.

<sup>75</sup> *Ibid* at s. 5.

<sup>76</sup> *Ibid* at s. 4.

<sup>77</sup> [2001] R.J.Q 2058 [*Barreau de Montréal*].

<sup>78</sup> R.S.Q, c. J-3 [*ARA*]. The requirement for performance evaluations before renewal has since been repealed. Members of TAQ are currently appointed for life during good behaviour and can only be removed, after an inquiry, for specific reasons such as loss of qualification or permanent disability.

administrative appeals tribunal that hears appeals from a large number of tribunals in Québec. At issue was whether the performance evaluation method provided in TAQ's enabling legislation contravened the requirements of an independent and impartial decision-making process under the *Québec Charter*.<sup>79</sup> The evaluation was to be conducted by a committee of tribunal members that included the President of TAQ as well as a representative of the executive branch of government.

It was argued that the requirements for members of TAQ to undergo a performance evaluation in order to receive salary increases raised a reasonable perception of infringement on their security of tenure. The concern was that having the head of the tribunal involved in performance evaluations could result in members deciding cases to please the chair instead of deciding cases in good conscience. It was further argued that the presence of a government representative as a member of the committee responsible for conducting the appraisal gave rise to a reasonable apprehension that the government could interfere in the adjudicative independence of the members. The government is always a party before TAQ and one might perceive that members whose decisions do not please the government could end up being evaluated poorly. The court agreed with these arguments, emphasizing not only the apparent lack of independence, but also the fact that the statute did not provide members under evaluation an opportunity to be heard about the recommendations put forward by the committee.

Viewed in light of the approach adopted in *ATAGAA* which requires all members up for renewal to be evaluated by the chair, it would seem wise to take heed of the cautionary tale provided by the *Barreau de Montréal* case. The requirement for an assessment before renewal should remain. Having the tribunal's input on whether to renew members is obviously important to assure that competent individuals are appointed. At the same time, it is difficult to think of a method that can guarantee against members under evaluation seeking to please the evaluator. Possibly, having evaluations performed by an external independent body (as is currently done with TAQ<sup>80</sup>) may assist with the perception that decision-makers are deciding independently when one party before them has a connection to the evaluator. I believe, however, that the most important lesson that can be taken from the *Barreau de Montréal* case is that having an opportunity to respond to recommendations to renew can lend accountability and transparency to the process in much the same way as was discussed above in relation to the removal of tribunal chairs.

## V. CONCLUSION

The *Good Government Act*, of which *ATAGAA* forms a part, was developed after consultation with 22 government ministries. There is no evidence, however, that administrative tribunals themselves were consulted in the creation of the statute.<sup>81</sup>

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See *ARAJ*, ss. 51-54. An excellent overview of the history of TAQ is provided in France Houle, "A Brief Historical Account of the Reforms to the Administrative Justice System in the Province of Québec" (2009) 22 *Can J Admin L & Prac* 47.

<sup>79</sup> Section 23 of the *Québec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, applies to all quasi-judicial bodies in Québec. This section reads: "Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him."

<sup>80</sup> See Houle, *supra* note 78 at 70-71.

<sup>81</sup> Both the debates in the legislative assembly as well as the background press material released by the Attorney General referred to consultation with 22 government ministries. There is no indication of consultation with adjudicative tribunals.

Perhaps it is not surprisingly, then, that *ATAGAA* could have been strengthened through a stronger engagement with the on-the-ground concerns of administrative tribunals.

Many of the contemporary conflicts between the values of accountability and independence stem from *de facto* relationships that were developed inside administrative tribunals or between tribunals and government. These relationships have either gone wrong or there is a reasonable perception that they have gone wrong. *ATAGAA* attempts to address the question of accountability solely by requiring tribunals to account to government. *ATAGAA*'s failing, however, is that it ignores the concomitant obligation on government to be accountable to administrative tribunals and, by extension, to the public.<sup>82</sup> Questions relating to the removal of appointees, budgetary resources, legislative consultation and performance evaluations are all issues for which *ATAGAA* shows little or no appreciation. Yet, they are administrative justice issues that have caused the public to lose confidence in the recent past. As well, while *ATAGAA* is strong on sending directions to administrative tribunals to account, it is weak on facilitating methods for tribunal accountability to be fostered as an ethos at the tribunal level. Finally, there are no safeguards to protect the collaborative governance approach that *ATAGAA* proposes from collapsing into one that functions through executive control. Until these aspects are fixed, *ATAGAA* will remain only a wavering commitment to the very concept of accountability that it promotes.

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<sup>82</sup> One could also mention that *ATAGAA* does not address the concern of whether administrative tribunals achieve their intended purpose, an issue that is explored by Lorne Sossin and Steven Hoffman in their contribution to this special issue. See "The Elusive Search for Accountability: Evaluating Adjudicative Tribunals" (2010) 28:2 Windsor YB Access Just.



## AGENCY DESIGN IN THE EUROPEAN UNION

Herwig C.H. Hofmann\*

*This article gives a brief overview of the main features, functions and future perspectives of agencies in the European Union [EU]. It highlights the specific notion of the EU's highly integrated, multi-level legal system as an explanatory factor for the specificities of agency design. The article looks at agencies in the EU through the lens of the structural and procedural arrangements for their independence and their accountability. The article comes to the conclusion that, generally speaking, accountability and independence are defined by and adapted to the position of an agency within the structure of administrative networks implementing EU law and policy. Their raison d'être is usually to coordinate Member State implementing activities rather than taking on these responsibilities themselves.*

*Cet article présente un bref aperçu des caractéristiques principales, des fonctions et des perspectives d'avenir d'agences au sein de l'Union Européenne [UE]. Il met en évidence la notion particulière que les spécificités de la façon dont les agences sont structurées s'expliquent par le fait que le système juridique de l'UE est hautement intégré et à niveaux multiples. L'article examine des agences de l'UE dans la perspective des arrangements structureaux et procéduraux en vue de leur indépendance et de leur obligation de rendre compte. L'article conclut que de façon générale l'obligation de rendre compte et l'indépendance sont définies par, et adaptées à, la position d'une agence dans le cadre des réseaux administratifs qui appliquent la loi et les politiques de l'EU. Leur raison d'être est généralement de coordonner les activités d'application des États Membres plutôt que d'être chargées elles-mêmes de ces responsabilités.*

### I. INTRODUCTION

The “agencification” of the European Union [EU] is continuing with full force. Currently, one might be forgiven for the impression that there is hardly a policy initiative in the EU which would not suggest the creation of an EU agency or the upgrading of an existing EU administrative structure to become an agency. The EU administrative landscape, as EU public law in general, remains radically experimentalist, transforming itself continuously, albeit often below the radar of the non-specialist public. The question therefore arises, what these agencies are, what they can do and to whom they are accountable? This paper gives a brief overview of the main features, functions and future perspectives of agencies in the EU. It highlights the specific notion of the EU's highly integrated, multi-level legal system as an explanatory factor for the specificities of agency design.

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## II. POWERS, DESIGN AND CONSTITUTIONAL POSITION

The latest major amendment to the constitutional charter of the EU, the *Treaty of Lisbon*, changes only very little with regard to the legal framework for agencies in the EU. One of the very few differences is that agency activity is now explicitly subject to judicial review.<sup>1</sup> But with only little case law on the essential aspects of agency design and agency functions in the EU, much is open in the political and scholarly legal debate on the possible structure and rights of EU agencies.

Three major aspects have an impact on the structure and the competencies of agencies as well as on their independence and accountability. One aspect arises from the notion of de-central implementation of EU law. Member States are empowered and obliged to implement EU law by means of national legislation and administration. Uniform legal enforcement in such de-central implementation requires a high level of coordination between the Member States and their administrative agencies. This coordinating role has in the past typically been played by comitology committees advising and supervising the European Commission (hereinafter referred to as the Commission). In an increasing amount of policy areas, this coordinating role is being undertaken by agencies of varying forms and designs. In a comparative perspective, however, one needs to add that European agencies are marked by generally limited functions when it comes to administrative rule-making. This distinguishes them from their counterparts in some Member States of the EU and also from those in other legal systems such as the US. European agencies may be authorised to make single-case decisions (adjudication) or to coordinate networks of regulators and to inform decision-makers, but they only exceptionally, and to a degree indirectly, engage in rule-making.

Second, the design and functioning of EU agencies are influenced by their scope of activity and purpose. Some are designed to advise the Member States and the EU institutions by providing information and by fulfilling a coordinating role for regulatory activity. Some actually prepare decisions to be ultimately taken by the Commission. Other agencies are designed to make implementation decisions in a given policy field with external effect vis-à-vis individuals. Finally, some are designed as hybrid entities which execute a certain policy or project in partnership with private parties and investors.<sup>2</sup>

A third aspect which has an impact on the nature of an agency is its accountability mechanisms through administrative supervision, including: method of agency reporting to the Commission; auditing by the Court of Auditors; political supervision, (which includes aspects of accountability to the EU legislative bodies) typically

<sup>1</sup> See the second sentence of the first paragraph of Article 263 *Treaty on the Functioning of the European Union* (TFEU), stating that the Court of Justice of the European Union “shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.” This is almost the only mention of an EU agency in the entire *Treaty*. The case law of the Court of Justice had been further advanced than that. In *Sogelma v EAR* [2008] ECR II-2771, para. 36). This was highly appropriate in view of Article 47 of the EU’s *Charter of Fundamental Rights* (which has now entered into binding force) explicitly granting the right to an effective remedy.

<sup>2</sup> See e.g. the agency established to run the experimental fusion-energy project ITER – Council Decision No 2007/198/Euratom of 27 March 2007 establishing the European Joint Undertaking for ITER, OJ 2007 L 90/58 and Council Regulation No 1908/2006 of 19 December 2006 laying down the rules of the participation of undertakings, research centres and universities, OJ 2007 L 54/4.

exercised by the European Parliament [EP] or the Council by means of budgetary powers, powers to nominate high ranking agency personnel, reporting duties and other methods; and finally, judicial review.

A widely accepted definition of EU agencies describes them as decentralised forms of administration that integrate national administrative bodies into the operations of the EU agencies by providing structures for co-operation between the supranational and national levels and between the national authorities.<sup>3</sup> Yet, this definition helps paper over the fact that the structure and scope of activities differ considerably among EU agencies.

### A. Function, Classification and Organisation of Agencies

When looking at the role of agencies in the EU legal system, one should not forget that, generally, implementation of EU policies takes place in cooperation with and as coordination of national and EU actors in the context of administrative networks. The need for creating EU agencies, which like in many legal systems have no direct constitutional basis, can be explained by the specific conditions for implementing EU law within a network structure. Basically, as is re-iterated in Article 291 (1) *Treaty on the Functioning of the European Union* [TFEU], the “Member States shall adopt all measures of national law necessary to implement legally binding Union acts.” In fact, most of the institutional features of agencies and many of their accountability mechanisms can be understood best as being oriented towards undertaking this networking function. At first sight, this seems to run counter to the generally received wisdom of EU administration being undertaken either at the EU or the Member State levels. One of the main reasons for this development of implementing EU policies in networks of EU and Member State actors may lie in the relatively small administrative capacities of the EU in relation to its duties.<sup>4</sup>

In this context, there is a continuously growing gap between the prolific creation of agencies in the EU and conferral of powers on them on the one hand, and their recognition in EU primary constitutional *Treaty* law on the other hand.<sup>5</sup> As Dehousse writes, “European integration is an unprecedented attempt to build a form of continental order without recreating the hierarchical power structure of states,”<sup>6</sup> but warns that “as those who have been following the situation know, the creation of European agencies was a fairly haphazard development.”<sup>7</sup> In its 2002 Communication<sup>8</sup> the Commission saw the key reason for the establishment of

<sup>3</sup> E. Chiti, “Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies” (2004) 10 *Eur LJ* 402 at 423-431; S. Griller & A. Orator, “Everything under control? The way forward for European agencies in the footsteps of the Meroni doctrine” (2010) 35 *Eur L Rev* 3.

<sup>4</sup> H. Kassim, “The European Administration: Between Europeanization and Domestication” in J. Hayward & A. Menon eds, *Governing Europe* (Oxford: Oxford University Press, 2003) 139 at 151.

<sup>5</sup> D. Curtin, “Delegation to Non-Majoritarian Agencies and Emerging Practices of Public Accountability” in D. Geradin, R. Munoz & N. Petit eds, *Regulation through agencies in the EU*, (Cheltenham: Elgar, 2005) 88; D. Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft* (Berlin: Duncker und Humblot, 1999) at 87-117.

<sup>6</sup> R. Dehousse, “Delegation of Powers in the EU: The Need for a Multi-principals Model” (2008) 31 *Western European Politics*, 789 at 793.

<sup>7</sup> *Ibid* at 790.

<sup>8</sup> Commission of the European Communities “Communication from the Commission – The operating framework for the European Regulatory Agencies” Brussels COM (2002) 718 final.

agencies as “the independence of their technical and/or scientific assessments.” Their main advantage is therefore that “their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations.”<sup>9</sup> In that sense, agencies help to create “Europe-wide epistemic communities whose technical truths transcend intergovernmental politics.”<sup>10</sup> However, agencies are also established as a more covert form of European integration at a time when “direct routes to further integration of the Union are blocked.”<sup>11</sup> Therefore, the rise of agencies as organisational forms in the EU goes hand in hand with the emergence of the constitutional principle of subsidiarity. Subsidiarity in the EU requires, simply stated, that action be taken on the European level only where a shared objective can actually be better achieved by action of the EU than by its Member States. The stated goal is to maintain government functions on a level as close as possible to its citizens.<sup>12</sup> In reality, observance of the principle of subsidiarity in the EU has required the development of a system of decentralised yet cooperative administrative structures since Member States generally insist they are better placed to implement a policy. The cooperative structures then develop, for example, through information exchange, joint warning systems, coordinated remedies for arising problems and a wealth of similar systems, all of which have been functions of EU agencies. Agencies thus aid in satisfying the need for uniformity in the implementation of Union law, while at the same time providing a form of decentralised implementation.<sup>13</sup> The aim of European agencies is therefore predominantly “to run networks of national administrations which come into play in the implementation of Community policies.”<sup>14</sup>

These network coordination functions of agencies, their more limited decision-making power and their linkage with national administrations, distinguish EU agencies from their US counterparts.<sup>15</sup> EU agencies are, however, closing the gap. Some agencies have genuine decision-making powers. The Office for the Harmonisation of the Internal Market [OHIM] is empowered to make legally binding decisions on applications to register Community trademarks and Community designs. Similarly, the Community Plant Variety Office [CPVO] has the competence to adopt legally binding decisions in relation to applications for the registration of plant variety rights. So far, the furthest reaching delegations in force, have been given to the European Air Safety Agency [EASA]. It has been entitled to adopt non-binding “guidance material.” Given that this power is exercised in the context of the empowerment to issue individual decisions, such soft law “guidance” comes close to

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<sup>9</sup> *Ibid* at 5.

<sup>10</sup> M. Shapiro, “The problems of independent agencies in the United States and the European Union” (1997) 4 *Journal of European Public Policy* 276 at 282.

<sup>11</sup> *Ibid* at 281.

<sup>12</sup> Article 5 (3) *TEU* states that “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

<sup>13</sup> R. Dehousse, “Regulation by networks in the European Community: the role of European agencies” (1997) 4 *Journal of European Public Policy* 246 at 257.

<sup>14</sup> *Ibid* at 255.

<sup>15</sup> Chiti, *supra* note 3 at 429.

hard law regulatory powers. The EASA also has quasi regulatory powers when advising the Commission on the rules to be adopted to implement the air safety regulation.<sup>16</sup> These quasi-regulatory powers arise from the fact that the technical part of its opinions, in particular, the part dealing with the construction, design and operation of aircraft, cannot be altered by the Commission without prior collaboration with the Agency.<sup>17</sup> In this role, EASA establishes administrative rules both for its internal administrative procedures as well as administrative rules to be applied by the Member States.<sup>18</sup> The resulting internal “rulemaking procedures” of the agency include provisions for the establishment of a rulemaking programme, formal initiation of the process, the drafting of the rules, participation and consultation procedures (including consequent review of comments) and, finally, the rules regarding publication and entry into force of the agency guidelines.<sup>19</sup> In many ways these rule-making procedures can be regarded as models for rule-making procedures by agencies. The approach chosen in the EASA legislation provides for procedures akin to the US approach of “notice and comment procedures” used in most administrative rule-making procedures by US agencies.

In view of these functions, classifications of EU agencies, despite the necessary generalisations, are an attempt to improve transparency and to streamline control, accountability and supervision of the exercise of public powers by EU agencies. I will not present various past attempts at classification but instead try to categorise agencies by their legal basis – i.e. the origin of delegation distinguishing between vertical and horizontal delegation of powers to agencies.

“Vertical” delegation takes place at the EU level between the Commission and an agency. In this case, the Commission, after having being delegated the powers to implement a policy in a legislative act, will “sub-delegate” this power to an EU agency. Most cases of vertical delegation can be found in what in EU terms is generally referred to as executive agencies. Executive agencies are those which the Commission has set up by executive decision to administer Union programmes in accordance with Council Regulation 58/2003. They can be entrusted with managing

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<sup>16</sup> Similarly, the European railway agency is entrusted in the field of railway safety with drafting common safety methods and common safety targets to be adopted by the Commission and binding on the Member States (See Art. 6 of Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive), OJ 2004 L 220/16). In addition, the agency has the task of drafting and proposing a harmonised format for both safety certificates and for applications for them (see Art. 7 of Regulation (EC) 881/2004 of the European Parliament and the Council of 29 April 2004 establishing a European Railway Agency (Agency Regulation), OJ 2004 L 164/1, as amended).

<sup>17</sup> Articles 12 b and 13 b of Regulation (EC) 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ 2002 L 240/1.

<sup>18</sup> Articles 14, 43 of Regulation 1592/2002, [2002] OJ L 240/1 and EASA MB/7/03 (Final) of 27.06.2003, European Aviation Safety Agency, Decision of the Management Board concerning the procedure to be applied by the agency for the issuing of Opinions, Certification Specifications and Guidance Material (“Rulemaking Procedure”, online: EASA <[www.easa.eu.int](http://www.easa.eu.int)>).

<sup>19</sup> Articles 14, 43 of Regulation 1592/2002, [2002] OJ L 240/1.

any tasks required to implement a Community Union programme, but not given “discretionary powers in translating political choices into action.”<sup>20</sup>

From this, one can distinguish “horizontal” delegation which takes place directly in EU legislation creating an agency or empowering an EU agency with certain implementing tasks which would otherwise by default reside with the Member States.<sup>21</sup> Cases of horizontal delegation are often undertaken in the context of what is generally, in a somewhat lazy shorthand, referred to as “regulatory” agencies. This terminology however does not imply that an agency has necessarily rule-making powers as is the case of many US agencies or agencies of EU member states such as is the case under Swedish administrative law.<sup>22</sup> Unlike executive agencies, in the case of regulatory agencies, the legislative act or a *Treaty* provision directly creating an agency provides it with delegated powers. Legal disputes to the extent of powers which may be delegated or which have been delegated under these various legal bases are ripe.<sup>23</sup> EU regulatory agencies can be sub-categorised in different ways, for example, according to the functions they perform. It is thus possible, with the Commission working paper of 2008,<sup>24</sup> to distinguish agencies adopting individual decisions,<sup>25</sup> providing direct assistance to the Commission and the Member States’ administrations (through technical know-how, scientific expertise, inspection reports and other means),<sup>26</sup> agencies in charge of operational activities (often with far reaching powers in the definition of the content and the reach of the operations, as well as the means employed to achieve them),<sup>27</sup> and finally agencies responsible for coordination of networks of national regulators (which generally also support these, by supplying technical and scientific expertise as well as collecting information).<sup>28</sup> Some agencies perform several of the mentioned functions. This list is far from complete, however. For example in the area of research, special partnership bodies have been created as

<sup>20</sup> Article 6(1) of Council Regulation (EC) 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1.

<sup>21</sup> Article 4 (3) *TEU* and Article 291 (1) *TFEU*.

<sup>22</sup> The majority of agencies which are often labelled “regulatory” are established by EU legislation properly so named on the legal basis of either a general provision such as Articles 114 or 352 *TFEU* or on a policy specific legal basis such as Article 187 *TFEU* for research, and other legal basis.

<sup>23</sup> Especially Article 114 *TFEU*, which is now the legal basis for many new agencies, has been subject to much dispute. See for an illustration the disputes underlying the cases C-66/04 *UK v Parliament and Council (smoke flavourings)* [2005] ECR I-10553; Case C-217/04 *UK v Parliament and Council (ENISA)* [2006] ECR I-3771, discussed in greater detail by K. Bradley, “Comitology and the Courts: tales of the unexpected” in H.C.H. Hofmann & A. Türk, eds, *EU Administrative Governance*, (Cheltenham: Elgar, 2006) 417; and H.C.H. Hofmann, “Which Limits? Control of Powers in an Integrated Legal System” in C. Barnard and O. Odudu eds, *The Outer Limits of EU Law* (Cambridge: Cambridge University Press, 2008) 45.

<sup>24</sup> COM (2008) 135 final.

<sup>25</sup> These include *inter alia* the European Trade Mark Office [OHIM], the European Air Safety Agency [EASA] and the chemical registration agency of the REACH regulation [ECHA].

<sup>26</sup> These include *inter alia* the European Marine Safety Agency [EMSA], the European Food Safety Agency [EFSA], the European Railway Agency [ERA].

<sup>27</sup> For example quite a few agencies are in this category such as *inter alia* the European border safety agency [FRONTEX], the former Council agencies EUROJUST, EUROPOL and CEPOL.

<sup>28</sup> For e.g. the European Network Information Safety Agency [ENISA], the European Centre for Disease Control [ECDC], the European Fundamental Rights Agency [FRA] and the European Institute for Gender Equality.

mixed public and private law bodies. These have been created to include third party and private financing into certain high-level research projects such as the international fusion energy project ITER, SESAR for air traffic management, or the European Institute of Innovation and Technology.

The organisation of agencies follows this basic distinction into vertical and horizontal delegation. Generally speaking, executive agencies which benefit from vertical (sub-) delegation by the Commission have a standardised structure under Regulation 58/2003 which leaves leeway only for small adjustments. That Regulation establishes that executive agencies are managed by a director<sup>29</sup> and a steering committee.<sup>30</sup> Anticipatory supervision of the executive agencies by means of vertical hierarchies include the authorisation of the detailed work plan and the draft operating budget of an executive agency, which must be submitted by its steering committee to the Commission annually.<sup>31</sup> *Ex post* supervision takes place through the Commission's right to review and overrule agency decisions in specific cases.<sup>32</sup>

Regulatory agencies are directly created and empowered by legislation. They are generally governed by a management board (sometimes also called administrative board or council) typically with one representative from each Member State, some minority (often non-voting) representatives of the Commission, and sometimes other (non-voting) members such as representatives of the social partners, academic experts, industry representatives and other stakeholders. The management board is responsible for appointments within the agency, the budget, work programming, and evaluations. In some instances the Commission can object to the proposed work programme.<sup>33</sup> The management board usually appoints the director of an agency (sometimes called president) on the basis of a Commission and in some cases a Council proposal often after a hearing by the European Parliament.<sup>34</sup> Generally, a candidate needs to be independent and have the necessary skills for the position.<sup>35</sup>

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<sup>29</sup> The Commission appoints the agency's director, generally for a period of four years. The director externally represents the agency, is responsible for its management and performance. She or he is responsible for the agency's budget, prepares the reports and is in charge of employment contracts (Articles 10, 11 of Regulation 58/2003).

<sup>30</sup> The steering committee consists of five members appointed by the Commission for two years (Art. 8 of Regulation 58/2003). This committee adopts the agency's annual work program (including objectives and performance indicators) and the budget on the basis of a draft by the director and after approval by the Commission. It also submits an annual activity report together with financial and management information to the Commission.

<sup>31</sup> Articles 7-12 of Council Regulation (EC) 58/2003 of 19 December 2002 laying down the statute of executive agencies Art. 13 (2), OJ 2003 L 11/1.

<sup>32</sup> Article 22 et seq. of Council Regulation (EC) 58/2003 of 19 December 2002 laying down the statute of executive agencies Art. 13 (2), OJ 2003 L 11/1.

<sup>33</sup> In this case the agency has to re-examine its programme and can adopt the programme, possibly amended, usually only with a two-thirds majority on the management board, which either must include the Commission representative's vote, or be based on unanimity among the Member States' representatives. This is the case in the context of the EMSA, the ERA and the Community Fisheries Control Agency [CFCA].

<sup>34</sup> See e.g. Art. 26(1) of Regulation (EC) 178/2002 of the European Parliament and the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ 2002 L 31/1.

<sup>35</sup> See e.g. Art. 15(1) and 16 of Regulation (EC) 1406/2002 of the European Parliament and the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ 2002 L 208/1, as amended.

The director is accountable to the management board and charged with the preparation and execution of its decisions, reporting and the day-to-day running of the agency, including staff matters. Given the technicality of many agency dossiers, they generally also contain scientific committees. Their appointment varies from designation by the management board<sup>36</sup> to nomination by the Member States<sup>37</sup> or a mixture of both.<sup>38</sup>

There is little in the way of standardised, supervisory methodology between the various forms of regulatory agencies. However, the one big exception is in regard to financial regulation.<sup>39</sup> The EU financial regulation contains essential rules concerning agencies' establishment plan, the creation of what is known as an agencies' framework financial regulation, the consolidation of the agencies' accounts with those of the Commission, and the discharge by the European Parliament [EP]. In addition, the framework financial regulation lays down common rules governing the establishment and implementation of their budget, including control aspects. Budgetary discharge is granted by the EP.

## B. Delegation of Powers

In all modern legal systems, effective government requires the allocation of broad, general and often discretionary powers to administrative actors.<sup>40</sup> The same is true in the context of the EU although EU constitutional law does not explicitly regulate delegation to EU agencies. The only explicit mentioning of agencies in the EU's constitutional basis takes place within the English language version of the first paragraph of Article 263 *TFEU* dealing with the annulment procedure before the European Court of Justice.

Nevertheless, case law on delegation was already established in the early days of European integration by the limitation on the powers of European agencies deriving originally from the *Meroni*<sup>41</sup> ruling, in which the Court considered as unlawful the delegation of discretionary powers to agencies and restricted such delegation to clearly defined powers. In *Meroni*, the Court was reviewing the possibility of (what then was the High Authority and what later became) the European Commission to confer implementing powers on a private body. In the terminology introduced in this article, it would have been a case of vertical delegation of powers. In *Meroni*, the Court held that no more powers could be delegated by the Commission than had legally been granted and that such delegation must be explicit.<sup>42</sup> The power of the Commission in Article 53 of the *Treaty* establishing the European Coal and Steel

<sup>36</sup> As is the case with the European Environmental Agency [EEA] and the EFSA.

<sup>37</sup> As is the case with the European Medical Agency [EMA] and EUROFOUND.

<sup>38</sup> As is the case with the European Monitoring Centre for Drugs and Drug Addiction [EMCDDA].

<sup>39</sup> Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 as amended. See also Proposal for a Council Regulation on the Financial Regulation Applicable to the General Budget of the EC, COM (2000) 461 final, in Amended Proposal for a Council Regulation on the Financial Regulation Applicable to the General Budget of the EC, COM (2001) 691.

<sup>40</sup> S.A. Shapiro, R.M. Murphy, "Eight Things Americans Cannot Figure Out About Controlling Administrative Power", (2009) 61 *Admin L Rev* 5 at 6; more generally for e.g. J. D. Huber & C. R. Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (Cambridge: Cambridge University Press, 2002).

<sup>41</sup> Cases 9 and 10/56 *Meroni v High Authority* [1957/58] ECR English Special Edition 133.

<sup>42</sup> *Ibid* at 150, 151.

Community [ECSC, which is no longer in force] to authorise or decide on the financial arrangements, however, “gives it the right to entrust certain powers to such bodies subject to conditions to be determined by it and subject to its supervision.”<sup>43</sup> Delegation is thus possible when it “involves clearly defined executive powers” and when their exercise can “be subject to strict review in the light of objective criteria determined by the delegating authority.” On the other hand, where delegation involves “a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy” such delegation can not take place through the type of vertical delegation provided in the case.<sup>44</sup> As reason for establishing this distinction, the ECJ refers to the principle of *institutional balance* – the EU terminology for the concept of the relative separation of powers. This reference to a general principle of law, one might argue, makes it unlikely that the *Meroni* ruling ought to be limited to the specific context of the *ECSC Treaty*<sup>45</sup> and should be considered as being applicable also within the legal system of the Lisbon regime.<sup>46</sup> One might, on the other hand, equally argue that the institutional balance in the context of the ECSC was sufficiently specific as to not follow the notion of *Meroni* too strictly in the very different context of the EU under the *Treaty of Lisbon*. As Schneider argues, the EU’s legal system is based on a more open legal framework explicitly recognising delegation to agencies.<sup>47</sup> Also, Vos finds that delegation of broader powers to agencies nowadays ought not to fall afoul of the *Meroni* doctrine, as the EU’s institutional balance could be protected “by a reinforcement or re-balancing of the existing institutions and constitutional guarantees for decision-making.”<sup>48</sup>

However, as Dehousse reminds us, not only legal but also political considerations play a role for the more narrowly defined mandate of European agencies.<sup>49</sup> In particular, the Commission seems to be anxious not to let the undoubted help that agencies provide in reducing its administrative overload result in a loss of its administrative authority and control. In reality, some agencies have gained quite considerable influence over the decision-making process, perhaps already stretching the *Meroni* doctrine to its limits, as was illustrated above with the example of the European Air Safety Agency [EASA]. This is not only the case where agencies have been entrusted with the adoption of binding decisions,<sup>50</sup> but also where they play an

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<sup>43</sup> *Ibid* at 151.

<sup>44</sup> *Ibid* at 152.

<sup>45</sup> However, see R. Dehousse, “Misfits: EU Law and the Transformation of European Governance” in C. Joerges & R. Dehousse eds, *Good Governance in Europe’s Integrated Market* (Oxford: Oxford University Press, 2002) 207 at 221. Dehousse argues that its general framework sufficiently distinguishes the EC Treaty from the regime prevalent under the previous *ECSC Treaty*, in which the High Authority exercised important regulatory powers. In particular, in contrast to the enforcement of EC law by national authorities, Art. 53 ECSC entrusted its application to the High Authority itself.

<sup>46</sup> K. Lenaerts, “Regulating the Regulatory Process: ‘Delegation of Powers’ in the European Community” (1993) 18 *Eur L Rev* 23 at 41.

<sup>47</sup> J.P. Schneider, “EU Agencies and the Meroni Doctrine” (2008) 61 *Admin L Rev* 29 at 38.

<sup>48</sup> E. Vos, “Reforming the European Commission: What Role to Play for EU Agencies?” (2000) 37 *CML Rev.* 1113 at 1123.

<sup>49</sup> Dehousse, *supra* note 45 at 223.

<sup>50</sup> See Council Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights, OJ 1994 L 227/1; Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark

essential part in the decision-making process such as the European Medicines Agency [EMA] which is in charge of authorisation and supervision of medical products.<sup>51</sup> EMA has been given the task to deliver scientific opinions on applications for the authorisation of pharmaceutical products. Even though its opinions are not binding on the Commission, which takes the final decision in accordance with the applicable comitology procedure, it has been argued that “the EMA’s opinion appears to condition substantially the discretion of the Commission in taking the final decision”,<sup>52</sup> in particular as the Commission is obliged to “systematically rubber-stamp EMA recommendations.”<sup>53</sup>

More recent case-law has to a certain degree loosened the strictures of the *Meroni* style non-delegation doctrine. In *Schröder v CPVO*,<sup>54</sup> the applicant challenged a decision of the Board of Appeal of an EU agency, the Community Plant Variety Office [CPVO]. In its review of the agency decision, the General Court applied only limited judicial review, explicitly because of the “discretion” the agency enjoyed.<sup>55</sup> This statement is remarkable, since without any reference to *Meroni*, the Court finds that an agency, such as the CPVO, can be entrusted with the exercise of administrative decisions subject only to marginal judicial review, a standard of review reserved for discretionary decisions. In *Commission v Germany* of March 2010 the Grand Chamber of the ECJ held that powers could be delegated to an agency (in this case EU law provided for delegation to national agencies) if democratic oversight of an independent agency was sufficiently protected. That was the case if first, parliament controlled the appointment of senior management of the agency as well as if second, the agency was required to submit regular public reports to the parliament.<sup>56</sup> Although it is not entirely clear to date whether this dictum is equally applicable to the EU itself, the case paints a more delegation-friendly picture of the current case law allowing for more independence of agencies than is generally regarded to be the case under the *Meroni* doctrine.

As an interim result, the debate on the importance of the early statements of the ECJ in a much changed legal environment is vigorous. It appears that the seminal *Meroni* case, the non-delegation doctrine is based on the idea that delegation of wide discretion, which would impede the institutional balance as defined by the Treaties, is not possible. Wide discretion is a notion which refers, in the definition of the ECJ, to quasi-legislative powers which means establishing the core elements of a policy for implementation. That leaves the possibility of far reaching delegation, even rule-making powers if limited by legislative guidance and exercised by institutional

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(codified version), OJ 2009 L 78/1; Regulation (EC) 1592/2002 of the European Parliament and the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ 2002 L 240/1.

<sup>51</sup> Regulation (EC) 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ 2004 L 136/1.

<sup>52</sup> See E. Chiti, “The Emergence of a Community Administration: the Case of European Agencies”, (2000) 37 CML Rev 37 309 at 336.

<sup>53</sup> Dehousse, *supra* note 45 at 223. See also Vos, *supra* note 48 at 1132.

<sup>54</sup> Case T-187/06 *Schröder v Community Plant Variety Office (CPVO)* [2008] ECR II-3151, confirmed on appeal in Case C-38/09 P *Schröder v CPVO* [2010] ECR I-nyr of 15 April 2010.

<sup>55</sup> *Ibid* at para 63.

<sup>56</sup> Case C-518/07 *Commission v Germany* of 9 March 2010, [2010] ECR I-nyr, at paras 42-46.

supervision. It is within this logic that delegation of powers to agencies is growing. The Courts seem to be accepting this increasingly. Agencies, however, exercise their powers in cooperation with, rather than in isolation from other EU institutions, national and international bodies due to the complexities of the integrated system of administration in the EU.

### III. ACCOUNTABILITY AND INDEPENDENCE IN THE CONTEXT OF NETWORK COORDINATION

The conditions for independence and accountability of EU agencies are governed by the specific context of integrated administration. EU agencies face a predicament. Although they are supposed to act with executive neutrality they also are responsible to the political bodies of the EU with respect to budgets, work-plans and nominations of leading personnel as well as to Member States through the Council.<sup>57</sup> Everson therefore points out some major factors of independence and accountability of agencies: Agencies are created and receive delegation of certain powers to exercise them by bundling expertise and technical know-how. This expertise is the main source of agency independence. This substantive independence is curtailed by mostly procedural rules to ensure accountability to politically responsible institutions of the EU. Independence is to be exercised in the context of integration of various administrative structures from the European and the Member State levels that deal with the implementation of EU policies.

#### A. Accountability

With respect to EU agencies, both the political dimension of accountability, in ensuring that the political will prevails, and its legal dimension, in aiming to ensure compliance with the law, are designed to be established by *ex ante* and by *ex post* accountability mechanisms. *Ex ante* accountability mechanisms of agencies broadly allow for the defining of tasks and for imposing conditions for carrying them out, including the choice of personnel entrusted with the tasks and the allocation of the budget to do so. *Ex post* mechanisms provide *inter alia* for possible demands to justify actions taken, as well as rewards for compliance or sanctions for non-compliance with the tasks defined *ex ante*.<sup>58</sup>

In EU law, the supervision of agencies appears to rely significantly on anticipatory elements, mainly through the right to nominate key personnel within an agency. In executive agencies, this right is tightly linked to the Commission's hierarchic administrative control, allowing it, for example, to nominate the members of the steering committees and the director of the agency. In regulatory agencies, this form of *ex ante* supervision has a more political dimension, due to the distribution of the nomination rights and hearing provisions amongst the Council, the EP and the Commission. For example, the members of the management boards are generally nominated by the Council on the basis of Member State representation. The election

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<sup>57</sup> M. Everson, "Agencies: the dark hour of the executive?" in H. Hofmann & A. Türk eds, *Legal Challenges in EU Administrative Law* (Cheltenham: Elgar, 2009) 116.

<sup>58</sup> M. Bovens, "Analysing and Assessing Accountability: A conceptual framework" (2007) 13 Eur LJ 447. The ECJ links this notion with the requirement to guarantee an institutional balance, stating in Case 70/88 *Parliament v Council* [1990] ECR I-2041, para. 22 that "[o]bservance of the institutional balance(...) requires that it should be possible to penalize any breach of that rule which may occur."

of the director of a regulatory agency usually takes place by the management board on the basis of a proposal from the Commission or the Council. In some cases, the election takes place after a hearing of the EP.

Anticipatory supervision also is exercised through the authorisation of work programmes and budgets. Again, with respect to executive agencies, this control is often in the form of hierarchic administrative supervision by the Commission. With respect to regulatory agencies, the political aspect of these supervision tools becomes more important. Also with regulatory agencies, there are aspects of administrative supervision in certain cases. Such supervision may exist, for example, where the Commission has the right to object to proposed work programmes.<sup>59</sup> But generally, the director establishing the work and the financial planning of an agency is responsible to the management board, the majority of which is comprised of Member State representatives.

*Ex post* supervision takes place through administrative, political and judicial supervision. On the level of administrative supervision, executive agencies have reporting duties to the Commission through reports submitted by their steering committees. The reporting duties of regulatory agencies allow the Member States and the political and administrative institutions of the Union to exert pressure on the agency. Agency regulations usually provide that an annual report has to be forwarded to the Member States, the European Parliament, the Council and the Commission.<sup>60</sup> Certain agencies specify that the director will address the agency's activities in a general report to the European Parliament.<sup>61</sup> Some agency regulations even provide that the European Parliament or the Council can require the director to participate in a hearing on any subject related to the agency's activities.<sup>62</sup> Finally, exceptionally, some agency statutes provide that agency actions can be referred to the Commission for a review of legality or subject to internal review within the agency itself.<sup>63</sup>

Supervision of agency activity takes place internally in cases in which agencies with decision-making powers have mechanisms for legality review in the form of an internal appeal. In those cases, following the internal appeal procedure is a precondition for the admissibility of judicial review through an appeal to the General

<sup>59</sup> As is the case in the context of the EMSA and the ERA.

<sup>60</sup> See e.g. Art. 6(9) of Regulation (EC) 460/2004 of the European Parliament and the Council of 10 March 2004 establishing a European Network and Information Security Agency [ENISA], OJ 2004 L 77/1, as amended; Art. 25(2)(b) of Regulation (EC) 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European railway agency (ERA), OJ 2004 L 220/3, as amended and many more.

<sup>61</sup> See e.g. Art. 32 of Regulation (EC) 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing an ERA, OJ 2004 L 220/3, as amended.

<sup>62</sup> See e.g. Art. 32 of Regulation (EC) 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European railway agency (ERA), OJ 2004 L 220/3, as amended; Art. 15(6) of Council Regulation (EC) 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [EFA], OJ 2007 L 53/1.

<sup>63</sup> See e.g. Art. 18 of Council Regulation (EEC) 337/75 of the Council of 10 February 1975 establishing a European Centre for the Development of Vocational Training (CDVT), OJ 1975 L 39/1, as amended; Art. 22 of Council Regulation (EEC) 1365/75 of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions, OJ 1975 L 139/1, as amended; Art. 22 of Council Regulation (EC) 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work, OJ 1994 L 216/1; Art. 28 of Regulation (EC) 851/2004 of the European Parliament and the Council of 21 April 2004 establishing a European centre for disease prevention and control, OJ 2004 L 142/1.

Court.<sup>64</sup> In all other cases, judicial review can be brought against agency decisions by parties directly or indirectly affected by a decision or by a Member State or EU institution under Article 263 TFEU.

Accountability is also linked to transparency. Transparency is in this context understood not in the more narrow sense of giving the right to access to documents (irrespective of the essential importance of that right for holding an agency accountable) but in the broader sense of improving the allocation of responsibility for decision-making. The latter is in many ways a pre-condition for exercising *ex ante* and *ex post* accountability measures. In this respect, the much criticised European Agency of the Management of Operational Cooperation at the External Borders [FRONTEX] may serve as an example for how the creation of an agency may increase transparency about EU activity. FRONTEX was established by Council regulation replacing much of the previously existing fragmentary and opaque structures that were attached to the Council in one form or another, for example the Common Unit for external border practitioners [SCIFA] that was a Council Working Party.<sup>65</sup> The fact that FRONTEX has been given quite far reaching operational powers in patrolling and securing the EU's external borders as well as its empowerment to enter into international operational cooperation, however, contains its own specific challenges for transparency with respect to the allocation of responsibilities.

## B. Independence

Independence of agencies may arise from various factors including *inter alia* the expertise of an agency and its relation to the regulated interests, an agency's organisational structure and its procedural provisions, as well as the position of the agency within the network administration of the EU. Independence is a relative concept. Independence can be freedom from influence by specific stakeholders in a matter - for example EU institutions, Member State governments or private parties. Being independent from the influence of one group of stakeholders, however, might in reality arise on the basis of strong influence or even dependence on others. Independence can also manifest itself in forms of financial independence or absence of control or supervision. Independence from certain external influences may also arise from practical aspects, for example the unique expertise that an agency has

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<sup>64</sup> See Art. 58-65 of Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark (codified version) (OHIM), OJ 2009 L 78/; Art. 67-73 of Council Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights (CPVO), OJ 1994 L 227/1; Art. 31-41 and Art. 11 of Regulation (EC) 1592/2002 of the European Parliament and the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA), OJ 2002 L 240/1.

<sup>65</sup> Curtin, *supra* note 5 at 99. FRONTEX is an EU agency with a legal personality and a certain operational autonomy. It has its own budget which is in part financed by the EU, in part by those Schengen Member States which are not members of the EU such as Liechtenstein, Iceland, Norway and Switzerland. FRONTEX is governed by its management board, which consists of operational heads of national border control authorities and representatives of the European Commission. The management board verifies the execution of the agency's budget and adopts internal financial rules. It further adopts working and mission procedures for *inter alia* the so called Rapid Border Intervention Teams [RABIT] which are mixed units from member State border guards jointly pursuing missions at the EU's external borders. The management board also is in charge of appointing the Executive Director and the deputy of the agency.

accumulated allowing it, in reality, to set its agenda and remain unchallenged in its decisions.

Expertise underlines the notion of decision-making based on the scientific as opposed to political influence over a certain decision-outcome. Expertise can be integrated into the agency by means of its permanent personnel as well as with respect to the integration of expert committees within the agency. Expertise and with it, independence of an agency, can however also be enhanced by participation of the regulated interest and other private parties who have an interest in the matter. For example, the EASA Regulation which stipulates that the procedures for the development of opinions, certification specifications and guidance material shall involve not only expertise of national aviation regulatory authorities, but also involve experts from “the relevant interested parties” and shall ensure that the agency publishes documents and “consults widely interested parties, according to a timetable and a procedure which includes an obligation on the Agency to make a written response to the consultation process.”<sup>66</sup>

These procedural provisions strengthening the expertise of an agency go hand in hand with other elements of independence. Agency independence relies to a large extent on the fact that accountability and supervisory mechanisms are often based on *ex ante* nomination of personnel and *ex post* reporting and discharging mechanisms. For example, unlike executive agencies, for regulatory agencies hardly any substantive elements exist in the form of directions or guidance as to the nature of individual decision-making other than the above mentioned forms of requiring work programmes to be authorised in certain cases. This choice towards procedural forms of supervision has a strong influence on ensuring independence of European agencies.

Independence of agencies is, it appears from this discussion, relative. Executive agencies are explicitly auxiliary bodies to support the Commission, over which the Commission wields almost exclusive control. On the other hand, EU regulatory agency structures are a mirror of the competing interests involved in implementation of EU law and the conflicts of whether the European or the Member State levels should implement a policy and to what degree. The result is a structure in which the representatives of various interests have their role to play. It should be noted that such a multiplicity of actors involved in the delegation and supervision of delegated powers may result in a certain degree of strengthening the independence of the agency.<sup>67</sup> Confronted with conflicting positions by several principals, agents may feel encouraged to apply their own best judgement to a problem. Establishing overview from various principals without the possibility of any single one blocking activity in case of conflicts with other principals, gives the agent large amounts of freedom.

The question of independence is also relative to the issue of the influences from which independence is sought.<sup>68</sup> Is the goal to achieve independence of an agency from political influence expressed by the Commission or the European Parliament, from specific Member State interests or from the interests of a specific industry or

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<sup>66</sup> Article 52 (1) (c) of Regulation No 216/2008 of the EP and the Council on the common rules in the field of aviation and establishing the European Aviation Safety Agency, OJ 2008 L 79/1.

<sup>67</sup> For a detailed discussion, see Vos, *supra* note 48 at 1125-33.

<sup>68</sup> For a more in depth discussion see E. Chiti, “An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies” (2009) 46 CML Rev 1395 at 1399.

consumer lobby? The organisational structure which would be most appropriate to achieve this independence will differ accordingly.

#### IV. REFLECTIONS FOR THE FUTURE

The factors leading to accountability and independence of EU agencies are both procedural and substantive. Not surprisingly, they differ as to the policy area and the legal basis of the agency. Generally speaking, accountability and independence are defined by the position of an agency within the administrative networks implementing EU law and policy. Agencies are actors which are created to navigate the difficult territory of implementation of EU law in the grey-zone between EU and Member State competencies. They are created and receive delegation of powers under EU law. Their *raison d'être* is usually to coordinate Member State implementing activities rather than taking on these responsibilities themselves.

The independence of an agency can increase with its accountability to multiple principals – namely, EU institutions as well as Member States. Next to this, even in the absence of clearly defined decision-making powers, a factor increasing an agency's independence is the amount of specific and unique expertise it can unite within its services. Such expertise and with it the independence of an agency is generally enhanced when the agency has access to information and participation of interested parties and stakeholders in the policy. The broader the spectrum of interests taken into account, and the more institutionalised and transparent the participation, the more independence the agency may gain. This arises from being able to gather a unique amount of information and knowledge about a specific topic which supports the already existing expertise-based legitimacy within an agency. Such participatory legitimacy, as one might call it, can be regarded a case of increased input-legitimacy into decision-making. Good input and well designed procedure will generally generate a bigger chance of proper outcome, which in turn generally dissuades Courts and political actors from intervening in the substantive choices of an agency.

Further independence arises, as the case of several agencies shows, from the possibility to conduct internal self-control of decisions. This sort of control is oriented towards legality and reasonableness of a decision and may generally raise the quality and legitimacy of decision-making procedures. Reflecting on the features leading to the independence of agencies in the EU is of course directly linked to aspects of accountability. Accountability can be strengthened in the context of reducing the amount of principals. EU executive agencies, for example, are nearly entirely controlled and responsible to the Commission. This makes them accountable but also much less independent vis-à-vis the political orientation of the Commission. Accountability will also be strengthened by the combination of *ex ante* and *ex post* supervision tools. Such supervision tools will include judicial review. Judicial review will have to be developed with the increasing powers conferred on agencies. Finally, accountability will be strengthened not only by control and supervision mechanisms but also simply by increasing transparency. EU administrative law, due to its network character, is in permanent evolution. The structures and responsibilities are generally rather opaque to outside observers. Clear distribution and descriptions of responsibilities and decision-making structures are a key ingredient to enhancing accountability of the exercise of public powers.



## POLITICS AND POLICY CHANGE IN AMERICAN ADMINISTRATIVE LAW

Richard Murphy\*

*This essay uses Justice Scalia's and Breyer's dueling opinions in FCC v. Fox Television Stations, Inc. (2009), as a vehicle for exploring the contested relationship between politics and policy change in administrative law. In Fox, a five – justice majority led by Justice Scalia insisted that an agency's abandonment of an old policy position in favor of a new one should survive review for arbitrariness so long as the agency explains why its new position is reasonable. A different five – justice majority (yes – that adds up to ten) led by Justice Breyer thought that Justice Scalia's stance left too much room for politicization of policymaking. To curb such influence, Justice Breyer insisted that an agency, to justify abandoning an old policy, must explain why it was reasonable to change from its old policy to the new one.*

*Neither of these two approaches in Fox hits quite the right note. Justice Scalia's view unduly minimizes the problem of politicization. Justice Breyer's solution seems formalistic and easy to evade. A better way forward may lie in combining Justice Scalia's simpler framework with Justice Breyer's more suspicious attitude. Taking a cue from Justice Frankfurter in Universal Camera, the courts should respond to the potential for excessive politicization of agency policymaking not with more doctrinal metaphysics but with a suspicious "mood."*

*Cet article se base sur les opinions adverses des juges Scalia et Breyer dans FCC v. Fox Television Stations Inc. (2009) comme véhicule pour explorer le rapport contesté entre la politique et les changements de politiques en droit administratif. Dans Fox, une majorité de cinq juges dirigée par le juge Scalia a insisté que l'abandon d'une ancienne politique par une agence en faveur d'une nouvelle politique devrait survivre à un examen pour juger si elle est arbitraire en autant que l'agence explique pourquoi sa nouvelle politique est raisonnable. Une autre majorité de cinq juges (oui – cela fait dix) dirigée par le juge Breyer a trouvé que la position du juge Scalia laissait trop de place à la politisation de l'élaboration de politiques. Pour enrayer cette influence, le juge Breyer a insisté que l'agence, pour justifier l'abandon d'une ancienne politique, doit expliquer pourquoi il était raisonnable de changer de l'ancienne à la nouvelle.*

*Ni l'une ni l'autre de ces approches n'est tout à fait dans la note. L'avis du juge Scalia minimise trop le problème de politisation. La solution du juge Breyer semble formaliste et facile à contourner. Une meilleure façon d'avancer serait peut – être de combiner le cadre plus simple du juge Scalia avec l'attitude plus soupçonneuse du juge Breyer. En suivant l'exemple du juge Frankfurter*

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*dans Universal Camera, les tribunaux devraient réagir contre le potentiel de politisation excessive de l'élaboration de politiques par une agence non pas avec une métaphysique plus doctrinale mais avec une «disposition» soupçonneuse.*

## I. INTRODUCTION

In American administrative law, agency policy decisions – whether developed through adjudication or rulemaking – are generally subject to a very weak form of stare decisis – perhaps one not worthy of the name. Oversimplifying a bit, so long as an agency uses the right procedures, it can abandon an earlier discretionary policy choice (which might be styled as a construction of law) so long as the agency acknowledges the change and explains why it is reasonable.<sup>1</sup> Thus, the agency need not explain why changing course is the *only* reasonable thing to do; the agency need only explain why changing course is *a* reasonable thing to do.

Two classic themes of administrative law underlie this relatively lax approach to agency change. The first and more straightforward theme relates to agency expertise – as agencies learn more about the way the world works, they should be able to make policy changes to reflect their new knowledge.<sup>2</sup> The second and more contestable theme relates to political accountability – agencies should enjoy a measure of policymaking flexibility because they are answerable to elected officials.<sup>3</sup>

This notion that political accountability justifies administrative discretion is easy to question. Certainly, presidents and Congress wield vast formal and informal influence over agencies, but a great deal of agency action must escape control by elected officials if only because the federal bureaucracy is so very vast. Worse, where political officials do wield influence, they may under some circumstances taint rather than legitimate agency action. For instance, one might think that experts at the Environmental Protection Agency [EPA], not the president or a senator from West Virginia, should determine limits on pollution from coal-fired plants under the rulemaking authority of the *Clean Air Act*.<sup>4</sup>

This abiding concern that political preferences – broadly construed to include value judgments – can improperly affect agency policymaking featured prominently in the Supreme Court's recent exploration of the force of agency precedent in *FCC v. Fox Television Stations, Inc.*, in which broadcast firms challenged the FCC's decision to abandon its "fleeting expletives" policy.<sup>5</sup> A five-justice majority led by Justice Scalia concluded that the agency had given an explanation for its action that was reasonable

<sup>1</sup> See e.g. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) (observing that an agency can change its statutory construction subject to *Chertron* deference provided it gives a reasonable explanation for the change and takes into account any legitimate reliance on its prior construction).

<sup>2</sup> *Chertron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-66 (1984). [*Chertron*]

<sup>3</sup> See *ibid* at 865-66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices ....").

<sup>4</sup> Cf. *Sierra Club v. Costle*, 657 F.2d 298, 406-10 (D.C. Cir. 1981) (holding that contacts between EPA and executive officials and Senator Byrd of West Virginia did not invalidate a rule governing emissions of coal-fired plants where EPA had supplied a reasonable explanation based on substantial recorded evidence for that rule).

<sup>5</sup> 129 S. Ct. 1800 (2009).

enough to survive judicial review for arbitrariness.<sup>6</sup> A different five-justice majority led by Justice Breyer, however, intimated strong concerns that the agency's decision had been unduly politicized. In an effort to curb such influence, Justice Breyer insisted that an agency, to give a reasonable explanation for abandoning an old policy, must do more than merely explain why its new policy, considered on its own, is reasonable. In addition, the agency must explain why it was reasonable *to change* from its old policy to the new one.<sup>7</sup> Writing for the four most conservative justices in this regard, Justice Scalia rejected this contention. In his view, the answer to the question "Why change?" always has an obvious answer: An agency changes course when it *likes* its new policy better than its old one.<sup>8</sup> For Justice Scalia, it is perfectly proper for an agency's likes and dislikes (i.e. its political preferences) to motivate its policy choices so long as those choices are otherwise reasonable.

This brief essay uses Justice Breyer's and Scalia's dueling opinions as a vehicle for exploring this contested relationship between politics and policy change in American administrative law.<sup>9</sup> Underlying its analysis is the premise that in a representative democracy that places political appointees in charge of regulatory agencies with broad, vague mandates, political preferences *should* affect some regulatory choices. Still, such preferences should not *distort* expert administrative judgments – as the old saw goes, we have a right to our own opinions but not to our own facts. In exercising judicial review, courts should do their best to police against such distortion.

Neither of the leading approaches in *Fox* seems to hit quite the right note regarding this problem of political preferences distorting discretionary judgment. Justice Scalia's opinion ignores the potential problem. Justice Breyer's insistence that agencies answer the "Why change?" question seems too formalistic and disingenuous as a solution. The FCC did, in fairness, explain why it was changing its policy – the problem was that Justice Breyer, perhaps quite wisely, did not think very much of the FCC's explanation.

One good path forward lies in combining Justice Scalia's simpler framework with Justice Breyer's more jaundiced attitude. We all know that strong preferences can

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<sup>6</sup> *Ibid* at 1812-13.

<sup>7</sup> *Ibid* at 1830 (Breyer, J., dissenting); see also *ibid.* at 1822 (Kennedy, J., concurring in part and concurring in the judgment) (stating agreement with Justice Breyer that "the agency must explain why 'it now reject[s] the considerations that led it to adopt that initial policy'").

<sup>8</sup> *Ibid* at 1811.

<sup>9</sup> For three notable, recent, and more extensive discussions of this relationship, see Nina A. Mendelson, "Disclosing 'Political' Oversight of Agency Decision Making" (2010) 108 Mich L Rev 1127 (contending that determining the legitimacy of political reasons for agency action requires transparent disclosure of political influence; contending that agencies should be required to publicly disclose summaries of White House influence on significant rulemaking decisions); Kathryn A. Watts, "Proposing a Place for Politics in Arbitrary and Capricious Review" (2009) 119 Yale LJ 2 (discussing the evolution of the relationship between politics and expertise in supporting agency action; proposing that transparent reliance on certain political preferences should count as a legitimate reason for agency action in the context of arbitrariness review); Jody Freeman & Adrian Vermeule, "*Massachusetts v. EPA*: From Politics to Expertise" (2007) Sup. Ct. Rev. 51 (2007) (contending that in a string of recent, major cases, the Supreme Court, concerned by excessive politicization of agency action during the Bush administration, has pushed agencies to rely on expertise rather than political preferences). See also Elena Kagan, "Presidential Administration" (2001) 114 Harv L Rev 2246 (extolling the virtues of increased presidential control over rulemaking); Peter L. Strauss, "Presidential Rulemaking" (1997) 72 Chicago-Kent L Rev 965 at 984 (contending that increased presidential control of rulemaking threatens excessive politicization of administration and erosion of the constraint of law on politics).

distort judgment. Where a reviewing judge has reason to think that strong political preferences (or pressure) are affecting agency judgment, that judge should scrutinize the agency's explanation for a decision with a sharper eye – or dare one say – a harder look. Taking a cue from Justice Frankfurter, the courts should respond to the potential for excessive politicization of agency policymaking not with a doctrine, but with a “mood.”<sup>10</sup>

## II. BEFORE *FOX*

To set the stage for *Fox*, this section will briefly explain the major doctrines that the federal courts have developed for reviewing the sufficiency of an agency's explanation for a decision to abandon a previous policy choice. (Readers who would rather undergo dental surgery than read about *State Farm* and *Chevron* again may wish to skip ahead.)

### A. Review of changes in policy that we put in the “policy” pigeonhole

The leading case governing the sufficiency of agency explanations for policy changes is that pillar of American administrative law, *Motor Vehicles Mfgs. Ass'n v. State Farm Automobile Ins. Co.*<sup>11</sup> This case arose out of the National Highway and Traffic Safety Administration's long effort to develop a rule governing passive safety restraints in automobiles. During the Carter administration, the agency adopted an iteration of the rule, MS 208, which allowed automobile manufacturers to choose to install either airbags or passive seat belts.<sup>12</sup> At the time, agency officials believed that manufacturers would choose airbags for 60% of vehicles and passive seat belts for 40%.<sup>13</sup>

The Reagan administration then rode into office on a deregulatory agenda. Under new leadership, the agency rescinded MS 208, explaining that the agency had discovered that the manufacturers would likely install airbags in only 1% of vehicles and that the benefits of passive seatbelts were not sufficient to justify significant costs to industry and consumer backlash.<sup>14</sup>

Before the Supreme Court, the petitioner Motor Vehicle Manufacturers Association [MVMA] contended that the agency's decision to rescind should be subject to the same type of extremely lax review that would have applied to a decision by the agency not to promulgate any rule in the first place.<sup>15</sup> The Court rejected this argument, noting:

Revocation constitutes a reversal of the agency's former views as to the proper course. A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will

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<sup>10</sup> *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (observing that legislative enactment of the “substantial evidence” standard of review expressed a congressional “mood” that the courts should scrutinize agency findings of fact more vigorously than they had before).

<sup>11</sup> 463 U.S. 29 (1983).

<sup>12</sup> *Ibid* at 37.

<sup>13</sup> *Ibid* at 38.

<sup>14</sup> *Ibid* at 38-39.

<sup>15</sup> *Ibid* at 41.

carry out the policies committed to it by Congress. There is, then, at least a *presumption* that those policies will be carried out best if the settled rule is adhered to.<sup>16</sup>

To rebut this presumption, the agency had to give an explanation for the rescission sufficient to satisfy arbitrariness review by the reviewing courts. Elaborating on what this standard requires, the Court explained that

... the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>17</sup>

In other words, the agency must demonstrate that, in reaching its decision, it thought about the right stuff (the “relevant factors”) and, having done so, did not adopt a manifestly irrational position. Judicial review of whether an agency choice is manifestly irrational requires, at bottom, a discretionary judgment call by the reviewing court – in other words, it requires courts to engage in the kind of practical, reasoned decisionmaking that courts expect of agencies.<sup>18</sup>

Applying the Court’s gloss on the arbitrariness standard, all nine justices concluded that the agency had arbitrarily failed to explain why, rather than abandon MS 208 entirely, the agency did not instead amend it to impose an airbags-only standard.<sup>19</sup> Five justices concluded, more tenuously, that the agency’s assessment of the value of passive safety belts arbitrarily failed to consider the effects of inertia – *i.e.*, that people might be too lazy to detach passive belts even though they do not care to wear them.<sup>20</sup>

In *State Farm*, the agency’s change of position was obvious, and, because MS 208 had not yet been implemented, there were no major reliance concerns to worry about. Many cases reiterate, however, that for a policy change to survive rationality review,

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<sup>16</sup> *Ibid* at 41-42 (citation and quotation marks omitted; italics added).

<sup>17</sup> *Ibid* at 43 (citations omitted).

<sup>18</sup> Cf. Daniel A. Farber & Suzanna Sherry, *Judgment Calls* (New York: Oxford University Press, 2009) at 40-42 (observing that courts, when exercising constrained discretion to implement a vague legal command, should be subject to the same requirements of reasoned decisionmaking as agencies).

<sup>19</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983). [*State Farm*]

<sup>20</sup> *Ibid* at 54.

an agency's explanation must at least acknowledge the fact of change.<sup>21</sup> Also, agencies must assess the significance of any reliance interests to the rationality of that change.<sup>22</sup>

As it relates to *Fox*, one notable aspect of the majority opinion in *State Farm* was its failure to discuss the significance of policy preferences. The majority opinion did recount how NHTSA's approach to passive safety restraints changed as presidents took and left power.<sup>23</sup> None of the justices were born yesterday, and all knew that political preferences were strongly in play. Nonetheless, the majority did not give any express weight to this political history in assessing the legality of NHTSA's abandonment of MS 208. Instead, the majority opinion focused purely on the agency's supposed technocratic failures.

By contrast, Justice Rehnquist, writing for four justices in a partial dissent and partial concurrence, directly addressed the issue of politics in administration. He explained:

The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.<sup>24</sup>

The gist of this passage is that political preferences can provide a sufficient justification for an agency to shift from one reasonable policy to another reasonable policy. This embrace of politics as a justification for deference was not, strictly speaking, inconsistent with the *State Farm* majority's analysis insofar as all the justices would agree that political preferences cannot justify a policy choice with fatal technocratic flaws. Politics can justify a choice among reasonable choices, not unreasonable ones.

There is, nonetheless, a difference in tone between the majority's and Justice Rehnquist's treatment of the role of political preferences. The majority's careful recounting of how the agency's policy ping-ponged back and forth as administrations changed suggests a suspicion that politics was distorting technocratic judgment. On this view, courts should tolerate rather than celebrate the effects of political preferences in agency policy change, and they should demand technocratic, not

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<sup>21</sup> See e.g., *National Cable & Telecomm. Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) (identifying unexplained inconsistency as a reason to condemn an agency interpretation as arbitrary).

<sup>22</sup> *Smiley v. Citibank* (South Dakota), N.A., 517 U.S. 735, 742 (1996)

<sup>23</sup> *State Farm*, *supra* note 19 at 35-38.

<sup>24</sup> *Ibid* at 59 (Rehnquist, J., concurring in part; dissenting in part).

political explanations from agencies.<sup>25</sup> Justice Rehnquist's opinion amounted to a partial rejoinder to the majority's implicit criticism. In essence, he was advising courts to consider that the effects of political preferences on policy change sometimes amount to democracy in action rather than illegitimate distortions of an expert-driven regulatory process.

### B. Review of changes in policy that we put into the "law" pigeonhole

Aspiring Supreme Court justices are required to deny three times ere the rooster crows that construction of vague law requires policymaking (a/k/a lawmaking). American administrative law's *Chevron* doctrine nonetheless recognizes that an agency engages in policymaking when it chooses among reasonable constructions of a statute it administers.<sup>26</sup> Given this recognition, it should not be surprising that the law governing changes in administrative statutory constructions subject to *Chevron* deference bears a striking resemblance to *State Farm*.

When reviewing a federal agency's construction of a statute it administers, a reviewing court must first determine whether to apply *Chevron* deference at all. The metaphysics addressing this point are regrettably confusing, but they largely boil down to the propositions that *Chevron* should apply: (a) where an agency develops a statutory interpretation through legislative rulemaking or formal adjudication; or (b) where, based on the totality of the circumstances, the court concludes it would be reasonable to apply *Chevron's* style of reasonability review.<sup>27</sup>

Where *Chevron* does not apply, courts purport to be in primary charge of determining statutory meaning and will adopt an agency statutory construction only if they find it to be the most "persuasive."<sup>28</sup> This stance would seem to minimize the role of agency political preferences in affecting statutory construction (but might be expected to increase the role of *judicial* political preferences).<sup>29</sup>

<sup>25</sup> Cf. Watts, *supra* note 9 at 5 (noting that *State Farm* "has been read to clarify ... [that] agencies should explain their decisions in technocratic, statutory, or scientifically driven terms, *not* political terms"); Kevin M. Stack, "The President's Statutory Powers to Administer the Laws" (2006) 106 Colum L Rev 263 at 307 n.191 (describing *State Farm* as requiring agencies to "rationalize their decisions in terms of statutory criteria" and blocking agencies from relying on a change in administration as "a sufficient basis for agency action").

<sup>26</sup> See *Chevron*, *supra* note 2 at 843-44 (characterizing ambiguous statutes as implicit delegations of policymaking authority).

<sup>27</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001) (indicating that statutory interpretations produced via formal adjudication or notice-and-comment rulemaking should usually net *Chevron* deference); *Barnhart v. Walton*, 535 U.S. 212 (2002) (indicating that determination of whether *Chevron* deference should apply to a statutory interpretation should be a function of the totality of the relevant circumstances).

<sup>28</sup> *Mead*, 533 U.S. at 234-35 (declaring that courts should apply *Skidmore* deference where *Chevron* is inapplicable; pursuant to *Skidmore*, a court should adopt an agency's statutory construction only if the court finds that construction persuasive).

<sup>29</sup> But perhaps not – see generally William Eskridge & Lauren Baer, "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*" (2008) 96 Geo LJ 1083 at 1142 (concluding, after an extensive survey of the Supreme Court's application of various deference regimes, that the Court's affirmance rates when applying *Chevron* are only about 3% higher than when the Court invokes *Skidmore*).

Where *Chevron* does apply, courts apply its famous two-step (which some insist has only one-step – but let’s not wander too far into the *Chevron* weeds).<sup>30</sup> At the first step, the court checks whether Congress has spoken to the precise statutory question at issue. If Congress has done so, then the court should simply implement Congress’s preferred construction. If not, the court proceeds to the second step and checks whether the agency’s construction was “permissible” or “reasonable.”<sup>31</sup> Commentators have debated for a long time what this second step actually entails, but Professor Ron Levin long ago gave the best answer: Step two checks whether the agency gave a reasoned explanation for its statutory construction.<sup>32</sup> Step two, in short, is *State Farm* – which makes conceptual sense given that *Chevron* recognizes that construction of unclear statutes requires policymaking. (It also makes a kind of historical sense given that *State Farm* was issued in 1983 and *Chevron* was handed down just a year later in 1984).

A quick read of *Chevron* itself confirms this identity. Simplifying somewhat, the statutory issue revolved around figuring out what should count as a “stationary source” subject to extensive permitting requirements. At step one of its *Chevron* analysis in *Chevron* itself, the Court canvassed all the relevant statutory text and legislative history and concluded that Congress had not communicated any clear intent with regard to the precise issue at stake.<sup>33</sup>

Revealingly, much of the Court’s step-two analysis appeared in a subsection of its opinion that was captioned “Policy.”<sup>34</sup> The Court observed that Congress had plainly wanted the agency to give weight both to environmental concerns and to economic concerns as well.<sup>35</sup> In the language of *State Farm*, both concerns were “relevant factors.” The Court then observed that EPA’s rulemaking record demonstrated that the agency had, indeed, given reasoned consideration to both these factors, explaining how adoption of the “bubble concept” might actually have positive environmental effects and be more economically efficient.<sup>36</sup> In the language of *State Farm*, the agency had not made a “clear error in judgment” in striking this policy balance.

On the way to affirming the agency, the Court minimized the importance of the fact that the agency had repeatedly changed its mind about the meaning of “stationary source.”<sup>37</sup> It is an easy matter to find Supreme Court cases indicating that courts should be quicker to defer to consistent agency statutory constructions.<sup>38</sup> This

<sup>30</sup> Matthew Stephenson & Adrian Vermeule, “*Chevron* Has Only One Step” (2009) 95 Va L Rev 597; but see Kenneth A. Bamberger & Peter L. Strauss, “*Chevron*’s Two Steps” (2009) 95 Va L Rev 611.

<sup>31</sup> *Chevron*, *supra* note 2 at 842-43.

<sup>32</sup> Ronald M. Levin, “The Anatomy of *Chevron*: Step Two Reconsidered” (1997) 72 Chicago-Kent L Rev 1253 at 1254 (suggesting courts regard step two and arbitrariness review as “identical”); Mark Seidenfeld, “A Syncopated *Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes” (1994) 73 Tex L Rev 83 at 128-29 (arguing that step two should require an agency to “explain why its interpretation is good policy in light of the purposes and concerns underlying the statutory scheme”).

<sup>33</sup> *Chevron*, *supra* note 2 at 859-64.

<sup>34</sup> *Ibid* at 864.

<sup>35</sup> *Ibid* at 863.

<sup>36</sup> *Ibid* at 863-64.

<sup>37</sup> *Ibid*.

<sup>38</sup> For cases in which the Court seemed inclined to apply a somewhat stronger form of stare decisis to agency statutory constructions than *Chevron* contemplates, see e.g. *NLRB v. Bell Aerospace*

proposition suggests that courts should review agency flip-flops with a sharper eye. The *Chevron* Court nonetheless advised that initial agency statutory constructions are “not instantly carved in stone” and stressed that agencies in fact *should* change their statutory constructions to fit new learning.<sup>39</sup>

In justifying its deferential approach to EPA’s flip-flop, the Supreme Court invoked both technocratic and political concerns that are utterly familiar in judicial review of agency policymaking. Courts should defer to agencies because they are the experts – EPA, not a federal judge, knows how to make the *Clean Air Act* work.<sup>40</sup> Courts should also defer to agencies because they are answerable to elected officials.<sup>41</sup>

Some have noted a tension between *State Farm* and *Chevron* with regard to the proper role of political preferences in agency policymaking. The gist of this critique is that *Chevron* expressly admits that political accountability justifies deference to political preferences, whereas the majority in *State Farm* – unlike Justice Rehnquist – insisted on framing review in purely technocratic terms.<sup>42</sup> This tension dissolves to some extent when one remembers that in *State Farm* the justices did not need to offer any special justification for deferring on an issue that everyone recognized fell into the “policy” pigeonhole. After all, everyone knows that judicial deference is in order on matters of agency policy. In *Chevron*, by contrast, the justices needed to explain why they were ceding interpretive authority on an issue denominated as “law.” Thus, the *Chevron* Court had a reason to invoke the justification of political accountability that the *State Farm* majority lacked. Still, it remains the case that *Chevron*, unlike the majority in *State Farm*, actively embraced political accountability (and thus political preferences) as a basis for deference.

### III. ALONG COMES A FOX

In 2009, *FCC v. Fox Television Stations, Inc.* gave the justices a vehicle for revisiting the role of political preferences in administration and the meaning of *State Farm*. Five justices in writings scattered across three opinions expressed concerns about undue politicization in *Fox*.<sup>43</sup> The four most conservative justices, led by Justice Scalia, did not seem to harbour such doubts.<sup>44</sup>

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*Co.*, 416 U.S. 267 at 274-75 (1974) (noting that “a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration”); *United States v. Chicago, North Shore & Milwaukee R.R. Co.*, 288 U.S. 1 at 13 (1933) (stating “the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons”); *United States v. Finell*, 185 U.S. 236 at 244 (1902) (holding that, in case of “doubt,” the longstanding interpretation of “the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons”); *Edward’s Lessee v. Darby*, 25 U.S. (12 Wheat) 206 at 210 (1827) (“In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.”).

<sup>39</sup> *Chevron*, *supra* note 2 at 863.

<sup>40</sup> *Ibid* at 865.

<sup>41</sup> *Ibid*.

<sup>42</sup> See e.g. Watts, *supra* note 9 at 38-39 (noting that *Chevron* actively embraced a political-control model for legitimating agency action whereas *State Farm*-style hard-look review “continues to insist on technocratic rather than political decisionmaking when it comes to agencies’ reason-giving duties”).

<sup>43</sup> See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring) (policy changes must rest on principles that are “rational, neutral, and in accord with the agency’s proper understanding of its authority”); *ibid* at 1825-26 (Stevens, J.) (stressing that Congress wished broadcast

The *Fax* matter arose out the FCC's efforts to carry out its thankless statutory mission of blocking the broadcast of "indecent" language. Decades ago, the FCC interpreted the statutory term "indecent" to cover:

language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, at times of the day when there is a reasonable risk that children may be in the audience.<sup>45</sup>

In the 1978 case of *FCC v. Pacifica Foundation*, a fractured Supreme Court rejected a First Amendment challenge to the use of this interpretation to sanction a broadcaster for airing George Carlin's *Filthy Words* monologue.<sup>46</sup> The narrow majority made much of the fact that Carlin's monologue repeated seven especially bad words over and over again.<sup>47</sup>

After *Pacifica*, the FCC, aware that it was operating in sensitive First Amendment territory, adopted an enforcement policy under which it declined to bring actions against broadcasters for "fleeting expletives." Under this policy, a broadcaster did not need to worry for its pocketbook or its license if an interviewee during a live broadcast suddenly made quick, non-literal use of a bad word.<sup>48</sup>

But then came Bono, Cher, and Nicole Richie. Bono, terrifically pleased to win a Golden Globe for the music for *Gangs of New York*, described the experience as "f\*\*\*\*\* brilliant" during NBC's live broadcast of the award ceremony.<sup>49</sup> During a live broadcast of the 2002 MTV Music Awards, Cher, displeased by critics who had suggested for some decades that her career was over, suggested that it would be good to "f\*\*\*em."<sup>50</sup> Nicole Richie, during a live broadcast of the 2003 MTV Music Awards, advised audience members that it is "not so f\*\*\*\*\* simple" to get "s\*\*\*" out of a Prada purse<sup>51</sup> – which is probably true but also not a nice thing to say with several million children watching.

These outbursts prompted two congressional subcommittee hearings during January and February 2004 at which various members of Congress raked the Commission over the coals for failing to enforce the indecency ban. Of special note, at the January meeting, members specifically advised the Commission to overturn a

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regulation "should be as free from political influence or arbitrary control as possible"); *ibid* at 1829 (Breyer, J., dissenting; joined in pertinent part by Justices Stevens, Kennedy, Ginsburg, and Souter) (insisting that independent agencies may not make decisions based on "purely political reasons").

<sup>44</sup> See generally *ibid* at 1812-13 (explaining, in just a few paragraphs, that the FCC had given a reasoned explanation for abandoning the fleeting expletives policy).

<sup>45</sup> *Pacifica Foundation*, 56 F.C.C.2d 94, 98 (1975).

<sup>46</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

<sup>47</sup> *Ibid* at 729 & 751-55 (emphasizing that Carlin repeated his offending words over and over again); see also *ibid* at 757 (Powell, J., concurring) (describing Carlin monologue as "verbal shock treatment").

<sup>48</sup> See *Fax*, *supra* note 43 at 1807 (explaining evolution of FCC's fleeting expletives policy).

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* at 1808.

<sup>51</sup> *Ibid*.

ruling by its enforcement staff that NBC was not liable for Bono's "f\*\*\*\*\* brilliant" remark.<sup>52</sup>

Most dogs, if you kick them hard enough, will move. In March 2004, the full Commission reversed its staff and concluded that the Bono broadcast had violated the indecency ban.<sup>53</sup> The Commission held that the fleeting nature of Bono's remark was not dispositive because allowing this type of safe harbour would "likely lead to more widespread use" of bad words.<sup>54</sup> Such an outcome would mark a failure to "safeguard the well-being of the nation's children from the most objectionable, most offensive language."<sup>55</sup> The Commission added that Bono's non-iteral use of his offending word was immaterial given that any use of the "F-Word ... inherently has a sexual connotation."<sup>56</sup> The broadcast was patently offensive because the "F-Word," alas, "is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language."<sup>57</sup> Notwithstanding its conclusion that the Bono broadcast was indecent, however, the Commission declined to sanction NBC because "existing precedent [governing fleeting expletives] would have permitted this broadcast."<sup>58</sup>

In a later order, the Commission gave a similar treatment to Fox's broadcasts of the Cher and Nicole Richie remarks.<sup>59</sup> In this order, the FCC described its fleeting expletives policy as a product of staff rulings and Commission dicta.<sup>60</sup> It made clear that, going forward, there would be no safe harbour for fleeting expletives, though a lack of repetition would weigh against a finding of indecency.<sup>61</sup>

Various broadcasters petitioned for review, claiming that: (a) the new policy violated the First Amendment; and (b) the policy change was arbitrary under the *Administrative Procedure Act*. The Second Circuit ruled for the broadcasters on the statutory ground and declined to reach the constitutional issue.<sup>62</sup>

As mentioned above, the Supreme Court by a 5-4 vote reversed the Second Circuit's conclusion that the FCC had failed to offer a reasoned justification for its action.<sup>63</sup> In addition to dividing sharply over the sufficiency of the agency's explanation, the justices also clashed over the general nature of arbitrariness review as applied to agency policy shifts.

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<sup>52</sup> See "Can You Say That On TV?": An Examination of the FCC's Enforcement with respect to Broadcast Indecency, Hearing before the Subcommittee on Telecomm. and the Internet of the House Committee on Energy and Commerce, 108<sup>th</sup> Cong., 2d Sess., 2, 17, 19 (Jan. 28, 2004). See generally *Fox*, *supra* note 43 at n.4 (discussing pressure inflicted by members of Congress on the FCC at the Jan. 28 hearing as well as at a Feb. 11, 2004 hearing held by the same subcommittee).

<sup>53</sup> *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4978-80 (2004).

<sup>54</sup> *Ibid* at 4979, para. 9.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid* at 4978, para. 8.

<sup>57</sup> *Ibid* at 4979, para. 9.

<sup>58</sup> *Ibid* at 4981-82, para. 15.

<sup>59</sup> *In re Complaints Regarding Various Television Broadcasts Between February 2 2002, and March 8, 2005*, 21 FCC Rcd. 13299 (2006) (hereinafter, "Remand Order").

<sup>60</sup> *Ibid* at 13307, para. 21.

<sup>61</sup> *Ibid* at 13325, para. 61.

<sup>62</sup> *FCC v. Fox Televisions Stations, Inc.* 489 F.3d 444 (2d Cir. 2008), *rev'd by* 129 S. Ct. 1800 (2009).

<sup>63</sup> *Fox*, *supra* note 43.

### A. Justice Breyer's majority opinion

Of the six opinions issued in *Fox*, Justice Breyer's opinion appears last and is denominated as a dissent. Justice Kennedy, however, joined Justice Breyer's discussion of the proper framework for arbitrariness review of agency policy shifts, which thus attracted a majority vote.<sup>64</sup>

Near the opening of his opinion, Justice Breyer contended that, although independent administrative agencies have broad policymaking authority, they may not lawfully "make policy choices for purely political reasons nor ... rest them primarily upon unexplained policy preferences."<sup>65</sup> Particularly at an agency such as the FCC, which is led by commissioners who serve fixed terms of office, are insulated from political control, and are not answerable to the voters, "it [is] all the more important that courts review [agency] decisionmaking to assure compliance with applicable provisions of the law – including law requiring that major policy decisions be based on articulable reasons."<sup>66</sup>

Implementing the duty of reasoned decisionmaking typically requires more from an agency when it abandons an old policy in favor of a new one than when the agency starts from a clean slate. Justice Breyer explained:

To explain a change requires more than setting forth reasons why the new policy is a good one. It also requires the agency to answer the question, "Why did you change?" And a rational answer to this question typically requires a more complete explanation than would prove satisfactory were change itself not at issue. An (imaginary) administrator explaining why he chose a policy that requires driving on the right-side, rather than the left-side, of the road might say, "Well, one side seemed as good as the other, so I flipped a coin." But even assuming the rationality of that explanation for an initial choice, that explanation is not at all rational if offered to explain why the administrator changed driving practice, from right-side to left-side, 25 years later.<sup>67</sup>

Justice Breyer insisted that requiring an agency to answer the "Why change?" question did not impose a "heightened" standard of arbitrariness review; nor did it require an agency to demonstrate that its new policy was "better" than the old one. Instead,

the law requires application of the *same standard* of review to different circumstances, namely circumstances characterized by the fact that *change* is at issue. It requires the agency to focus upon the fact of change where change is relevant, just as it must focus upon any other relevant circumstance. It requires the agency here to

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<sup>64</sup> See *ibid* at 1822 (Kennedy, J., concurring).

<sup>65</sup> *Ibid* at 1829 (Breyer, J., dissenting).

<sup>66</sup> *Ibid* at 1830 (Breyer, J., dissenting).

<sup>67</sup> *Ibid* at 1830-31 (Breyer, J., dissenting).

focus upon the reasons that led the agency to adopt the initial policy, and to explain why it now comes to a new judgment.<sup>68</sup>

Applying this standard, an agency that wishes to abandon an old policy that was based on a particular view of the facts, applicable law, or special policy concerns, should explain why these factors are no longer controlling.

Although he seemed intent on minimizing the role of political preferences in policymaking, Justice Breyer did concede, “*sometimes* the ultimate explanation for change may have to be, ‘We now weigh the relevant considerations differently.’”<sup>69</sup> Leaving room for agencies to “weigh” unchanged circumstances differently opens the door to political (i.e., value) preferences to come into play. For instance, one might think that this approach would allow FCC Commissioners who particularly dislike bad language to justify abandoning the fleeting expletive policy by declaring something like: “Given that bad language is bad for kids, we don’t think our old policy offers enough protection.”

Justice Breyer’s application of his framework to the FCC in *Fox*, however, suggests that he has a more potent form of review in mind. For instance, as part of its justification for abandoning the fleeting expletives policy, the FCC indicated that it wished to protect children from the “first blow” of profanity.<sup>70</sup> Justice Breyer contended that the “difficulty with this argument ... is that it does not explain the *change*” given that the FCC “has long used the theory of the ‘first blow’ to justify its regulation of broadcast indecency.” He queried: “What, in respect to the ‘first blow,’ has changed?”<sup>71</sup> The short, implicit answer to his question would seem to be that the FCC now “weighs” this consideration differently. It seems fair to hazard, however, that the agency could not have satisfied Justice Breyer by committing to paper a justification something like, “We at the FCC worry a lot more about ‘first blows’ than we used to a couple of decades ago. We can’t imagine what we were thinking back then.”

In sum, Justice Breyer’s approach to the role of political preferences in administrative policy changes seems ambivalent (which, by the way, is both wise and appropriate). He holds to the view that independent regulatory agencies should base their policy choices on technocratic rather than “unexplained” political preferences. Knowing that political concerns cannot sensibly be squeezed out the system, he acknowledges that agency views regarding how to “weigh” relevant considerations may evolve and that this evolution may be reflected by policy changes. His application of his framework to the FCC, however, seemed to give no weight to the agency’s changed views of the significance of controlling the broadcast of bad language.

## B. Justice Scalia’s conflicting majority opinion

Justice Scalia and Justice Breyer agree with regard to many of the basics of arbitrariness review. For instance, both claim that an agency change in policy does not trigger a “heightened” standard of review – contrary to any Court of Appeals

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<sup>68</sup> *Ibid* at 1831 (Breyer, J., dissenting). [Emphasis in original]

<sup>69</sup> *Ibid* at 1831. [Emphasis in original]

<sup>70</sup> “Remand Order”, *supra* note 59 at 13309, para. 25.

<sup>71</sup> *Fox*, *supra* note 43 (Breyer, J., dissenting).

intimations to the contrary.<sup>72</sup> Both agree that an agency must acknowledge its policy shifts and take into consideration any reliance interests an old policy may have engendered.<sup>73</sup> On either justices' approach, an agency that bases a policy change on a new understanding of the relevant facts must explain how its views have evolved and why they justify a new policy.<sup>74</sup>

The two justices part company, however, with regard to: (a) the proper role of political preferences in policy change; and (b) how this role affects the agency's duty to answer the "Why change?" question. The short of the matter is that Justice Scalia and his fellow conservatives believe that political preferences may justify any agency choice among reasonable alternatives. In a portion of his opinion that five justices (including Justice Kennedy) joined, he explained:

[O]f course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.<sup>75</sup>

Suppose a reasonable FCC might adopt a safe harbour approach to fleeting expletives or it might not. If both choices are "reasonable" – whatever exactly that means – then the FCC gets to choose which it "believes" to be better. The agency need not explain why it believes this choice to be better – which, on some level, may be no more possible than explaining why one prefers chocolate ice cream to strawberry.

Justice Scalia's framework thus rejects Justice Breyer's contention that an agency must explain why it prefers a new (reasonable) policy over an old (reasonable) policy.<sup>76</sup> On examination, however, the scope of this disagreement seems rather small. All justices expect an agency to provide reasons for any significant policy choice. Where an agency policy change is motivated by changed factual or legal considerations, the agency must say so on any view as part of giving a reasoned explanation.<sup>77</sup> The doctrinal difference between Justices Scalia and Breyer in *Fox* therefore reduces to how they treat agency decisions to change policy in the absence of any noteworthy change to any relevant considerations of fact or law. In other words, the difference revolves around treatment of policy choices based on evolving political preferences in the absence of any technocratic cover.

Even in this narrow context, moreover, the difference is more one of tone than of doctrine. Justice Scalia believes that an agency need not explain why it "believes" one

<sup>72</sup> *Ibid* at 1810-11 (Scalia, J.); *ibid* at 1831 (Breyer, J., dissenting).

<sup>73</sup> *Ibid* at 1811 (Scalia, J.); *ibid* at 1830 (Breyer, J., dissenting).

<sup>74</sup> *Ibid* at 1811 (Scalia, J.) (declaring that an agency making a policy shift must explain reliance on factual findings that contradict those upon which its prior policy was based); *ibid* at 1831 (Breyer, J., dissenting) (declaring that "one would normally expect the agency to focus upon those earlier views of fact, of law, or of policy and explain why they are no longer controlling").

<sup>75</sup> *Fox*, *supra* note 43.

<sup>76</sup> See *ibid* at 1830-32 (Breyer, J., dissenting) (elaborating on the "Why change" requirement).

<sup>77</sup> *Ibid* at 1811 (Scalia, J.); *ibid* at 1831 (Breyer, J., dissenting).

reasonable policy choice is “better” than another – it is enough that they are both reasonable. Justice Breyer, by contrast, expects an agency to confess on the record where the reason for a policy change is simply, “We now weigh the relevant considerations differently.”<sup>78</sup> Either approach ostensibly leaves room for political preferences to influence choice. Turning to tone, however, Justice Scalia’s opinion in *Fox*, like the majority opinion in *Chevron* or Justice Rehnquist’s opinion in *State Farm*, demonstrates that the four most conservative justices of the current Court deem this role of politics in administration to be perfectly satisfactory. The remaining five, led by Justice Breyer, seem more inclined to regard the role of political preferences in administration as a necessary evil to be exposed and minimized rather than celebrated.

#### IV. GOOD JUDGMENT AND CONTROL OF POLITICS

Having dissected *Fox* for a bit, this essay will close by suggesting an alternative way of thinking about the problem of political preferences in administrative policymaking. To start, it is obviously impossible for agencies to implement vague, indeterminate mandates without any regard to political or value preferences. The American system’s decision to allocate control over agencies to political appointees accentuates the role of political preferences in administration and suggests that we regard this role as broadly acceptable.

At what point, however, does the effect of political preferences on administration become excessive? To answer this question, it may be helpful to consider the nature of agency decisionmaking and judicial review. Agencies make policies in response to some perceived problem that suggests some range of policy responses. For instance, if there is evidence suggesting that carbon dioxide emissions are harming the planet, an environmental agency may explore potential efforts to curb these emissions. The agency will gather and assess information that seems relevant to this task (*e.g.*, data concerning past temperatures, ocean currents, ice sheets, etc.). Among other influences, the agency’s political preferences will affect what it chooses to investigate and how it assesses what it finds out.

In any mildly complex context, the agency’s findings will not compel a particular and specific policy response as a matter of logic. For instance, confirming that carbon dioxide emissions are warming the planet in a dangerous way may compel the conclusion that emissions should be reduced, but this information does not compel specific responses with regard to the precise level of reductions, their timing, nor their acceptable expense. The agency’s findings will, however, provide grist for practical, intuitive judgments – which the agency’s political and value preferences must affect – regarding these specifics. In short, just as administrative law expects, the agency should investigate and consider the “relevant factors,” and, having done so, exercise *good* judgment regarding what to do about them.

When courts review an agency policy choice for arbitrariness, they are supposed to check whether the agency: (a) thought about what it was supposed to think about in fashioning its policy; and (b) made a “clear error” in judgment. Both of these inquiries require judges to make practical, intuitive judgments that are inevitably subject to a judge’s own political preferences – an effect well-illustrated by studies

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<sup>78</sup> *Ibid* at 1831 (Breyer, J., dissenting).

showing that conservative judges have a greater tendency to find liberal policies arbitrary and vice versa.<sup>79</sup> Indeed, one justification for judicial deference to agency decisionmaking is that a deferential attitude should, in theory at least, help minimize the illegitimate force of such *judicial* political preferences.<sup>80</sup>

Another reason courts are supposed to defer to agency policy choices, however, is that agencies are supposed to be experts. The EPA should know a great deal more about environmental policy than the courts; the FCC should know more about telecommunications policy, etc. Especially in complex, technical contexts, this information asymmetry can make it difficult for courts to assess the correctness of agency action. Therefore, just as I generally defer to my doctor's expert choice of treatment for whatever ails me, so also courts should defer to agency expert policy choices.

I am less likely to be so trusting of my doctor's recommendation of a test, however, if I know she stands to make a great deal of money from it. In this circumstance, I will respond to the expert's conflict of interest by tending to rely on my own judgment to a greater degree. I may ask more questions about the test; I might ask about other alternatives with greater urgency; I might even be more inclined simply to reject the doctor's advice altogether.

This common-sense reaction translates neatly enough into the realm of judicial review. There is, in short, less reason for courts to be trusting of agency expert judgment where there are grounds for concluding that the agency's policy choice is strongly subject to potential distortion from political preferences or pressure. In such a situation, it makes sense for a judge to probe more deeply into whether the agency has, indeed, adequately investigated, considered, and assessed all of the relevant factors or reached, at the end of the day, a "reasonable" policy judgment that avoids any "serious error" in judgment.

This prescription seems to fit Justice Breyer's behavior in *Fox* rather well. As Justice Scalia himself made plain, the FCC was in hot water with members of Congress with oversight power over the agency.<sup>81</sup> One way out of this hot water was to find NBC and Fox liable for the "fleeting expletives" uttered by Bono, Cher, and Nicole Richie. Sure enough, the agency soon abandoned the "fleeting expletives" policy. Under this circumstance, it made perfect sense for Justice Breyer to press hard on the agency's technocratic explanation for the change – querying, for instance, whether the agency had adequately explored empirical literature on the effects of profanity on young children or whether the agency had given short shrift to the concerns of local broadcasters who might have less technical ability than major corporations to control accidental broadcasts of fleeting expletives.<sup>82</sup>

At least in the context of judicial review, the answer to controlling political preferences in policymaking may not lie so much in fashioning new doctrines or frameworks that might well be easy to manipulate and confusing (*cf.*, our good friend

<sup>79</sup> See Thomas J. Miles and Cass R. Sunstein, "The Real World of Arbitrariness Review" (2008) 75 U Chicago L. Rev 761 at 777, 788.

<sup>80</sup> For which we may as well cite *Chevron*, *supra* note 2 at 837, 865 (noting that agencies, unlike federal judges, are answerable to elected officials).

<sup>81</sup> See generally *Fox*, *supra* note 43 at 1816 n.4 (collecting quotes from congressional subcommittee hearings at which members of Congress grilled FCC Commissioners for failing to enforce the indecency ban).

<sup>82</sup> *Ibid* at 1835-37, 1839 (Breyer, J., dissenting).

the *Chevron* doctrine). Rather, the appropriate judicial response may lie in cultivating a somewhat less trusting and more suspicious “mood” when reviewing agency actions subject to hot-button political preferences and pressure.<sup>83</sup>

It bears noting that it is precisely when courts review agency policy changes intertwined with hot-button political preferences that *judges* are most likely to be influenced by *their own* strong preferences – surely Justice Scalia’s and Justice Breyer’s attitudes toward FCC control of indecent broadcasts had *something* to do with their contrasting approaches in *Fox*. Judges with good judicial temperaments should be self-aware enough to try to minimize this problem but obviously cannot eliminate it. Still, even though judges should try to curb the role of their own politics in judicial review, it is only reasonable for them to take notice of the role of politics in agency decisionmaking.

#### IV. CONCLUSION

The leading cases in American administrative law on the subject of judicial review of agency policymaking – which include *State Farm*, *Chevron*, and now perhaps *Fox* – indicate a certain judicial ambivalence about the proper role of agency political preferences in policy change. Ambivalence is an appropriate response given that it is perfectly appropriate and inevitable that political preferences affect policy change but not good at all where such influence becomes excessive. Agency policymaking must partake of politics, but it should also be constrained by expertise and law.<sup>84</sup> At bottom, finding the right balance between politics and expertise must be a function of a type of sound judgment that is not easily captured in an all-encompassing, abstract doctrine.

In *Fox* itself, the two leading administrative law scholars of the United States Supreme Court, Justices Scalia and Breyer, dueled over how judicial review should control political preferences. For Justice Scalia, the answer is simple – an agency can follow its politics and values where they lead provided that the agency comes up with a “reasonable” explanation for its policy change. The agency need not explain how its political preferences drove it to choose one reasonable possibility over another. Justice Breyer, by contrast, seeks to control the role of political preferences by forcing agencies to answer the “Why change?” question in a way that may force agencies to “confess” when they are motivated by politics rather than expertise.

This brief essay suggests that one good, honest way forward would be to combine Justice Scalia’s simple framework with Justice Breyer’s suspicious attitude. In short, it is perfectly reasonable for courts, when exercising the discretionary judgment needed to apply arbitrariness review, to eye agency policy changes with more suspicion where there are grounds for thinking that the agency’s judgment was distorted by strong political preferences. The right judicial response to concerns over excessive administrative politicization may be to embrace a mood, not new doctrine.

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<sup>83</sup> *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (Frankfurter, J.) (explaining that the APA expressed a congressional expectation that courts adopt a tougher “mood” when reviewing agency factual findings).

<sup>84</sup> *Cf. Strauss, supra* note 9, at 985 (“The issue is mediating between politics and law – recognizing the strengths and weaknesses of each and finding ways of promoting their proper contribution – rather than pretending to locate the practice at either pole.”).



## THE ELUSIVE SEARCH FOR ACCOUNTABILITY: EVALUATING ADJUDICATIVE TRIBUNALS<sup>±</sup>

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*Evaluating the success of adjudicative tribunals is an important but elusive undertaking. Adjudicative tribunals are created by governments and given statutory authority by legislatures for a host of reasons. These reasons may and often do include legal aspects, policy aspects and partisan aspects. While such tribunals are increasingly being asked by governments to be accountable, too often this devolves into publishing statistics on their caseload, dispositions, budgets and staffing. We are interested in a different and more basic question – are these tribunals successful? How do we know, for example, whether the remedies ordered by a tribunal actually do advance the purposes for which it was created? Can the success of an adjudicative tribunal be subject to meaningful empirical validation? While issues of evaluation and accountability cut across national and jurisdictional boundaries, the authors argue that this type of question can only be addressed empirically, by actually looking to the practice of a particular board or boards, in the context of a particular statute or statutes, and in particular jurisdictions at particular times. Such accounts can and should form the basis for comparative study. Only through comparative study can the value and limitations of particular methodologies become apparent. This study takes as its case study the role of adjudicative tribunals in the health system. The authors draw primarily from Canadian tribunal experience, though examples from other jurisdictions are used to demonstrate the potential of empirical evaluation. The authors discuss the relative dearth of empirical study in administrative law and argue that it ought to be the focus of the discussion on accountability in administrative justice.*

*Évaluer le succès de tribunaux qui tranchent des litiges est une entreprise importante mais difficile à effectuer. Les tribunaux qui tranchent des litiges sont créés par des gouvernements et dotés de pouvoir légal par des législatures pour une multitude de raisons. Ces raisons peuvent inclure des aspects légaux, des aspects liés à des politiques et des aspects partisans ce qui est souvent le cas. Pourquoi les gouvernements demandent de plus en plus à de tels tribunaux de*

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*rendre compte, trop souvent, ceci se réduit à la publication de statistiques sur le nombre de cas traités, leurs dispositions, les budgets et le personnel. Une question différente et plus fondamentale nous intéresse – ces tribunaux réussissent-ils? Comment savons-nous, par exemple, si les recours ordonnés par un tribunal font en fait avancer les objectifs pour lesquels il a été créé? Le succès d'un tribunal qui tranche des litiges peut-il faire l'objet de validation empirique significative? Quoique les questions d'évaluation et du devoir de rendre compte traversent des frontières entre nations et champs de compétence, les auteurs soutiennent que ce genre de question ne peut être traité qu'empiriquement, en examinant en fait les pratiques d'un conseil ou de conseils particuliers, dans le contexte d'une loi ou de lois particulières et dans des sphères de compétence particulières à des moments particuliers. De tels comptes rendus peuvent et devraient constituer la base d'étude comparative. Seule l'étude comparative peut faire ressortir la valeur et les limites d'une méthodologie particulière. L'étude de cas choisie pour la présente étude est le rôle de tribunaux qui tranchent des litiges dans le système de santé. Les auteurs puisent surtout dans l'expérience de tribunaux canadiens, quoique des exemples tirés d'autres territoires de compétence soient utilisés pour démontrer le potentiel de l'évaluation empirique. Les auteurs discutent de la pénurie relative d'étude empirique dans le domaine du droit administratif et soutiennent que là devrait être le point central de la discussion du devoir de rendre compte dans le domaine de la justice administrative.*

## I. INTRODUCTION

Evaluating the success of adjudicative tribunals, like accountability itself, is an important but elusive undertaking. Adjudicative tribunals are created by governments and given statutory authority by legislatures for a host of reasons. These reasons may and often do include legal aspects, policy aspects and partisan aspects. While such tribunals are increasingly being asked by governments to be accountable,<sup>1</sup> too often this devolves into publishing statistics on their caseload, dispositions, budgets and staffing. We are interested in a different and more basic question – are these tribunals successful? How do we know, for example, whether the remedies ordered by a tribunal actually do advance the purposes for which it was created? Can the success of an adjudicative tribunal be subject to meaningful empirical validation? This is the question we attempt to explore.

While issues of evaluation and accountability cut across national and jurisdictional boundaries, we believe this question can only be addressed by looking to the practice of a particular board or boards, in the context of a particular statute or statutes, and in particular jurisdictions. Such accounts can (and, in our view, should) then form the basis for comparative study. Only through comparative study can the value and limitations of particular methodologies become apparent.

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<sup>1</sup> See for e.g. the paper presented by Laverne Jacobs on the new Ontario tribunal legislation for the Administrative Law Discussion Forum (Quebec City) (May 25-26, 2010), “A Wavering Commitment? Administrative Independence and Collaborative Governance in Ontario’s Adjudicative Tribunals Accountability Legislation” (2010) 26:2 Windsor YB Access Just.

This study takes as its case study the role of adjudicative tribunals in the health system, but the concern for evaluation could be applied just as easily to a variety of administrative, policy or operational spheres. While we draw primarily from Canadian tribunal experience, the literature in this field is primarily American, British and Australian. Not only does this literature derive from several jurisdictions, it also is as likely to arise from sociologists, political scientists and health policy experts as from lawyers and legal scholars. Our hope is that this brief analysis stimulates discussion across both academic and national boundaries, and specifically within the administrative law community.

Adjudicative tribunals were established in order to play an important role in the health sector, yet their actual influence as part of the health system remains largely unknown.<sup>2</sup> Most evaluations of their work have focused on internal measures of accountability and independence rather than external indicators of societal impact. When their effectiveness is examined, evaluators tend to utilize anecdotes from various experts and stakeholders rather than rigorous empirical data. As efforts to reform health systems continue both within Canada and internationally, it will be increasingly important to understand the benefits, costs and implications of adjudicative tribunals for providers and consumers of health care services as well as the institutional structures on which they rely.

In this context, empirical evaluations represent an opportunity to inform policymaking through better understanding the impact of adjudicative tribunals on the health system. Empirical research includes quantitative and qualitative investigations on the effects of tribunal processes and decision-making on economic, social or health outcomes.<sup>3</sup> Empirical study designs range from experimental (e.g., randomized controlled trials, interrupted time-series studies, etc.) to observational (e.g., cohort, case-control and cross-sectional studies), with data often gathered from surveys, interviews, focus groups, statistical inventories, performance data or documentary analyses.

Empirical research certainly is not new to the health sphere but it is less common in adjudicative settings and rarer still in the context of administrative justice. That said, interest in empirical research in this aspect of the health system is on the rise.<sup>4</sup> In addition to these general challenges faced by all empirical legal researchers, any attempt to evaluate the impact of a health-related adjudicative tribunal faces additional hurdles. Not only has such an assessment never before been comprehensively undertaken, but the most suitable research methodology to do so remains highly elusive. Much of empirical health research, for example, relates to patient outcomes and the costs associated with achieving these outcomes. In the setting of adjudicative tribunals, these metrics may not apply. A proceeding before a health tribunal may take place after the outcome for the patient already has occurred,

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<sup>2</sup> Adjudicative tribunals may be defined in a number of ways. This category could include: (1) any administrative body engaged in adjudication, including regulatory bodies whose principle function is policymaking but who also engage in adjudication; (2) both administrative and judicial bodies which engage in adjudication; or (3) only those bodies whose primary or only function is adjudication. R. Ellis, *Executive Branch Justice: Canada's "Official Courts"* (Ph.D. Dissertation, Osgoode Hall Law School, York University, 2009) [unpublished] at 77.

<sup>3</sup> M.M. Mello & K. Zeiler, "Empirical Health Law Scholarship: The State of the Field" (2008) 96 *Geo. LJ* 649.

<sup>4</sup> *Ibid.*

or at a time when the outcome is unlikely to have any impact on patient outcome. For this reason, the tribunals in fact may impose additional costs on the health system without directly yielding improved health outcomes. While those additional costs may well lead to better practices and procedures on the part of other actors in the health system (e.g., regulatory colleges, insurance plans, hospitals), or enhance public confidence in the accountability of the health system, this type of benefit is indirect, may only become apparent over time, and is inherently difficult to measure.

Distinctions in statutory mandate and the absence of clear statutory language setting out the purposes of adjudicative tribunals may leave no final target outcomes against which services can be evaluated. Further, as creatures of statute that serve quasi-judicial functions, adjudicative tribunals sit at the intersection of the legal and health worlds. These tribunals operate within these two paradigms – a dichotomy of process and outcomes – whose goals may sometimes diverge. Indeed, these administrative bodies are expected to preserve the legal focus on process, fairness and individual-level dispute resolution while at the same time working to improve health-related outcomes by enhancing the overall effectiveness of the health system.<sup>5</sup> The tension between a process and a substance based mandate presents distinct challenges for empirical evaluation. The complex co-dependence and interconnectedness of these tribunals with the health system's constituent elements ensure that simple appraisal techniques cannot be effectively utilized. To the extent that adjudicative tribunals have an impact on the health system, it is likely to be linked to a host of other variables. The fact that evaluation is not easy, however, does not detract from its importance.

Despite these benefits, the evaluation and accountability of adjudicative tribunals is one of the least scrutinized areas of administrative law.<sup>6</sup> The topic necessarily engages the issue of administrative independence, the statutory environment within which all adjudicative tribunals operate, the policy priorities of government which fund tribunals, the complexity of the health system, and the role of the court in supervising health-related adjudicative tribunals through the mechanisms of judicial review. Evaluating impact in the health sector is also necessarily a contextual exercise. As Peter Cane observed in the administrative law context, “the impact of judicial review needs to be studied in a contextualised way by reference to judicial review's objectives and functions. Also, it should not be assumed that, when we discuss the impact of judicial review, we are all talking about impact of the same thing or, at least, of a single institution with a single set of objectives and functions.”<sup>7</sup> A similar approach is necessary for health-related adjudicative tribunals but has never been systematically followed.

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<sup>5</sup> While this process-outcomes dichotomy between the legal and health worlds is certainly evident when comparing their respective research literature, it is important to recognize that both types of work are conducted within both realms. Mello and Zeiler, *ibid.* for example, highlight several socio-legal studies that gathered outcome-related data, and health researchers frequently address questions of ethics and resource allocation that are more procedural in nature.

<sup>6</sup> See the discussion of the study of tribunals in Peter Cane, *Administrative Tribunals and Adjudication* (London: Hart, 2009), ch. 1

<sup>7</sup> *Ibid.* M. Sunkin, “Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies” in M. Hertogh & S. Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge, UK: Cambridge University Press, 2004) 43.

This paper aims to explore the context, challenges and opportunities for empirically evaluating the impact of adjudicative tribunals in the health sector. First, we discuss the purpose, function and importance of these bodies within the health system, including their statutory mandates and policy goals. Second, we examine the various ways in which their performance could potentially be assessed and will justify why there is a need to develop empirical approaches for the assessment of adjudicative decision-making. Third, we identify the barriers to evaluating the impact of adjudicative tribunals. Finally, based on this analysis, we explore the path forward for the empirical assessment of adjudicative decision-making.

The focus of this analysis is on Ontario's two adjudicative health tribunals in Canada, the Ontario Health Professions Appeal and Review Board [HPARB] and the Health Services Appeal and Review Board [HSARB]. Both HPARB and HSARB have statutory mandates to review important health decisions that intimately affect the lives of their constituents. Using these two bodies as case studies for exploring the context, challenges and opportunities for evaluating adjudicative tribunals may enrich our understanding of administrative tribunals throughout other sectors as well.

## **II. THE CONTEXT OF ADJUDICATIVE TRIBUNALS IN THE HEALTH SECTOR**

Adjudicative tribunals are administrative bodies that are created by statutes and exercise delegated decision-making powers of the executive branch for the purposes of achieving certain policy goals. They serve as an oversight mechanism for lower-level decision-makers and apply legal and normative principles to resolve disputes between conflicting parties. They are independent – operating at arm's-length from the government – and serve quasi-judicial functions otherwise fulfilled by the formal judicial system. This independence, however, also has limits; their members are appointed by the executive branch of government (in the case of HPARB and HSARB, the power of appointment is effectively in the hands of the Minister of Health, in consultation with the Chair of the Boards) which also sets their staffing allowances and budgets. Their decisions, while often final, must be authorized by their enabling statute and are subject to judicial review by the courts.

In the health sector, adjudicative tribunals may be involved with resolving disputes regarding medical malpractice claims, insurance coverage for health care services, determination of mental capacity, licensing decisions for health care facilities, and patient safety procedures. They serve as an oversight and accountability mechanism for lower-level health decision-makers and ensure they follow appropriate processes and act according to their respective statutory mandates. They aim to boost public confidence in the credibility of decision-making within the health system, facilitate better and more consistent decisions, and reduce the risk of errors that in this context can have deadly consequences. Finally, they promote fairness and justice within health care, militate against self-interest and corruption, and provide opportunities to address wrongs through redress.

The HPARB, for example, is an integral part of Ontario's self-regulating health professional system. It helps to ensure that the health professions are regulated in the public interest, that appropriate standards of practice are created and maintained, that patients have access to the health professional of their choice, and that they are treated with respect and sensitivity by health professionals. HPARB was established

as a response to two related phenomena in the early 1970's: first, the recommendation arising out of the Report by the Honourable James Chalmers McRuer's Royal Commission Inquiry into Civil Rights<sup>8</sup> [McRuer Report] which emphasized the need for public interest oversight over self-regulating professional bodies; and second, the Committee on the Healing Arts tabled by the government on April 28, 1970<sup>9</sup> [Healing Arts Report], which also emphasized the primacy of public interest regulation of health professionals. Under the Province of Ontario's *Regulated Health Professions Act* [RHPA] people may appeal the decision of a self-regulated health professional College to not pursue a disciplinary proceeding before the HPARB.<sup>10</sup> If the appropriate statutory processes were not followed by the relevant College, then the Board is empowered to send the matter back to the college for reconsideration. HPARB also hears appeals from adverse decisions by the colleges in relation to registration requests. The remedies available to HPARB panels focus on the regulated Colleges, as opposed to the parties. For example, if a complaint was dismissed and an HPARB panel finds that the investigation was inadequate or the decision to dismiss the complaint was unreasonable, the complaint usually will be sent back to the College to reconsider its reasons or investigate the complaint further. Recommendations to the College may also be provided where the issues raised on a complaint review are more systemic. Parties, however, are not entitled to damages, or to an apology, or to any other individual remedy they may seek or to which they may feel entitled. For this reason, it is not uncommon to find parties who both seek a complaint review from HPARB and simultaneously pursue civil remedies against health professionals or health facilities arising from the same factual circumstances.

The HSARB similarly is a part-time Board providing oversight for the decisions of various actors within the health system. Its broad jurisdiction arises from fourteen different statutes and includes reviewing decisions concerning payment for health care services under the Ontario Health Insurance Plan [OHIP], eligibility for housing in long-term care facilities, licensing of nursing homes and other independent health facilities, and the decisions of public health officials.<sup>11</sup> By contrast, HSARB provides individual remedies, ordering, for example, that OHIP fund out-of-country medical services where the statutory test is met.

Both HPARB and HSARB have a full-time Chair,<sup>12</sup> and a roster of part-time members,<sup>13</sup> some of whom have legal training (and, in the case of HSARB, legal or medical training) and some who do not. Both Boards have been held to be expert

<sup>8</sup> *Royal Commission Inquiry into Civil Rights*, (Toronto: Queen's Printer, Ontario, 1968) (Commissioner: Honourable J.C. McRuer).

<sup>9</sup> *Report of the Committee on the Healing Arts*, (Toronto: Queen's Printer, 1970) (Chair: I. R. Dowie)

<sup>10</sup> *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, s. 3. Also see R. Steinecke. *A Complete Guide to the Regulated Health Professions Act*, looseleaf. (Toronto: Canada Law Book, 2000). The RHPA is one of several statutes administered by HPARB.

<sup>11</sup> C. Pitfield & C.M. Flood, "Section 7 'Safety Valves': Appealing Wait Times Within a One-Tier System" in C.M. Flood, K. Roach & L. Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 477.

<sup>12</sup> Since 2008, the same individual has served as Chair of both Boards.

<sup>13</sup> HPARB has three full time Vice Chairs and approximately 35 part-time members. HSARB has approximately 25 part-time members. Of these, approximately 10 part-time members are cross-appointed to both Boards.

bodies by reviewing Courts which warrant deference. Their substantive decisions may only be overturned on judicial review to a court if found to be “unreasonable.”<sup>14</sup>

As indicated above, a key aspect of evaluating tribunals created by statute is to assess whether a tribunal is fulfilling its statutory objective(s). This may be especially challenging, for example, if the specific goals of the relevant tribunal are diffuse and ambiguous in their enabling legislation. Ontario’s *RHPA*, for example, does not detail the purposes of the Board, so this must be inferred from the powers and authority it has been provided. For example, as indicated above, HPARB has the power to review decisions of regulated health colleges, not to refer complaints to discipline on grounds of the reasonableness of the college’s decision and the adequacy of the college’s investigation.<sup>15</sup> HPARB has broader jurisdiction to review decisions by Colleges to deny registration to applicants.<sup>16</sup> Thus, while HPARB’s role is generally to ensure public interest accountability over decision-making by regulated health Colleges, HPARB’s role in reviewing complaints suggests a different purpose, and a more deferential standard of review, than its role in reviewing denials of registration. Evaluation needs to be responsive to these differences of statutory mandate and remedial discretion.

### III. THE CONTEXT FOR EVALUATING ADJUDICATIVE TRIBUNALS

Assessing the work of these adjudicative tribunals, as suggested above, is an inherently complex enterprise. However, evaluations can be thought of and categorized according to their orientation and methodology.

In terms of orientation, evaluations of tribunals can be focused on how they function or what impact they have. The former would analyze the internal operations of a tribunal while the latter would assess the body’s external effects on a specified population. Procedural analyses are important to promote coherent internal management structures, good governance, accountability, efficiency and efficacy. External impact evaluations, on the other hand, represent a way to assess the real-world effectiveness of the adjudicative tribunal, its impact on others within the health care system, and the benefits (or consequences) that this impact yields. Such studies can determine whether or not these bodies support and/or enhance the functioning of various health system institutions and decision-makers and whether or not they ultimately influence service provision, access to justice in the health sector, and health outcomes. External impact evaluations require expertise and independence – they are not traditionally conducted by auditors,<sup>17</sup> ombudsmen<sup>18</sup> or internal staff.<sup>19</sup>

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<sup>14</sup> See, with respect to HPARB, *Botros v. Beadle* (2007), 71 Admin LR (4th) 225, and with respect to HSARB, *Flora v. Ontario* (Health Insurance Plan, General Manager) 2008 ONCA 538.

<sup>15</sup> See s. 29(2) of the *Health Professions Procedure Code*, Schedule 2 to the *RHPA*.

<sup>16</sup> See s. 22(1) of the *Health Professions Procedure Code*, Schedule 2 to the *RHPA*.

<sup>17</sup> Ontario, Office of the Auditor-General (J. McCarter), *Annual Report 2008* (Toronto: Queen’s Printer for Ontario, 2008) online: Government of Ontario <[http://www.auditor.on.ca/en/reports\\_en/en-08/ar\\_en08.pdf](http://www.auditor.on.ca/en/reports_en/en-08/ar_en08.pdf)>.

<sup>18</sup> Ontario, Office of the Ombudsman, *Ombudsman Ontario: Annual Report 2007-2008*, (Chair: A. Marin) online: Ombudsman Ontario <[http://www.ombuds-man.on.ca/media/18971/ar08\\_eng.pdf](http://www.ombuds-man.on.ca/media/18971/ar08_eng.pdf)>.

<sup>19</sup> Ontario, Health Professions Regulatory Advisory Council, *HPRAC: Annual Report April 1, 2007 – March 31, 2008*. Online: HPRAC <<http://www.h-p-r-a-c.org/en/reports/resources/H-P-R-A-C-Annual-Report-2007-2008.pdf>>.

A review of several evaluations of administrative bodies highlights that they tend to focus on issues related to internal operations rather than external impact. The recent report of the Ontario Security Commission's Fairness Committee, for example, examined whether the agency's internal governance structure created a perception or reality of bias in its adjudicative responsibilities<sup>20</sup>. The United Kingdom's National Audit Office similarly reviewed the procedures used by its Department of Work and Pensions to medically assess incapacity and disability<sup>21</sup> and to hear appeals of social security benefit decisions.<sup>22</sup> Some reviews examine particular problems that had previously been identified<sup>23</sup> while others focus on users' satisfaction with a tribunal's provision of services.<sup>24</sup>

Several assessment efforts have even focused on the internal operations of multiple tribunals or a jurisdiction's entire tribunal system, including the report of Ontario's Agency Reform Commission,<sup>25</sup> the UK's Leggatt Review of Tribunals,<sup>26</sup> and the report of the UK's former Council on Tribunals<sup>27</sup>. Academic publications similarly

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- <sup>20</sup> Ontario, Ontario Securities Commission *Report of the Fairness Committee to David A. Brown, Q.C., Chair of the Ontario Securities Commission*, 2004 (authors, C.A. Osborne, D.J. Mullan, and B. Finlay). Online: OSC <[http://www.osc.gov.on.ca/Regulation/Five-Year-Review/fyr\\_2004-0818\\_fairness\\_committee.pdf](http://www.osc.gov.on.ca/Regulation/Five-Year-Review/fyr_2004-0818_fairness_committee.pdf)>. [Osborne Report]
- <sup>21</sup> United Kingdom, National Audit Office, *Progress in Improving the Medical Assessment of Incapacity and Disability Benefits: Report by the Comptroller and Auditor General*. HC 1141, Session 2002-2003, 17/10/2003. (London: Stationery Office, 2003) online: NAO <[http://www.nao.org.uk/publications/nao\\_reports/02-03/0203-1141.pdf](http://www.nao.org.uk/publications/nao_reports/02-03/0203-1141.pdf)> [NAO Progress].
- <sup>22</sup> United Kingdom, National Audit Office, *Getting It Right, Putting It Right: Improving Decision-Making and Appeals in Social Security Benefits*. HC 1142, Session 2002-2003, 07/11/2003. (London: Stationery Office, 2003). Online: NAO <[http://www.nao.org.uk/publications/nao\\_reports/02-03/02031142.pdf](http://www.nao.org.uk/publications/nao_reports/02-03/02031142.pdf)> [NAO, *Getting it Right*].
- <sup>23</sup> Ontario, Society of Ontario Adjudicators and Regulators, *Towards Maintaining and Improving the Quality of Adjudication: SOAR Recommendations for Performance Management in Ontario's Administrative Justice Tribunals*. (Toronto: Society of Ontario Adjudicators and Regulators, 1995), online: SOAR <[http://www.soar.on.ca/soar-perf\\_man.htm](http://www.soar.on.ca/soar-perf_man.htm)> [SOAR Recommendations]; S. Blumenthal & S. Wessely, *The Pattern of Delays in Mental Health Review Tribunals*. (London: Stationery Office, 1993); S. Blumenthal & S. Wessely, "The Pattern of Delays in Mental Health Review Tribunals" (1994) 18 *Psychiatric Bulletin* 400. Online: The Psychiatrist <<http://pb.rcpsych.org/cgi/reprint/18/7/398.pdf>>.
- <sup>24</sup> J. Aston, D. Hill & N.D. Tackey, *The Experience of Claimants in Race Discrimination Employment Tribunal Cases*. *Employment Relations Research Series, No. 55*. (London: UK Department of Trade and Industry, 2006) online: DTI <<http://www.dti.gov.uk/files/file27818.pdf>>; Employment Tribunals Service, *Employment Tribunals Service User Survey 2005* (London: Employment Tribunals Service, 2005); Confederation of British Industry, *A Matter of Confidence: Restoring Faith in Employment Tribunals* (London: Confederation of British Industry, 2005). Online: CBI <[http://www.c-b-i.org.uk/n-d-b-s/Press.nsf/0/33f-9830ed-75f765b-8025708-8005-23621/\\$FILE/Tribunals-Brief-CBI.pdf](http://www.c-b-i.org.uk/n-d-b-s/Press.nsf/0/33f-9830ed-75f765b-8025708-8005-23621/$FILE/Tribunals-Brief-CBI.pdf)>; M.P. Carscallen, W.K. Gray & J.G. Pink, *Regulatory Burden Task Force: Report to the Ontario Securities Commission* (Toronto: Ontario Securities Commission, 2003) online: OSC <[http://www.o-s-c.gov.on.ca/About/Governance/Accountability/ga\\_20031212\\_rbt-rpt.pdf](http://www.o-s-c.gov.on.ca/About/Governance/Accountability/ga_20031212_rbt-rpt.pdf)>.
- <sup>25</sup> Ontario, Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies (G. Guzzo, J. Baird, B. Grimmer, G. Martiniuk & J. Flaherty) *Everyday Justice: Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies*. (Toronto: Government of Ontario, 1998). Online: Council of Canadian Administrative Tribunals <[http://www.ccat-ctac.org/downloads/1998\\_Guzzo-report.pdf](http://www.ccat-ctac.org/downloads/1998_Guzzo-report.pdf)> [Guzzo Report].
- <sup>26</sup> A. Leggatt, *Tribunals for Users: One System, One Service* (London: UK Department for Constitutional Affairs, 2001) online: <<http://www.tribunals-review.org.uk/index.htm>>.
- <sup>27</sup> M. Adler & J. Gulland, *Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review* (London: Council on Tribunals, 2003) online: Council on Tribunals <[http://www.council-ontribunals.gov.uk/docs/other\\_adler\(2\).pdf](http://www.council-ontribunals.gov.uk/docs/other_adler(2).pdf)>.

appear to focus on the internal operations of tribunals across various topics – whether they regulate securities,<sup>28</sup> medical malpractice claims,<sup>29</sup> privacy,<sup>30</sup> pensions,<sup>31</sup> or determinations of medical incapacity<sup>32</sup> – and often examine users' experience.<sup>33</sup> While not a single governmental evaluation could be found that focused on the external impact of adjudicative tribunals, at least one academic publication discusses the potential benefits that administrative "health courts" (which resolve malpractice claims) can have on patient safety.<sup>34</sup>

In terms of methodology, assessments of tribunals can either be conducted through expert reviews or empirical evaluations. The first approach would take advantage of the personal experiences and perspective of an investigator (usually based on some combination of interviews and analysis of primary data and secondary literature) while the second approach attempts to attain more objective and generalizable data. Expert reviews often focus on identifying structural problems and recommending possible ways to overcome them. This approach is also more likely to have fewer costs and a faster completion timeline. Empirical evaluations of tribunals, by contrast, aspire to scientific methods and can be used to, *inter alia*, quantitatively or qualitatively assess impact, identify the factors that determine their successful operations, and track perceptions of them over time. These two methodological approaches cannot be completely dichotomized as experts often utilize empirical methods and even the most scientifically rigorous and objective evaluations must be interpreted by individuals through the lens of their expertise.

Reviews of adjudicative tribunals have been conducted using both expert and empirical methodologies. Prominent observers, academics and practitioners, for

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- <sup>28</sup> S. Rousseau, *The Québec Experience with an Independent Administrative Tribunal Specialized in Securities: A Study of the Bureau de décision et de révision en valeurs mobilières* (Ottawa: Expert Panel on Securities Regulation, 2008) online: Groupe Experts <<http://www.groupe-experts.ca/eng/reports/research-studies/quebec-independent-adjudicative-tribunal-rousseau.php>>; P. Moyer, "The Regulation of Corporate Law by Securities Regulators: A Comparison of Ontario and the United States" (1997) 55 UT Fac L Rev 43.
- <sup>29</sup> G. Siegal, M.M. Mello & D.M. Studdert, "Adjudicating Severe Birth Injury Claims in Florida and Virginia: The Experience of a Landmark Experiment in Personal Injury Compensation" (2008) 34 Am J L & Med 489. Online: Harvard School of Public Health <[http://www.hsph.harvard.edu/faculty/michelle-mello/files/FL-VA\\_PDF.pdf](http://www.hsph.harvard.edu/faculty/michelle-mello/files/FL-VA_PDF.pdf)>.
- <sup>30</sup> L. Jacobs, "Reconciling Tribunal Independence and Expertise -- Empirical Observations" (Presented at The Future of Administrative Justice Symposium, University of Toronto, 18 January 2008) online: University of Toronto Faculty of Law <[http://www.law.utoronto.ca/documents/conferences/adminjustice08\\_Jacobs.pdf](http://www.law.utoronto.ca/documents/conferences/adminjustice08_Jacobs.pdf)>.
- <sup>31</sup> L. Sossin, "The Effectiveness and Efficiency of Pension Regulation in Ontario and in Comparative Perspective" (Toronto: Expert Commission on Pensions, 2007) online: Pension Review <<http://www.pension-review.on.ca/english/summaries/8Sossin.html>>.
- <sup>32</sup> M. Dolan, R. Gibb & P. Coorey, "Mental Health Review Tribunals: A Survey of Special Hospital Patients' Opinions" (1999) 10 Journal of Forensic Psychiatry 264; C. Bradley, M. Marshall & D. Gath, "Why Do So Few Patients Appeal Against Detention Under the Mental Health Act?" (1995) 310 Brit Med J 364. Online: BMJ <<http://www.b-m-j.com/cgi/content/full/310/6976/364>>; J. Peay, *Tribunals on Trial: A Study of Decision Making Under the Mental Health Act 1983* (Oxford: Clarendon Press, 1989).
- <sup>33</sup> H. Genn, B. Lever, L. Gray, and National Centre for Social Research, *Tribunals for Diverse Users*, 2006 Online: Department for Constitutional Affairs <[http://www.d-c-a.gov.uk/research/2006/01\\_2006.pdf](http://www.d-c-a.gov.uk/research/2006/01_2006.pdf)>.
- <sup>34</sup> M.M. Mello *et al*, "Health Courts' and Accountability for Patient Safety" (2006) 84 Milbank Quarterly 459.

example, have assessed various tribunals' organizational structures<sup>35</sup>, efficiency,<sup>36</sup> accessibility,<sup>37</sup> independence,<sup>38</sup> performance standards<sup>39</sup> and overall effectiveness.<sup>40</sup> Other reviews feature empirical elements such as (1) surveys that capture the perceived quality of services offered,<sup>41</sup> stakeholder attitudes towards the tribunal,<sup>42</sup> and the functioning of a certain process;<sup>43</sup> (2) interviews that probe users' experiences with the tribunal,<sup>44</sup> its perceived impartiality,<sup>45</sup> and the effectiveness of a particular procedure;<sup>46</sup> and (3) performance data and documentary analyses for examining key features of a tribunal's caseload<sup>47</sup> and arrangements for how it makes appeal decisions.<sup>48</sup>

The challenge in evaluating health-related adjudicative tribunals, therefore, seems to lie at the intersection of orientation and methodology. Assessments of adjudicative tribunals have focused on both process and impact, and have been conducted using both expert reviews and empirical methods, yet not a single review could be found that empirically evaluated the external impact of an adjudicative tribunal, despite extensive searching. While this lack of research may indicate that such undertaking are not important, interesting or possible, the evidence suggests otherwise: the need for external impact evaluations is evident<sup>49</sup> and such evaluations have been conducted

<sup>35</sup> Osborne Report, *supra* note 20; Moyer, *supra* note 28.

<sup>36</sup> Carscallen, Gray & Pink, *supra* note 24.

<sup>37</sup> Adler & Gulland, *supra* note 27.

<sup>38</sup> Rousseau, *supra* note 28.

<sup>39</sup> SOAR Recommendations, *supra* note 23.

<sup>40</sup> Leggatt, *supra* note 26; Guzzo Report, *supra* note 25; Sossin, *supra* note 31; Mello *et al*, *supra* note 34.

<sup>41</sup> Employment Tribunals Service, *supra* note 24.

<sup>42</sup> Confederation of British Industry, *A Matter of Confidence: Restoring Faith in Employment Tribunals* (London: Confederation of British Industry, 2005) Online: CBI <[http://www.c-b-i.org.uk/ndbs/Press.nsf/0/33f9830ed75f765b8025708800523621/\\$FILE/Tribunals Brief - CBI.pdf](http://www.c-b-i.org.uk/ndbs/Press.nsf/0/33f9830ed75f765b8025708800523621/$FILE/Tribunals%20Brief%20-%20CBI.pdf)>.

<sup>43</sup> P. Latreille, J.A. Latreille & K.G. Knight. *Findings from the 1998 Survey of Representatives in Employment Tribunal Cases. Employment Relations Research Series, No. 35.* (London: UK Department of Trade and Industry, 2004) online: BERR <<http://www.berr.gov.uk/files/file11453.pdf>>; P. Latreille, J.A. Latreille & K.G. Knight "Making a Difference? Legal Representation in Employment Tribunal Cases: Evidence from a Survey of Representatives" (2005) 34 *Indus. L. J.* 308.

<sup>44</sup> Aston, Hill, & Tackey, *supra* note 24.

<sup>45</sup> Jacobs, *supra* note 30.

<sup>46</sup> Siegal, Mello & Studdert, *supra* note 29; *NAO Progress*, *supra* note 21; Bradley, Marshall & Gath, *supra* note 32.

<sup>47</sup> B. Hayward, M. Peters, N. Rousseau & K. Seeds. *Findings from the Survey of Employment Tribunal Applications 2003. Employment Relations Research Series, No. 33.* (London: UK Department of Trade and Industry, 2004) Available online: DTI <<http://www.dti.gov.uk/files/file11455.pdf>>.

<sup>48</sup> NAO, *Getting it Right*, *supra* note 22; Peay, *supra* note 32.

<sup>49</sup> M. Hertogh & S. Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge, UK: Cambridge University Press, 2004); Center for Global Development's Evaluation Gap Working Group, *When Will We Ever Learn? Improving Lives Through Impact Evaluation.* (Washington DC: Center for Global Development, 2006) online: CGD <[http://www.c-g-dev.org/files/7973\\_file\\_WillWeEverLearn.pdf](http://www.c-g-dev.org/files/7973_file_WillWeEverLearn.pdf)>; World Bank, *Conducting Quality Impact Evaluations under Budget, Time and Data Constraints.* (Washington DC: World Bank, 2006). online: World- Bank <[http://lnweb90.world-bank.org/oed/oeddoelib.nsf/Doc-UNID-View-For-Java-Search/757A5CC0BAE22558852571770059D89C/\\$file/conduct\\_qual\\_impact.pdf](http://lnweb90.world-bank.org/oed/oeddoelib.nsf/Doc-UNID-View-For-Java-Search/757A5CC0BAE22558852571770059D89C/$file/conduct_qual_impact.pdf)>; OECD Development Assistance Committee, *Review of the DAC Principles for Evaluation of Development Assistance* (Paris: Organisation for Economic Co-operation and Development, 1998) online: OECD <<http://www.oecd.org/dataoecd/63/50/2065863.pdf>>.

with success in related settings which also involve the nexus of the health and law sectors and beyond.<sup>50</sup>

The dearth of externally-focused empirical evaluations is not only a missed opportunity, in our view, but may also pose a significant risk. The lack of an empirical rationale for the benefits of a tribunal may render it vulnerable to opposition or simply to general cost-cutting initiatives, or to pursue policy directions that undermine rather than advance its purposes. Without this data, the Boards may lack the baseline measures needed to track changes over time, evaluate the performance of decision-makers and staff, and engage in longer term strategic planning. If you are running in the dark, there is no way to know whether you are moving forward, or further away from your destination, or simply going in circles.

Indeed, it is widely accepted that data-driven strategies are more likely to help decision-makers achieve their goals in a cost-effective way than policies pursued in the absence of evidence.<sup>51</sup> Information gathered by health-related adjudicative tribunals like HPARB and HSARB through empirical methods may be of particular interest to government officials as it can demonstrate performance benchmarks and ensure public funds are being invested and spent effectively. If reform is called for, empirical data will be essential in identifying what needs to change. For academics, it is an under-scrutinized sphere of administrative law and health systems functioning that is both ripe for research and, potentially, reform.

#### IV. CHALLENGES FOR EMPIRICALLY EVALUATING ADJUDICATIVE TRIBUNALS

Yet despite the tremendous benefits, empirical impact evaluations of adjudicative tribunals are not being conducted. This absence of assessment efforts is most likely attributable to the various challenges facing anyone who embarks on undertaking such a project. In the context of health adjudicative tribunals, these obstacles can be divided into three categories: (A) complexity in the health system; (B) methodological complications; and (C) legal barriers.

##### A. Challenges with Complexity in the Health System

Empirically evaluating the impact of any adjudicative tribunal is a naturally difficult enterprise as it requires the body's various effects to be isolated from the larger social context within which it operates. This is no doubt complicated for tribunals in every sector because their activities are usually only indirectly related to their existential goals. This challenge, however, may be further exacerbated in the health context due to its overwhelming complexity.

Indeed, health systems are increasingly being recognized as complex adaptive systems that are multi-layered, non-linear and highly sophisticated. They consist of

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<sup>50</sup> Mello & Zeiler, *supra* note 3; N. Jones *et al.*, "Working Paper 300: Improving Impact Evaluation Production and Use" (London: Overseas Development Institute, 2009) online: <<http://www.o-d-i.org.uk/resources/download/3177.pdf>>.

<sup>51</sup> World Health Organization, *World Report on Knowledge for Better Health* (Geneva: World Health Organization, 2004) online: WHO <[http://www.who.int/r-p-c/meetings/world\\_report\\_knowledge\\_for\\_better\\_health.pdf](http://www.who.int/r-p-c/meetings/world_report_knowledge_for_better_health.pdf)>; K. Chalkidou *et al.*, Comparative Effectiveness Research and Evidence-Based Health Policy: Experience from Four Countries. 2009 87 *Milbank Quarterly* 339. Online: Milbank <[http://www.milbank.org/quarterly/milq\\_87\\_2-final-chalkidou.pdf](http://www.milbank.org/quarterly/milq_87_2-final-chalkidou.pdf)>.

countless sub-systems with immeasurable independent actors, established policies, zealously guarded interests, entrenched professional “silos” and divergent cultures that can all influence each another and even alter their external environments. This web of elements, and the unpredictable interactions among them, ensures that conventional mechanistic or “cause-effect” conceptualizations of the health system are inaccurate and oversimplifications of its complex dynamics.<sup>52</sup>

While scientific knowledge has been greatly advanced by breaking big questions into smaller ones that can be observed, analyzed and understood through rational deduction, this process is severely limited when the studied phenomenon or intervention is located within a system whose constitutive parts are not independent, constant nor predictable. The fact that the health system exhibits characteristics of distributed control, co-dependence and nesting of smaller systems within other larger systems further aggravates this challenge and makes it difficult to fully examine adjudicative tribunals without reference to other actors and institutions (such as adjudicators, staff, government policymakers, regulatory colleges, relevant expert panels, the traditional court system and the public). Isolating and attributing impact is further problematized by the fact that health-related adjudicative tribunals serve diverse functions according to various players within completely different contexts.<sup>53</sup>

### **B. Challenges with Research Methodology**

Yet in addition to the daunting barriers of evaluating adjudicative tribunals caused by health system complexity, there are further methodological barriers associated with such an undertaking. The primary challenge, as highlighted above, is that simple research designs cannot be used to isolate adjudicative tribunals and elegantly locate cause-effect relationships between them and their goals. But above and beyond the various explanations illuminated by the complexity perspective is the fact that efforts of adjudicative tribunals are only indirectly related to their goals. Indeed, health services themselves only partially help meet their goal of improved health for people. Any legal, regulatory or oversight “intervention” that serves to better structure these services would be even further removed from their ultimate goals. Empirical impact studies of such interventions must be expertly designed to account for this complexity.

However, even if simple methods did exist to observe the relationship between adjudicative tribunals and their goals, there is currently a lack of clear evaluative criteria against which particular adjudicative tribunals can be measured. This is because their goals are not easily articulated and have thus not been defined with adequate precision – if defined at all. Desired outcome measures are consequently absent which ensures that suitable quantitative and/or qualitative research methodologies cannot be matched to them. This problem, however, cannot simply be overcome by brainstorming possible goals of adjudicative tribunals. Indeed, the existential purpose of these bodies may change and evolve over time with new legislators, government policymakers, adjudicators and tribunal staff who can each

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<sup>52</sup> B. Zimmerman, P. Plsek & C. Lindberg, *Edgeware: Insights from Complexity Science for Health Care Leaders* (Irving, Texas: VHA Inc., 1998)

<sup>53</sup> P.E. Plsek & T. Greenhalgh (2001) “Complexity Science: The Challenge of Complexity in Health Care” 323 *Brit Med J* 625.

contribute towards a shift in the focus and priority of their operations over time.<sup>54</sup> Various community stakeholders may also perceive the role of a particular adjudicative tribunal in their sector very differently depending upon their own mandate, ideological perspective and unique vantage point. While reference to a tribunal's enabling statute may be informative in crafting an outcome measure, it is not always decisive. In the case of HPARB, legislative provisions suggest this body was created to ensure effective regulation of the health professions in the public interest,<sup>55</sup> yet this goal is not easily measurable. Indeed, the ability to empirically evaluate a complex intervention like a health-related adjudicative tribunal depends upon having a desired outcome that is observable and testable against a null hypothesis.

A desire to empirically "prove" cause-effect relationships between adjudicative tribunals and a particular outcome is also complicated by the impossibility of randomly allocating potential users of existing tribunals into groups that either receive or do not receive their services. Randomized controlled trials – the most rigorous of discrete empirical evaluations<sup>56</sup> – assess the effect of an intervention on a test population in comparison to a theoretically identical population. This method, however, requires a properly-constituted (i.e., randomized) and adequately-sized (i.e., large) control group with both known and unknown confounding factors evenly distributed between them in order to isolate the impact of tribunal services and measure it against a benchmark. Non-randomized retrospective evaluations comparing users of tribunals to non-users (or the situation of the general public in jurisdictions with and without comparable tribunals) may not be an ideal solution to this challenge as this creates a situation where user-status and outcomes are measured at the same time. This prevents efforts to control for confounding factors which in turn extinguishes the possibility of making causal determinations.<sup>57</sup>

A penultimate methodological challenge for conducting external impact evaluations of health-related adjudicative tribunals is that there are few examples of past efforts upon which to emulate. As previously mentioned, many empirical studies have examined the internal processes of tribunals, but none could be found that focused on their societal impact. This is exacerbated by the dearth of obvious empirical data sets which can be analyzed and from which potential evaluators can draw.<sup>58</sup> Whereas hospitals may be able to compare their patient population and its outcomes to those from neighbouring hospitals, adjudicative tribunals are not likely in a position to continually collect data about their past users nor compare this information to existing data sets from the same region or other jurisdictions.

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<sup>54</sup> For example, the evolution of Ontario's Health Professions Appeal and Review Board over a period of 40 years was documented in the tribunal's formal submission to the Health Professions Regulatory Advisory Council regarding interprofessional collaboration among health colleges and professionals. Health Professions Appeal and Review Board, *Recommendations to Health Professions Regulatory Advisory Council*. (Toronto: Health Professions Appeal and Review Board, 2008). online: HPARB <<http://www.hprac.org/en/projects/resources/hprac-1457May30HPARB.pdf>>.

<sup>55</sup> *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, s. 3.

<sup>56</sup> GRADE Working Group, "Grading Quality of Evidence and Strength Recommendations"(2004)328 *Brit Med J*. Available online: BMJ <<http://www.bmj.com/cgi/content/full/328/7454/1490>> (accessed on 10 April 2009).

<sup>57</sup> Mello & Zeiler, *supra* note 3.

<sup>58</sup> *Ibid.*

Finally, the identity and background of the researcher(s) evaluating the impact of an adjudicative tribunal must also be considered. While the goal of empirical study is to avoid bias and ideological assumptions, every researcher brings a particular matrix of perspective, orientation, experience and values to their work. Insiders, for example, may bring intuition and experiential judgment, while outsiders may bring independence, fresh eyes and objectivity.

### C. Legal Barriers

As institutions that function within both the health and legal systems, health-related adjudicative tribunals must also overcome the realities of the legal sector that may not be particularly nurturing for empirical impact evaluations. For example, legal actors are often focused more on achieving due process, transparency and good governance than specific societal outcomes (like improved health status which is the goal of direct clinical health care). Excellent process in the legal world is often thought to be the most likely way to achieve the best outcome, without much attention to the actual substantive benefits or costs to which an excellent process might give rise.

There is also, appropriately, a much greater concern for maintaining independence and avoiding any apprehension of bias. Like impartiality, independence is a common law right of procedural fairness enjoyed by parties who come before administrative bodies in common law jurisdictions (including Canada, United States, United Kingdom, Australia and New Zealand). In Canada, independence for adjudicative tribunals is based on the categories of judicial independence identified by the Supreme Court of Canada in *Valente v. The Queen* (i.e., security of tenure, financial independence and administrative independence over adjudicative matters)<sup>59</sup> and applied to administrative bodies in *Canadian Pacific Ltd. v. Matsqui Indian Band* – albeit in a more flexible and contextually sensitive manner.<sup>60</sup>

Respecting this independence of adjudicative tribunals will naturally influence the process and content of any evaluation in multiple ways. For example, independence suggests that governments should refrain from evaluating tribunals' substantive decisions lest reasonable observers apprehend that tribunals may adjust their decision-making to align with what the government of the day perceives as "successful." Similarly, it may also be difficult for a tribunal to establish evaluative criteria or outcome measures for itself as this might lead a reasonable observer to conclude that the tribunal may pursue these goals at the expense of fairness to the parties. This concern for independence even questions the extent to which tribunals' staff and members can be directly involved in any evaluation for fear of influencing or interfering with their services that must remain neutral at all times. Contrary to encouraging self-evaluation as is common within the health sphere, the legal environment may actually discourage adjudicative tribunals from assessing their own

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<sup>59</sup> *Valente v. The Queen* (1985), 24 D.L.R. (4th) 161 (S.C.C.).

<sup>60</sup> *Canadian Pacific Ltd. v. Matsqui Indian Band* (1995), 122 D.L.R. (4th) 129 (S.C.C.). It should be noted that these standards of independence that are relevant in the adjudicative tribunal context are only a common law right which may be displaced by statute, unlike judicial independence which is a constitutional principle. See *Ocean Port Hotel v. British Columbia*, 2001 SCC 17.

external impact, especially since such undertakings are not explicitly part of their statutory mandates.<sup>61</sup>

Finally, as recently highlighted by the Nuffield Inquiry on Empirical Legal Research, the legal academy also suffers from a dearth of empirical competence and capacity to conduct such studies.<sup>62</sup> While the field of empirical health law scholarship has recently grown exponentially,<sup>63</sup> it is generally accepted that current capacity is inadequate and that it may further diminish over time. Empirical legal methodologies are also not generally recognized to be as prestigious within the academic community as traditional doctrinal investigations.<sup>64</sup> The pervasive culture of deference to experts and authority must further diminish the perceived value of objective empirical work and weaken any apparent need for more rigorous research that is higher on the hierarchy of evidence.<sup>65</sup> Again, the focus on elements of process (e.g., bias and independence) rather than impact (e.g., judicial decisions) as indicator of quality and performance must also deter legal scholars from conducting work in this area such that target outcomes are less likely to be assessed.

## V. REASONS FOR OPTIMISM

However, despite the challenges faced by potential evaluators of adjudicative tribunals, there is reason for optimism: each of the various identified barriers can be overcome and have indeed been circumvented in similar evaluations. For example, as previously mentioned, many empirical evaluations have been conducted that focus on the internal operations of these bodies. A major literature review in 2007 highlighted much of the work that has been conducted and published in this area.<sup>66</sup> Yet in addition to these studies, empirical evaluations have also been undertaken to assess the external impact of similarly-functioning specialty courts that operate within the judicial system. A systematic review of the research evidence has even been conducted on the societal impact of at least one type of these judicial organs.<sup>67</sup>

Indeed, methodologically, there may be much to learn from external impact evaluations of specialist courts in the judicial sector.<sup>68</sup> For example, “drug courts” have been extensively evaluated in the United States and in other jurisdictions

<sup>61</sup> On the other hand, a study which expresses respect for the adjudicative independence of tribunals will likely have greater credibility and attract broader “buy in” than a study which is perceived as inconsistent with it.

<sup>62</sup> H. Genn, M. Partington & S. Wheeler, *Nuffield Inquiry on Empirical Legal Research: Law in the Real World: Improving our Understanding of How Law Works: Final Report and Recommendations* (London: Nuffield Foundation, 2006) Online: UCL <[http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry\\_report.pdf](http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_report.pdf)>.

<sup>63</sup> Mello & Zeiler, *supra* note 3.

<sup>64</sup> Genn, Partington & Wheeler, *supra* note 62.

<sup>65</sup> GRADE Working Group, *supra* note 56.

<sup>66</sup> M. Partington, E. Kirton-Darling & F. McClenaghan, *Empirical Research on Tribunals: An Annotated Review of Research Published between 1992 and 2007* (London: Administrative Justice and Tribunals Council, 2007) Online: AJTC <<http://www.ajtc.gov.uk/docs/EmpiricalResearch.pdf>>.

<sup>67</sup> D.B. Wilson, O. Mitchell & D.L. Mackenzie, “A Systematic Review of Drug Court Effects on Recidivism” (2006) 2 *Journal of Experimental Criminology* 459.

<sup>68</sup> J. Plotnikoff & R. Woolfson, *Review of the Effectiveness of Specialist Courts in Other Jurisdictions. DCA Report Series, No. 3/05*. (London: UK Department for Constitutional Affairs, 2005) Online: DCA <[http://www.dca.gov.uk/research/2005/3\\_2005.pdf](http://www.dca.gov.uk/research/2005/3_2005.pdf)>.

regarding their ability to increase treatment rates, lower criminal recidivism, and enhance cost-effectiveness of prosecution.<sup>69</sup> Domestic violence courts and community courts have similarly been assessed for compliance, cost-effectiveness, conviction rates and public perception, and mental health courts have been comprehensively examined for reducing criminal violence, enhancing community safety, conserving fiscal resources and improving clinical outcomes. However, it must be recognized that the context within which these judicial bodies operate is very different from that of health-related administrative tribunals. Not only are they part of the judiciary rather than the executive branch of government, but their existential goals are usually related to diverting complex or special cases from traditional courtrooms rather than supporting the infrastructure of a completely different system (like that of health). Empirically tracking desired outcomes like cost-savings and reduced reoffending rates will naturally be easier in this context when the intervention or service is more directly related to its goal. Yet, alternatively, it may actually be more difficult for these judicial organs to evaluate themselves due to their strict separation from the executive (which has the financial resources to fund such an undertaking) and the likelihood of them to zealously guard their independence.

The possible range of empirical legal research methodologies that can be used in evaluating health-related adjudicative tribunals may benefit from earlier studies. For example, Mello and Zeiler describe the diversity and comparative advantages of various empirical approaches that have been taken by scholars in the health law field to address issues as wide-ranging as medical malpractice reform and motor safety laws.<sup>70</sup> And on the use of randomized controlled trials, for which these two scholars are less optimistic, Pleasence provides an account of such an undertaking in the United Kingdom, highlights the many technical, practical and ethical barriers that were faced, and suggests ways to overcome them in the future.<sup>71</sup>

## VI. OPPORTUNITIES FOR MOVING FORWARD

There are several developments converging on the importance of evaluation. First, there is a wave of interest in enhancing accountability both in governmental and administrative settings. Second, and related to the first development, governments are increasingly attracted to legislative schemes which provide for greater transparency and oversight. In Ontario, for example, the recently enacted *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* requires a set of prescribed adjudicative tribunals (including HPARB and HSARB) to publish a set of “public accountability documents” which include a mandate and mission statement, a public consultation policy, a service standard policy, an ethics plan, and a member

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<sup>69</sup> Wilson, Mitchell & Mackenzie, *supra* note 67; United States Government Accountability Office, *Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes* (Washington DC: United States Government Accountability Office, 2005) online: GAO <<http://www.gao.gov/new.items/d05219.pdf>>; B.L. Green *et al.*, “Building the Evidence Base for Family Drug Treatment Courts: Results from Recent Outcome Studies” (2009) 6 *Drug Court Review* 53. Online: NDCI <<http://www.n-d-c-i.org/sites/default/files/ncdc/DCR%2C%20Vol.%206%2C%20No%202.pdf>>).

<sup>70</sup> Mello & Zeiler, *supra* note 3.

<sup>71</sup> P. Pleasence, “Trials and Tribulations: Conducting Randomized Experiments in a Socio-legal Setting” 2008) 35 *J L & Soc’y* 8.

accountability framework. The consultation plan must describe whether and how the tribunal will consult with the public when it is considering changes to its rules or policies. The service standard policy must set out the standards of service that the tribunal intends to provide and a process for making, reviewing and responding to complaints about the tribunal's service. The member accountability framework must contain a description of the functions of the members of the tribunal and a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal. A code of conduct must also be established for the members of the tribunal. Finally, the *Act* also requires adjudicative tribunals to prepare governance accountability documents, including a memorandum of understanding, a business plan and an annual report. While these "public accountability documents" do not necessarily provide the data necessary to conduct a complete evaluation of a tribunal, they help foster a culture of evaluation through tracking data, identifying benchmarks and engaging in strategic planning.

In order to determine the data which will be helpful in evaluating tribunals such as HPARB and HSARB, potential evaluators must also thoughtfully consider both the target audience of their research and the overall goal that their particular health-related adjudicative tribunal is expected to help achieve, and then identify the most important targeted outcomes that are relevant to the audience and important for the goal's fulfillment.<sup>72</sup> When such outcomes cannot directly be measured, as may often be the case, evaluators must identify strong surrogate endpoints which are measurements that reflect important outcomes even if they are of indirect or diminished practical importance. Performance indicators can then be developed followed by the corresponding methodologies for tracking changes to them.

In the case of Ontario's health-related adjudicative tribunals, both HPARB and HSARB may describe their overall goal as contributing to the health of Ontarians by enhancing decision-making within the health system. If government officials are the evaluation's intended audience, targeted outcomes could include: (1) confidence in the health system, (2) equity, justice and fairness in health decision-making, (3) strengthened health system institutions, and (4) better health services and patient safety via enhanced regulation and oversight. Since these outcomes would be nearly impossible to measure directly, surrogate endpoints can be developed and could possibly include: (1) access to adjudicative mechanisms for dispute resolution, (2) perceived legitimacy of adjudicative decisions, (3) satisfaction with adjudicative services, (4) perceived fairness and legitimacy of adjudicative services, (5) changed conduct of health system institutions and decision-makers, (6) establishment or expansion of support mechanisms for primary health decision-makers, (7) improved oversight of primary health decision-makers leading to better health outcomes, (8) better diagnostic and treatment decisions by primary health decision-makers, and (9) respect among stakeholders for the tribunal's oversight function. Performance indicators and their corresponding empirical methodologies could then range from the public's awareness for the tribunal's existence to the perceived concern among primary health decision-makers that their decisions will be reversed.

Once a system of empirical observation is in place, potential evaluators can establish benchmarks according to which they can track and assess performance.

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<sup>72</sup> S.O. 2009 c.33 schedule 5.

Such comparative points of measurement can be drawn from thoughtful consideration, aspirational goals of leaders, expert judgments on what is possible, data from similar tribunals in other jurisdictions (i.e., comparative analysis), or previous empirical observations from the same tribunal (i.e., interrupted time-series analysis).

## **VII. CONCLUSION**

In summary, adjudicative tribunals serve an essential function within the health sector, yet their contributions and impact on the delivery of health services and society in general are not usually evaluated empirically. A focus on evaluation may enhance tribunals' capacity to engage in continuous quality improvement efforts, enhance the public's confidence, and maximize their societal impact. More broadly, a focus on empirical evaluation extends the reach of administrative law to the norms and means of administrative adjudication, and beyond the legal doctrines considered by tribunals or the courts which supervise them. In our view, understanding the significance and implications of these doctrines requires situating them in institutional and policy contexts. For administrative law, in short, it ought to matter whether administrative justice is or is not being realized.

## REINVENTING REGULATION/REINVENTING ACCOUNTABILITY: JUDICIAL REVIEW IN NEW GOVERNANCE REGIMES

William D. Araiza\*

*This Essay considers the doctrinal and institutional challenges courts and designers of New Governance systems face when considering the availability and scope of judicial review. Part II briefly summarizes New Governance principles, while Part III explains the challenges they pose for American standing law. The Essay then considers solutions. Part IV considers aspects of other nations' administrative standing law, considering whether those nations' legal innovations overcome these hurdles while remaining true to courts' proper role in reviewing agency action. Other nations have taken significant steps to resolve these issues; however, it remains unclear whether those resolutions transfer to the different institutional and legal structure in the United States. Part V considers whether the problem of standing can be resolved in a principled way by reconceptualizing the injury plaintiffs allege when they challenge New Governance regulation. Finally, Part VI considers the proper scope of judicial review of New Governance regulation.*

*Cet article traite des défis doctrinaux et institutionnels qui se présentent aux tribunaux et aux concepteurs de systèmes de Nouvelle Gouvernance lorsqu'ils envisagent la disponibilité et la portée de la révision judiciaire. La partie II résume brièvement les principes de Nouvelle Gouvernance alors que la partie III explique les défis qu'ils présentent pour la législation américaine en vigueur. L'article considère ensuite des solutions. La partie IV traite d'aspects de la législation administrative en vigueur d'autres nations, en examinant si les innovations juridiques de ces nations surmontent ces obstacles tout en demeurant fidèles au rôle approprié des tribunaux lorsqu'ils révisent les actions d'agences. D'autres nations ont adopté des mesures importantes pour solutionner ces questions; toutefois, il n'est pas encore clair si ces solutions peuvent s'appliquer à la structure institutionnelle et juridique différente des États-Unis. La partie V considère si le problème de la qualité pour agir peut être résolu de façon qui respecte les principes en conceptualisant différemment le préjudice allégué par le demandeur qui conteste la réglementation de la Nouvelle Gouvernance. Finalement, la partie VI considère la portée appropriée de la révision judiciaire de la réglementation de Nouvelle Gouvernance.*

### I. INTRODUCTION

The approach to public administration known as “New Governance” has become a popular subject of academic study. While specific New Governance ideas are often

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not particularly novel, it is only relatively recently that scholars have found methodological commonalities across different regulatory areas, and endowed them with the term “New Governance.”<sup>1</sup> Over the course of the last decade, this regulatory approach has become grist for a lively scholarly discussion that both examines this phenomenon more abstractly<sup>2</sup> and applies it to particular regulatory contexts, both domestic<sup>3</sup> and international.<sup>4</sup>

Unsurprisingly, up to now scholars have focused largely on discovering and examining these commonalities before considering how the phenomenon of New Governance fits with traditional public law features such as judicial review. The lack of attention to judicial review is especially understandable since the characteristics of New Governance regulation make it, at first glance, a poor fit with traditional judicial review of administrative action.<sup>5</sup> Nevertheless, despite its relatively lower priority as an object of study, it remains critical for New Governance scholars to consider how judicial review fits into the picture. Accountability remains a fundamental requirement of public law, regardless of the modality of the regulation. While New Governance promises to provide accountability through new approaches to regulation, an external – that is, judicial – role remains indispensable to that accountability, and hence, to the system’s overall legitimacy. The absence of such an external check will inevitably raise the concerns – including those about capture, misfeasance and neglect of diffuse interests – that led to the expansion of the judicial role in the American federal administrative system in the 1960s and 1970s.<sup>6</sup>

The importance of such external accountability need not distort the fundamental thrust of New Governance regulation. While judicial review may be crucial, it need not be the tail that wags the regulatory dog. The flex point between the basic principles of New Governance and judicial review may rest in legal doctrine governing the access to and scope of that review. In other words, if anything needs to “give” in this system, it is not necessarily New Governance itself, nor the availability of judicial review, but rather, the doctrinal rules that govern such review. Making those rules conform to the structure of New Governance regulation in a way that preserves a meaningful yet appropriately limited role for courts may well constitute an important challenge to the construction of a full theory of New Governance regulation.

After Part II of this essay briefly summarizes New Governance principles, Part III lays out the challenges those principles pose for traditional American standing law. This part of the essay focuses on the doctrinal requirements of injury, causation and redressability and the problems they present for challenges to agency action taken under New Governance principles.

The essay then considers possible fixes. Part IV expands the essay’s geographic focus by considering aspects of other nations’ laws governing standing to challenge

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<sup>1</sup> See e.g. Karkkainen, *infra* note 7 at 472 (discussing use of the term “New Governance”).

<sup>2</sup> See e.g. Lobel, *infra* note 27.

<sup>3</sup> See e.g. Susan Sturm, “Second Generation Employment Discrimination: A Structural Approach” (2001) 101 Colum L Rev 458 (American employment discrimination law).

<sup>4</sup> See e.g. David Markell, “The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency and Accountability” (2010) 45 Wake Forest L Rev 435 (examining the New Governance-influenced procedures for citizen participation in the North American Commission for Environmental Cooperation).

<sup>5</sup> See *infra* Part II.

<sup>6</sup> See e.g. Richard Stewart, “The Reformation of American Administrative Law” (1975) 88 Harv L Rev 1667.

administrative action. In particular, it considers whether innovations in those nations' standing law help overcome these hurdles while remaining true to courts' proper role in the administrative system. While other nations have taken some significant steps to overcome or resolve these issues, it remains unclear whether those resolutions easily transfer to the different institutional and legal structure in the United States. Part V considers whether the standing problem can be resolved in a principled way by reconceptualizing the injury plaintiffs allege when they challenge New Governance regulation. It suggests such a reconceptualization is both doctrinally plausible and justified by a proper understanding of New Governance regulation.

Part VI widens the essay's scope by considering the proper scope of judicial review of New Governance regulation. In particular, it focuses on the problem presented by judicial review of ongoing agency management of public-private collaborations. Such management constitutes much of what is novel about New Governance; however, judicial review of such ongoing activity raises concerns about judicial competence and overstepping.

Part VI notes the skepticism with which American courts have considered the prospect of judicial supervision of agencies' ongoing management activities. However, it suggests that some form of ongoing judicial supervision is probably necessary to any realistic scheme of judicial review of New Governance regulation. This Part of the essay analogizes to an area where American courts have previously exerted this type of power – structural reform litigation, and, in particular, judicial oversight over school desegregation. It notes the challenges the desegregation mandate imposed on courts, and concedes the (at best) partial success of that effort. However, it also suggests that shouldering these burdens may become necessary in the administrative law context. Part VI ends by suggesting the mechanics of how an appropriate system of judicial review might be constructed.

## II. THE BASICS: NEW GOVERNANCE AND THE CHALLENGES IT POSES

“New Governance” is a catch-all label that includes within it a variety of regulatory approaches. However, for purposes of this very general examination, certain common characteristics of New Governance models can be identified. This list is incomplete and not authoritative; indeed, New Governance scholars disagree about what New Governance actually includes.<sup>7</sup> However, the identification here of some generally-accepted characteristics illustrates how, even at this general level of explanation, New Governance presents significant problems for the prospect of judicial review.

For our purposes, a key feature of New Governance is its use of soft, non-mandatory regulatory tools.<sup>8</sup> Regardless of “how soft” those tools are – that is, regardless of the precise degree to which non-binding norms mix with authoritative and mandatory legal rules – the fact remains that, compared with traditional regulation, New Governance features some significant degree of “regulation without rules.” In place of rules, New Governance contemplates participant-generated and

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<sup>7</sup> See generally Bradley Karkkainen, “New Governance in Legal Thought and in the World: Some Splitting as an Antidote to Overzealous Lumping” (2004) 89 Minn L Rev 471 (noting the variations among New Governance scholars with regard to the scope of the field).

<sup>8</sup> See Lobel, *infra* note 27 at 388-395; see also Abbott & Sindal, *infra* note 13 at 508-509 (describing the presence of “soft law” as one of the “four central elements of New Governance”).

enforced norms, with government performing an ongoing role of coordinating and incentivizing the work of other actors.<sup>9</sup>

Second, New Governance is marked by its broad, problem-based focus.<sup>10</sup> Rather than slicing a particular problem into its component parts and allocating regulation of each to a particular agency, New Governance envisions a more holistic approach to problem-solving, one that emphasizes the interrelated nature of the regulatory problem at hand. Coordinated delivery of social services for the poor, and coordinated land-use, transportation and environmental planning present two examples of holistic consideration of regulatory problems that traditionally are split into smaller parts for regulation by agencies operating under different mandates and often not communicating with each other.

Finally, New Governance is characterized by devolution and subsidiarity.<sup>11</sup> New Governance scholars generally favour decentralized decision-making involving groups whose local focus would often make them invisible to a more centralized, hierarchical, bureaucracy. Such decision-making is justified on the related grounds that problems are best dealt with by those in closest contact to the actual problem, and optimal solutions are often those that are closely tailored to the specifics of a given situation.<sup>12</sup>

These characteristics of New Governance, as laudable as they might be, nevertheless present significant challenges for a system of judicial review that was developed under a very different set of assumptions about how regulation is performed. First, the “soft” nature of New Governance raises serious questions about causation under conventional standing doctrine. As will be examined in more detail in Part III, if government is not unambiguously acting to the detriment of a particular interest, but rather is simply coordinating or incentivizing third-party action, it becomes unclear whether one can confidently say that a given government action has “caused” anyone any harm.

Other facets of New Governance raise analogous concerns. The multi-pronged, holistic nature of New Governance regulation suggests that no one government institution is ultimately responsible for the harms caused. While theoretically such multi-pronged approaches to problems can be led by one government actor, the dispersal of expertise and interests presumably means that in most cases regulation marked by this feature will take the form of multiple government actors coordinating their actions.<sup>13</sup> This diffusion of authority may lead to a diffusion of responsibility, and a concomitant reluctance on the part of reviewing courts to conclude that judicial correction of one agency’s misconduct will in fact redress the plaintiff’s injury.<sup>14</sup> This

<sup>9</sup> As suggested above, such action may co-exist with more traditional regulation.

<sup>10</sup> See e.g. Lobel, *infra* note 27 at 385-388.

<sup>11</sup> See e.g. Lobel, *infra* note 27 at 381-385; see also Abbott and Snidal, *infra* note 13 at 508-509 (describing the incorporation of “a decentralized range of actors and institutions” as one of the “four central elements of New Governance”).

<sup>12</sup> See e.g. Abbott and Snidal, *infra* note 13 at 525-527.

<sup>13</sup> See e.g. Kenneth Abbott and Duncan Snidal, “Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit” 42 *Vand J Transnat’l L* (2009) 501 at 528-529 (noting the phenomenon of diffused expertise in the transnational regulatory context).

<sup>14</sup> See e.g. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, at 568-571 (1992) (plurality portion of opinion) [*Defenders of Wildlife*] (concluding that the failure to sue the agency actually threatening an endangered species renders speculative the question whether relief against the agency responsible for administering the *Endangered Species Act* would redress any injury caused by a species extinction). Of course, this same dynamic impacts causation analysis as well. This is unsurprising, given that

horizontal diffuseness of responsibility is matched by a vertical diffuseness, to the extent New Governance features devolution of decision-making power, whether to more local levels of government or private actors. This vertical diffusion of responsibility raises the same concern about redressability.

Moreover, the nature of New Governance regulation as primarily concerned with coordination and management of others' actions raises questions about the appropriate scope of judicial review. If the federal government's role in New Governance is that of "an orchestrator rather than a top-down commander,"<sup>15</sup> and "less one of direct action than one of providing financial support, strategic direction, and leadership"<sup>16</sup> for other actors, then presumably judicial review of government action necessitates review of how the government performs those tasks. As will be noted later,<sup>17</sup> American courts have expressed concern about such programmatic judicial review.<sup>18</sup> To the extent this reticence derives ultimately from the common-law limits on judicial review of administrative action, this problem may be one not purely confined to the United States.<sup>19</sup>

Thus, New Governance poses challenges both for the availability and scope of judicial review in the administrative system. The next Part considers the availability problem, as seen through the lens of American standing law. After canvassing other nations' legal systems for possible fixes to the problems thus presented, the essay then moves on to consider how judicial review – both its availability and its scope – can come to accommodate New Governance regulation while staying within the bounds of the traditional judicial role.

### III. NEW GOVERNANCE AND AMERICAN STANDING LAW

New Governance regulation fits uncomfortably with American legal doctrine governing the availability of judicial review of agency action. The biggest problems flow from the doctrine's insistence that the defendant agency have caused the plaintiff's injury, and, relatedly, that judicial relief would redress the plaintiff's injury. In the usual situation where the agency is directly regulating private parties, causation is normally established quite easily. Indeed, causation presents no special problem even in some third-party harm situations. For example, courts generally have no problem finding causation when a plaintiff alleges that an agency's failure to regulate emissions pursuant to law allows a third party to continue to pollute, thus causing harm to the plaintiff.

However, causation becomes more problematic when regulation assumes certain New Governance forms. To illustrate this, consider a case from over thirty years ago, well before the rise of a discourse on New Governance. In *Simon v. Eastern Kentucky Welfare Rights Organization*,<sup>20</sup> the plaintiff welfare-rights organization, acting on behalf

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causation and redressability can be considered mirror images of each other. See e.g. Charles Kelso, "Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results" (1996) 28 U Tol L Rev 93 at 135 n. 280.

<sup>15</sup> Abbott and Snidal, *supra* note 13 at 521.

<sup>16</sup> Paul Osterman *et al*, *Working in America: A Blueprint for the New Labor Market* (Boston: M.I.T. Press, 2001) at 151.

<sup>17</sup> See below Part VI.

<sup>18</sup> See e.g. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) [*National Wildlife Federation*] (noting that requests for such programmatic corrections are generally not properly addressed to courts).

<sup>19</sup> See text accompanying *infra* note 47.

<sup>20</sup> 426 U.S. 26 (1976) [*Eastern Kentucky*].

of its members, sued the Internal Revenue Service [IRS], alleging that it had misinterpreted a provision of the *Internal Revenue Code* and thereby made it easier for hospitals to deny indigents free health care while still enjoying charity status (with the attendant tax deductibility of contributions).

The Supreme Court held that the organization could not show that the IRS caused its members' injury. It concluded that it was simply too speculative whether the agency's regulation prompted the hospitals' denial of free services and therefore caused the plaintiffs' harm. For the same reason, it concluded that it was similarly speculative whether a court order enjoining the regulation would redress that lack of medical care.<sup>21</sup> Instead, the Court suggested that it was equally plausible that a court order requiring the IRS to tighten the rules for charity status would prompt the hospitals to choose to forego that status and continue denying free care.<sup>22</sup>

Somewhat more distantly, but in substance essentially indistinguishable, is the situation where government is alleged to violate law when funding activity by third parties. For example, in *Lujan v. Defenders of Wildlife*<sup>23</sup> the plaintiffs argued that the U.S. Government violated the *Endangered Species Act* when it funded development projects abroad without engaging in internal consultations about the projects' impact on endangered species. In rejecting the plaintiffs' standing, a plurality concluded that their injury was not redressable, because (among other reasons) U.S. Government funding for the project made up only a small percentage of the project's cost. According to the plurality,<sup>24</sup> it was therefore unclear whether the project would be stopped or altered even if the Court ruled for the plaintiffs on the consultation issue.<sup>25</sup>

While it is hazardous to extrapolate, these examples nevertheless bode poorly for American courts' willingness to hear challenges to much New Governance regulation.<sup>26</sup> If it is true that such regulation can be described as non-coercive and

<sup>21</sup> See Kelso, *supra* note 14.

<sup>22</sup> 426 U.S. at 42-44. The Court endorsed *Eastern Kentucky's* analysis in a later, analogous, case. See *Allen v. Wright*, 468 U.S. 737 (1984).

<sup>23</sup> 504 U.S. 555 (1992).

<sup>24</sup> The members of the *Lujan* majority that refused to join Justice Scalia's redressability analysis – Justice Kennedy, joined by Justice Souter – did not reach the redressability issue. See *Defenders of Wildlife*, *supra* note 14 at 579, 580 (opinion of Kennedy, J.).

<sup>25</sup> *Ibid* at 571 (opinion of Scalia, J.). A majority found that the plaintiffs had not established injury; for that reason the Court denied the plaintiffs' standing. See *ibid* at 562-567.

<sup>26</sup> A recent case, *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010), hints at a more generous approach to standing. The facts of *Monsanto* are complex, but the key point is that the Court held that a party had standing to challenge an injunction prohibiting an agency from taking a deregulatory act, even though a reversal of the injunction would require the agency to consider whether to promulgate a more limited deregulatory order after conducting an environmental assessment that might or might not support partial deregulation. See *ibid* at 2753-2754. The Court observed that the agency had made it clear that it favoured such a partial deregulation in response to the court's ruling on the merits against its full deregulation decision. For that reason, the Court stated that "there is more than a strong likelihood that [the agency] would partially deregulate [the product] were it not for the District Court's injunction. The District Court's elimination of that likelihood is plainly sufficient to establish a constitutionally cognizable injury." *Ibid* at 2754.

*Monsanto* suggests that an injury may be considered redressable even when the court's order (here, reversing the lower court's injunction) simply throws the matter into the hands of a third party (here, the agency), which might or might not take the action desired by the plaintiff. As such, one might view the Court's decision as a partial repudiation of its analysis in cases such as *Eastern Kentucky*. See text accompanying *supra* note 22. But because the Court expressed such confidence that the agency would in fact take the desired action, its analysis is probably best understood as simply an application of the rule requiring only that it be "likely" that the plaintiff's injury would be redressable by a court. See e.g. *Sprint Communications v. APCC Services, Inc.*, 554 U.S. 269 (2008) at 269. By contrast, in the context of New Governance regulation, redressability would likely be far more speculative, given the

informal,<sup>27</sup> and as relying on third-party action,<sup>28</sup> then presumably it is beyond the reach of a plaintiff's lawsuit, as the defendant-agency can claim that the nature of the regulation renders causation and redressability too speculative.<sup>29</sup> The next Part considers how other nations' laws have approached this issue.

#### IV. NEW GOVERNANCE REGULATION AND STANDING REQUIREMENTS OUTSIDE THE UNITED STATES

The world's legal systems are, of course, far too diverse to permit in this short space a comprehensive canvassing of other nations' standing law. Instead, this essay will discuss particular aspects of that law to note both challenges and possibilities for accommodating judicial review of New Governance regulation.

As a very general matter, most nations' judicial systems recognize the need for a plaintiff to show an interest in the subject-matter of the lawsuit. Common law nations derived this requirement from English law,<sup>30</sup> while civil law nations generally recognize such a requirement as well.<sup>31</sup> However, in some cases national legislatures have abolished the injury requirement in particular types of lawsuits. Most notably, a number of common law and civil law nations have authorized environmental groups to sue on environmental matters without having to demonstrate the existence of a concrete interest, either of its own or one of its members.<sup>32</sup> In other cases, legislatures or courts have authorized other organizations, such as unions or the Red Cross, to sue on matters relevant to the organization's interest without it having to satisfy that nation's law's conventional standing requirements.<sup>33</sup>

In one sense these broad grants of standing go beyond resolving the more discrete problem presented by standing to challenge New Governance action. This latter issue presents the problem of conceptualizing injury and causation in the context of a prospective plaintiff who otherwise plainly has an interest in the challenged regulatory activity. For example, New Governance regulation of land use

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fluid, multi-party nature of the regulatory process. Thus, *Monsanto*, while promising, does not represent the deeper reconceptualization of standing law that may be required to secure judicial review of New Governance regulation. See below Part IV.

<sup>27</sup> See Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought" (2004) 89 *Minn L Rev* 342 at 388-389.

<sup>28</sup> See Lester Salamon, "The New Governance and the Tools of Public Action: An Introduction" (2001) 28 *Fordham Urb LJ* 1611 at 1613.

<sup>29</sup> *Cf. Eastern Kentucky*, *supra* note 20 at 46 (Stewart, J. concurring) ("I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.").

<sup>30</sup> See e.g. Jon Owens, "Comparative Law and Standing to Sue: A Petition For Redress For the Environment" (2001) 7 *Env'tl Law* 321 at 348.

<sup>31</sup> See generally van Dijk, *infra* note 33 (discussing French and German law); Parker, *infra* note 33 at 277-278 (discussing requirement under Italian law).

<sup>32</sup> See generally Owens, *supra* note 30. Compare *Sierra Club v. Morton*, 405 U.S. 727 (1972) (refusing to allow a well-known environmental advocacy group to challenge an agency action adversely affecting the environment without showing injury either to the organization itself or to one of its members).

<sup>33</sup> See P. van Dijk, *Judicial Review of Governmental Action and the Requirement of an Interest to Sue* (Alphen ann den Ryn, Netherlands and Rockville Maryland: Sitoff and Nordoff, 1980) (French court allowing a union to sue); Douglas Parker, "Standing to Litigate 'Abstract Social Interests' in the United States and Italy: Reexamining 'Injury in Fact'" (1995) 33 *Colum J Transnat'l L* 259 at 284-287 (Italian legislature giving unions the right to sue to challenge anti-union contact by employers, without any requirement that the union's own interest is at stake and without the union suing as a representative of its members); *ibid* at 287-290 (Italian statute authorizing the Red Cross to sue to vindicate humanitarian interests).

clearly impacts residents of the area, even if the “soft” nature of the regulation renders problematic standard applications of the injury and causation requirements. By contrast, the environmental, union and Red Cross legislation discussed above has simply wiped away those requirements.<sup>34</sup>

However, at another level one can discern useful parallels between legislation granting broad standing rights and judicial attempts to reconceptualize injury and causation. Both moves can be justified by concern that the diffuse nature of the issue makes it hard for a would-be plaintiff to satisfy conventional rules. In both cases then, the absence of these innovations raises the risk that no person would ever have standing to sue.<sup>35</sup> Thus, the aggressive step of abolishing standing requirements and the more limited reconceptualization of injury and causation both respond to a desire to ensure the availability of judicial review when either the nature of the issue or the nature of the regulatory style would frustrate it under more conventional standing rules.

Other nations’ actions also raise the separate, but related, question of institutional authority over standing requirements. Italy, for example, has granted organizational standing, without the need for the organization to satisfy normal standing requirements, by statutorily authorizing particular organizations to sue to vindicate particular causes.<sup>36</sup> Indeed, Italy has gone even farther, and empowered the Ministry of the Environment to certify environmental organizations as authorized to enjoy this special juridical status.<sup>37</sup> Other nations that have wiped away standing limits for certain organizations have done so by courts construing generally-phrased statutory language.<sup>38</sup>

By contrast, in the United States standing remains very much a matter of judicial construction of constitutional law. This difference matters because the constitutional nature of American standing law places primary responsibility for innovations with the Supreme Court, rather than Congress. Moreover, the ostensibly unchanging nature of the case-or-controversy requirement suggests that a more likely and doctrinally justifiable innovation may involve reconceptualizing the inputs into the standing inquiry – here, injury and causation – rather than explicitly abandoning those requirements, as European<sup>39</sup> and other<sup>40</sup> legislatures have done.

Such a reconceptualization of injury and causation may change standing law sufficiently to accommodate judicial review of New Governance regulation. Nevertheless, systems where legislatures enjoy significant influence over standing may still be better-suited to respond to the challenge New Governance poses to judicial review. The softness of New Governance regulation means that stretching concepts of injury and causation will entail difficult line-drawing problems. The Supreme Court

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<sup>34</sup> See e.g. Parker, *ibid* at 288 (noting that the Italian Red Cross statute goes beyond any concern with concrete injury). Compare *Eastern Kentucky*, *supra* note 20 (Stewart, J. concurring) (observing that under the Court’s refusal to grant standing to a private party beneficiary of an agency’s assessment of another party’s tax liability, nobody would be able to contest the tax liability of a third party). The facts of *Eastern Kentucky* are provided above, at text accompanying *supra* notes 20-22.

<sup>35</sup> See *Regina v. Sec’y of State for Foreign & Commw. Affairs* ex parte *The World Dev. Movement Ltd.*, 1 W.L.R. 386, 393 (Q.B. 1995) (British court recognizing standing for a public interest organization, in part due to the fact that if standing were denied then nobody would have standing to challenge the legality of the government action).

<sup>36</sup> See *supra* note 33 (Italy). Compare *Sierra Club*, *supra* note 36.

<sup>37</sup> See Parker, *supra* note 33 at 288-294.

<sup>38</sup> See Owens, *supra* note 30 at 345-348 (Great Britain).

<sup>39</sup> See e.g. Parker, *supra* note 33 at 288-294 (Italy).

<sup>40</sup> See e.g. Owens, *supra* note 32 at 369 (Peru).

has already confronted this problem when dealing with its broadest application of these concepts – its acceptance as sufficient (even if only at the pleading stage) of the creative and attenuated causal chain in *United States v. Students Challenging Regulatory and Administrative Procedures* [*SCRAP*].<sup>41</sup> As the Court has grown more conservative, its embarrassment at its acceptance of the plausibility of the standing claim in *SCRAP* has increased. However, its inability to draw principled limits has led it to reject injury and causation claims with only the barest of reasoning. For example, in *Lujan v. Defenders of Wildlife*,<sup>42</sup> the Court rejected a claim that zookeepers and others with a professional interest in an animal species were injured by action threatening the species' continued existence with little more than the exclamation that such a claim was "beyond all reason."<sup>43</sup>

By contrast, legislatures enjoy much more legitimacy in drawing lines that, if drawn by a court, would appear to be unprincipled.<sup>44</sup> Legislation is nothing if not line-drawing; its legitimacy flows from legislators' popular mandate, rather than principled interpretation of a legal text. Thus, nations where legislatures control standing may be better suited to draw potentially fine-grained distinctions about which parties may seek judicial review of New Governance regulation that theoretically impacts many groups of people, or interests that are in some sense diffused.<sup>45</sup>

Of course, practice is messier than theory. In the American context the stark dichotomy between legislation and constitution is belied by the status of the *APA* as a foundational statute that has accommodated significant shifts in regulatory theory and understandings of judicial review. The picture gets even murkier in light of the *APA*'s status as a codification of longstanding common law rules of judicial review of agency action.<sup>46</sup> Given the quasi-constitutional status of much of that common law, the *APA* arguably takes on a dual status – a "mere" statute that serves only as the default that Congress can override at will, but also a codification of quasi-constitutional limits on judicial review.<sup>47</sup> In turn, this dual nature suggests that the extent of congressional power to use its control over administrative law to influence the availability of judicial review remains an unresolved question in the American system. To the extent courts in other systems face their own limitations beyond the power of the national parliament to influence, this difficulty may be more than a purely American one.

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<sup>41</sup> 412 U.S. 669 (1973) (accepting, for purposes of surviving a motion to dismiss, plaintiffs' claims that changes in railroad rates harmed their interest as hikers because the rates would cause some recycling activity to become uneconomical, thus leading to more trash deposited on hiking trails).

<sup>42</sup> *Defenders of Wildlife*, *supra* note 14 at 555.

<sup>43</sup> *Ibid* at 566.

<sup>44</sup> See e.g. William D. Araiza, "The Section 5 Power and the Rational Basis Standard of Equal Protection" (2005) 79 Tul L Rev 519 at 546-551.

<sup>45</sup> See text accompanying *supra* note 37.

<sup>46</sup> See e.g. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) [*Southern Utah*] (describing some of the *APA*'s limitations on judicial review as based on the common-law principles of mandamus); see also *Webster v. Doe*, 486 U.S. 592, 606, 608-609 (1988) (Scalia, J., dissenting) (describing the "committed to agency discretion by law" provision for precluding judicial review of agency action as resting on common-law limits on judicial review).

<sup>47</sup> See e.g. *Webster*, *ibid* at 609 (Scalia, J., dissenting) (describing political questions as one of the doctrinal areas that developed as part of the common law of judicial review of agency action).

## V. GOVERNMENT ACCOUNTABILITY AND THE JUDICIAL ROLE

One might consider restrictions in American standing law to reflect merely technical flaws that are relatively easily corrected through a broader understanding of causation. But the issue raises more fundamental concerns.

At one level, the problem can be understood to implicate not causation but the nature of the injury itself. In *Simon*, for example, one might just as easily have understood the plaintiffs' injury not as loss of free medical care, but, as Justice Brennan saw it in his separate opinion, as the decreased opportunity to receive such care.<sup>48</sup> Reconceptualizing the injury in this way might remedy the problem caused by the Court's skepticism about the causal link between the harm and the challenged government action.

One might object that this "resolution" is simply a play on words: if one doesn't know in a given case whether government *really* caused a particular injury, presumably one can know with more confidence that the government action at least made the injury more likely. Under this understanding, this answer to the problem reflects not so much a reconceptualization of injury as a simple weakening of the causation requirement. One might argue that it may be a good idea to weaken the causation requirement in this way, but still insist that the move described above simply accomplishes that straightforward fix, rather than reflecting any deeper rethinking about what injury should mean.

However, in another sense this resolution does go beyond wordplay to reflect a deeper reconceptualization of injury. In *Simon*, Justice Brennan begins his critique of the Court's standing analysis by citing the plaintiff's *legal* claim – that "the IRS is offering the economic inducement of tax-exempt status to such hospitals under terms illegal under the Internal Revenue Code."<sup>49</sup> Why worry about the legal claim when the issue is standing? After all, we all understand that one may suffer injury separate from the invasion of one's legal rights – indeed, this is assumed when a plaintiff is held not to have standing because he is asserting the legal interests of a third party.<sup>50</sup> Justice Brennan seems to take this unusual analytic route because he wanted to tie the plaintiffs' injury to the legal claim they are asserting:

Respondents' claim is not, and by its very nature could not be, that they have been and will be illegally denied the provision of indigent medical services by the hospitals. Rather, if respondents have a claim cognizable under the law, it is that the Internal Revenue Code requires the Government to offer economic inducements to the relevant hospitals only under conditions which are likely to benefit respondents. The relevant injury in light of this claim is, then, injury to this beneficial interest – as respondents alleged,

<sup>48</sup> See *Eastern Kentucky*, *supra* note 20 at 46, 56 (Brennan, J., concurring in the judgment) ("The relevant injury ... is ... as respondents alleged ... injury to their 'opportunity and ability' to receive medical services").

<sup>49</sup> *Ibid* at 55 (Brennan, J., concurring in the judgment).

<sup>50</sup> See e.g. in *Warth v. Seldin*, 422 U.S. 490 (1975), the Court assumed that the taxpayers of a city had Article III standing to sue a neighbouring town over its exclusionary zoning. But even though the taxpayers were assumed to have Article III injury, they were not allowed to sue because they were asserting a third party's legal rights. In the administrative law context one could also cite the (rare) cases where a plaintiff suffers Article III injury but is nevertheless held to be outside of the zone of interests protected by the statute. See e.g. *Air Courier Conference of America v. American Postal Workers Union AFL-CIO*, 498 U.S. 517 (1991).

injury to their “opportunity and ability” to receive medical services.<sup>51</sup>

Justice Brennan’s phrase, “the relevant injury in light of this claim,” has to be understood as tying the injury to the benefits they enjoy under the statute. The statute creates the interest Justice Brennan believes the plaintiffs to have relied on for their standing. This is not just loosening causation. It is reimagining the nature of the injury.

New Governance regulation should be understood as creating rights analogous to the right perceived by Justice Brennan in *Eastern Kentucky*. Under New Governance principles government aims, at least in part, to create conditions under which other actors modify their conduct in desired ways. So understood, it makes sense to think about injury not as the deprivation of a particular concrete good (such as medical care or a clean environment), but instead as the deprivation of the optimal conditions under which other parties might provide the good.

One finds a parallel to this sort of incentivizing conduct in, of all places, constitutional litigation. In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,<sup>52</sup> the Supreme Court concluded that a white-owned contracting firm had standing to challenge a city’s racial set-aside for contracting business, despite the plaintiff lacking any evidence that the set-aside had ever caused it to lose a contract. Instead of denying standing, the Court reconceptualized the injury, by describing it as the inability to compete on a level playing field.<sup>53</sup> In this sense, then, the Court’s understanding of Equal Protection reflects a concern that is at least passingly analogous to some New Governance regulation. In both New Governance and Equal Protection, the point is not to mandate certain outcomes (equal distribution of contracts to all races on a proportionate basis, or provision of a certain amount of healthcare).<sup>54</sup> Rather, the point is to insist on a process – equal consideration of all contractors, regardless of race, and the incentivizing of private hospitals to provide medical care. That process may or may not have a particular substantive good in mind,<sup>55</sup> but in both cases the right in question is understood as a right to that process, not a right to that substantive good.

In such a case, where the government undertakes only to provide a decision-making process it makes sense to understand the injury in analogous terms. In *Eastern Kentucky* Justice Brennan understood the interest, derived from the statute, as the “opportunity” to receive medical care based on an appropriate incentivizing of private conduct. In *Florida Contractors*, the interest, derived from the Constitution, was the “opportunity” to compete for contracts on an equal basis. So too, in a New Governance context one might understand the interest, derived from the

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<sup>51</sup> *Eastern Kentucky*, *supra* note 20 at 56 (Brennan, J., concurring in the judgment).

<sup>52</sup> 508 U.S. 656 (1993) [*Florida Contractors*].

<sup>53</sup> *Ibid* at 666 (“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The “injury in fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”).

<sup>54</sup> See *ibid.* (equal protection).

<sup>55</sup> Equal protection may not have equal outcomes as its goal, though presumably there remains the aspiration that, with equal treatment, outcomes will eventually equalize.

government's regulatory approach, as the opportunity to benefit from appropriate government leadership and coordination of third parties' actions.

Still, one might argue that equal protection is a special case – that, essentially, denial of equal treatment is itself understood to be a cognizable harm, even without an explicitly concrete loss.<sup>56</sup> Under this argument, any other similar opportunity loss, such as the reduced likelihood of enjoying a particular good because of sub-optimal government incentivizing of private conduct, is simply different, and inadequate for standing purposes. Indeed, American courts' insistence that injury be not just particularized, but *concrete*, seems to fly in the face of a claim that an individual has an interest in, say, the appropriate incentivizing of private conduct or an appropriate level of public-private consultation or partnership with regard to a given goal, completely separate from the interest in the concrete benefit itself.

However, such a reconceptualization seems to align better with the nature of New Governance regulation. As explained in Part III, in New Governance regulation the government should be understood not as ultimately responsible for the provision of a particular service, but rather as a coordinator and facilitator of private conduct so that the good in question is provided via private choice. The nature of this role suggests that the private party's interest protected in the regulatory program is best understood in terms of opportunities to enjoy the substantive good, rather than in terms of the good itself. In addition to having the practical benefit of resolving the causation problem, this understanding of the plaintiff's interest aligns New Governance style with the interests private parties have in making sure that government follows the law when it regulates. This harmonization therefore allows courts to answer questions about the availability of judicial review with an eye toward what government is really charged with doing when it regulates according to New Governance principles.

Doctrinally, this move may not be as difficult or unprincipled as it might seem at first glance. American courts recognize that statutes may create rights, the deprivation of which constitutes an Article III injury.<sup>57</sup> They also recognize that the *APA* requires that a plaintiff be “arguably within the zone of interests” sought to be protected by the statute alleged to be violated.<sup>58</sup> While the “zone of interests” test is an additional, prudential standing requirement imposed over and above the Article III injury test, in a case where the injury is alleged to be the deprivation of a statutorily-bestowed interest, there appears to be no reason why possessing that statutorily-based interest should not satisfy Article III requirements. Indeed, basing the standing inquiry on the existence of a statutorily-granted interest hearkens back to traditional American standing law, which required such an interest (rather than simple concrete injury) as an indispensable element.<sup>59</sup> In the case of New Governance, that statutorily-provided interest is best understood as an interest in proper government management of the collaborate relationships that constitute this style of regulation.

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<sup>56</sup> See e.g. *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that white plaintiffs are injured by being intentionally placed in a majority-minority district, because being subject to the race-conscious action itself constitutes the injury).

<sup>57</sup> See e.g. *Havens Realty v. Coleman*, 455 U.S. 363 (1982).

<sup>58</sup> *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970).

<sup>59</sup> See e.g. *Edward Hines Yellow Pine Trustees v. United States*, 263 U.S. 143 (1923); *Alabama Power v. Ickes*, 302 U.S. 464 (1938).

Thus, the doctrinal pieces exist to accomplish this change. To be sure, they may require some shuffling, but no more than courts have accomplished in the past when accommodating judicial review to new theories of regulation.<sup>60</sup>

## VI. BEYOND STANDING: THE SCOPE OF JUDICIAL REVIEW OF NEW GOVERNANCE REGULATION

Structuring judicial review with “an eye toward what government is really charged with doing” raises concerns beyond the availability of judicial review. In particular, it also raises issues about the scope of such review. Most importantly for present purposes, New Governance envisions a role for government as ongoing manager of a continuing process of collaboration and problem-solving among various parties. Thus, judicial review of government’s role in that process will entail ongoing review, with appropriately tailored remedies.

This form of judicial review poses challenges for American courts. The Supreme Court is skeptical about judicial supervision of ongoing agency policy management. In *Lujan v. National Wildlife Federation*<sup>61</sup> the Court refused to consider as ripe for adjudication challenges to aspects of the Interior Department’s general land management program, since actions taken under that program did not yet have “an actual or immediately threatened effect.”<sup>62</sup> It noted that such programmatic review clashed with “the traditional... and normal mode of operation of the courts.”<sup>63</sup> Even more to the point, in *Norton v. Southern Utah Wilderness Alliance*<sup>64</sup> the Court worried that judicial supervision of an agency’s ongoing management responsibilities would stretch courts’ competence and unduly interfere with agencies’ discretion.<sup>65</sup>

It is an important question whether these hurdles flow from legislative or constitutional limits on federal courts. In *National Wildlife Federation* the Court characterized the limitation in that case as statutory, suggesting that Congress could cure the ripeness problem the Court identified by providing for judicial review “at a higher level of generality” than the level at which an agency action would normally be considered ripe.<sup>66</sup> Similarly, in *Southern Utah* the Court described the hurdle as statutory, concluding that “[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with [statutory directives to engage in ongoing management action] is not contemplated by the *APA*.”<sup>67</sup>

<sup>60</sup> See text accompanying *infra* notes 74-81. As a final comparative glance, it bears noting that one scholar concludes that at least the Italian system has largely adopted this approach. See Parker, *supra* note 33 at 279-280 (concluding that Italian standing law tends to focus more on the meaning of the legal right asserted by the plaintiff and less on an American-style preliminary inquiry into the plaintiff’s injury).

<sup>61</sup> *National Wildlife Federation*, *supra* note 18.

<sup>62</sup> *Ibid* at 894. Other nations’ administrative law systems impose at least roughly analogous limits. See e.g. van Dijk, *supra* note 33 at 134-135 (describing roughly analogous requirements in French administrative law).

<sup>63</sup> *National Wildlife Federation*, *supra* note 18 at 894.

<sup>64</sup> *Southern Utah*, *supra* note 46 at 2373.

<sup>65</sup> *Ibid* at 2381.

<sup>66</sup> See *National Wildlife Federation*, *supra* note 18 at 894.

<sup>67</sup> *Southern Utah*, *supra* note 46 at 2381. See also *National Wildlife Federation* *supra* note 18 at 890 n. 2 (refusing to consider as “final agency action” under the *APA* an agency’s general program that does not take the form of “some specific order or regulation, applying some particular measure across the board”).

However, at other times the Court appears to consider these hurdles to reflect fundamental separation of powers principles – in particular, the principle that challenges to large-scale, programmatic actions are most appropriately directed to Congress or the agency itself (including, presumably, to the presidential administration to which the agency is accountable).<sup>68</sup> Such suggestions of a constitutional foundation for the limitation on judicial review echo the Court's citation of similar separation of powers reasons for refusing to hear generalized grievances.<sup>69</sup>

Still, if there is to be judicial review of New Governance some allowance must be made for broad, programmatic attacks. To the extent New Governance regulation consists of government engaging in an ongoing planning and management process, judicial review of that regulation necessarily implies review of such ongoing, programmatic activities. Slicing and dicing those activities in order to isolate a particular government action suitable for traditional judicial review and correction fundamentally misapprehends the thrust of New Governance. To analogize very roughly, such traditional judicial review would amount to reviewing why the tire of a car was not properly rotating and attempting to correct it by mandating that it rotate correctly, instead of asking whether the entire car was operating correctly and mandating an appropriate remedy. Simply put, if government regulation becomes more programmatic in nature, then judicial review must follow, if it is to remain relevant.

Such holistic judicial review finds a distant echo in courts' management of structural reform litigation – most notably, school desegregation litigation. Such management responsibilities arose in response to the Supreme Court's rejection of immediate desegregation and its insistence on the complete removal of the vestiges of the previously segregated system. This combination created a landscape where fulfillment of the desegregation mandate was expected to come about through an ongoing process managed by courts.

Scholars who have studied courts' role in this process offer a decidedly mixed verdict on its success.<sup>70</sup> In addition to concerns about their competence to manage such large-scale change, the alleged intrusiveness of long-term judicial control over schools has led a more conservative Supreme Court to impose severe limits on the tools courts can wield to ensure fulfillment of the desegregation mandate. Somewhat analogous concerns apply also to the prospect of judicial supervision of agency management under New Governance. Concededly, such supervision does not explicitly aim at remaking an institution. However, it does involve reviewing how a

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<sup>68</sup> See e.g. *Southern Utah* *supra* note 46 at 891 (“respondents cannot seek *wholesale* improvement of [the agency’s land program] by court decree, rather than in the offices of the [agency] or the halls of Congress, where programmatic improvements are normally made.”) [emphasis in original]. To the extent the action is taken by an “independent” agency, the Court in a recent case appeared to substitute Congress for the President as the party ultimately responsible for correcting such programmatic failures. See *Federal Communications Commission v. Fox Television Stations*, 129 S.Ct. 1800, 1816 & n. 4 (2009).

<sup>69</sup> See *Defenders of Wildlife*, *supra* note 14 at 573-578. This is not to say that the standing issue in *Defenders of Wildlife* is exactly analogous to the ripeness-based concern in *National Wildlife Federation*. However, in both cases, the Court expressed concern about judicial review of general government policies, without an effect that is either immediate, see *National Wildlife*, *supra* note 18 at 894, or particularized, see *Defenders of Wildlife*, *supra* note 14. As a further ambiguity, in at least one case the Court has backed off its statement in *Defenders of Wildlife* that the generalized grievance bar is necessarily of constitutional stature. See *Federal Election Comm’n v. Akins*, 524 U.S. 11 (1998).

<sup>70</sup> The classic statement of this pessimistic appraisal is Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

complex institution interacts on an ongoing basis with other institutions, in a way that runs the risk of intruding on the entity primarily tasked with those responsibilities.<sup>71</sup> If courts could only partially succeed (at best) at the desegregation task before their supervisory role was sharply cut back, one might wonder if the same fate would likely attend supervision of ongoing agency management of a complex, interactive regulatory process.

At the very least, judicial review of New Governance regulation suggests a new role for courts. Justice Scalia implied as much in *Southern Utah*, when he tied restrictions on judicial review of ongoing agency action not just to the *APA* but to the tradition of the mandamus remedy on which the relevant part of the *APA* rested.<sup>72</sup> Indeed, if Justice Scalia has his history right, then the issues raised by this new type of judicial review transcend American law and affect, at the very least, other nations whose administrative law traditions relate back to English common law.<sup>73</sup>

The parallel between this new type of judicial review and the troubled history of courts' management of school desegregation gives pause to any confident call for reworking judicial review to account for the characteristics of New Governance regulation. Still, judicial review of agency action in the United States has undergone major changes in the past, even within the last sixty years during which the *APA* has purportedly set forth the basic ground rules. For example, courts have expanded the concept of standing,<sup>74</sup> embraced judicial review earlier in the administrative process,<sup>75</sup> and greatly expanded the judicial role in reviewing agency action for reasonableness.<sup>76</sup> All of these developments are relevant to the type of judicial review necessary to ensure effective supervision over New Governance regulation. At the same time, in embracing these earlier innovations courts remained mindful of their limited role and the need to respect agency discretion.<sup>77</sup> These past examples of doctrinal evolution suggest that one should not too quickly discount the courts' ability to develop new practices of judicial review that both respond to new regulatory realities and respect their limited roles.

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<sup>71</sup> Speaking for a unanimous court in *Southern Utah*, *supra* note 46, Justice Scalia expressed those concerns in this way:

The principal purpose of the *APA* limitations we have discussed [on judicial review of ongoing agency management of a regulatory issue] – and of the traditional limitations upon mandamus from which they were derived – is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day management.

<sup>72</sup> *Ibid* at 2381.

<sup>73</sup> *Cf. supra* note 47.

<sup>74</sup> *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970); *SCRAP*, *supra* note 41.

<sup>75</sup> *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

<sup>76</sup> See e.g. *Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (sketching out the development of “hard look” review of agency action under the “arbitrary and capricious” standard).

<sup>77</sup> See e.g. *Toilet Goods v. Gardner*, 387 U.S. 158 (1967) (companion case to *Abbott Laboratories*, finding an agency action unripe even under the more generous *Abbott Laboratories* test); *Motor Veh. Mfrs Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43-44 (1983) (recognizing the limited role of judicial review even under the “hard look” gloss on the “arbitrary and capricious” standard).

Congress can assist the courts in this effort. In 1946 Congress enacted the skeletal framework we know as the *APA*, and the courts construed it over time. Similarly, Congress enacted a “mood” when it enacted the substantial evidence test,<sup>78</sup> and courts applied it using their unique expertise.<sup>79</sup> In facing this new challenge, a combination of more careful statutory specification of the availability and substance of judicial review and continued evolution of the gloss courts place on the *APA*<sup>80</sup> provide at least some hope that New Governance can generate a new understanding of appropriate judicial review. Such innovations would follow in the footsteps of the statutory innovation and judicial gloss that altered judicial review of agency action during the New Deal, the consumer and environmental movements of the 1960s and 1970s, and the deregulatory/cost-efficiency thrusts of the 1980s and 1990s.<sup>81</sup>

## VII. CONCLUSION

The reconceptualization of judicial review offered above takes us into deep waters. It suggests that what is needed is more than just a tinkering with any one legal system’s standing doctrine or system of remedies. Instead, it suggests the need for a more general rethinking of judicial review – or, more accurately, a re-application of fundamental principles of judicial review to the new challenges posed by New Governance regulation. Such a re-application requires that we revisit the fundamental purposes and limitations of judicial review in the administrative system. It is only with those first principles re-established that we can confidently think about how the reinvention of public administration requires the reinvention of judicial review.

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<sup>78</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

<sup>79</sup> See e.g. *ibid* at 494-496 (discussing how a reviewing judge should review an ALJ’s credibility-based fact-findings when those findings were reversed by the agency head on appeal); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9<sup>th</sup> Cir. 1977) (same).

<sup>80</sup> See generally William D. Araiza, “In Praise of a Skeletal APA: *Norton v. Southern Utah Wilderness Alliance*, Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA” (2004) 56 Admin L Rev 979 (noting how courts have been able to place glosses on the general language of the *APA* to reflect evolving theories of regulation and judicial review).

<sup>81</sup> For classic examples of how judicial review has moved in relation to changes in theories of regulation, compare *Scenic Hudson Preservation Conf. v. Federal Power Comm’n*, 354 F.2d 608(2<sup>nd</sup> Cir. 1965) (applying arbitrary and capricious review with an eye to ensuring that under-represented environmental interests were considered by the agency) with *American Dental Ass’n v. Martin*, 984 F.2d 823 (7<sup>th</sup> Cir. 1993) (Posner, J.) (applying cost-benefit analysis to agency action under the arbitrary and capricious standard).

## IMPLICATIONS OF THE INTERNET FOR QUASI-LEGISLATIVE INSTRUMENTS OF REGULATION

Peter L. Strauss\*

*It is a quarter century since I began telling my Administrative Law students that they had better be watching the Internet and how agencies of interest to them were using it, as they entered an Information Age career. The changes since then have been remarkable. Rulemaking, where the pace has perhaps been slowest, is now accelerating into the Internet, driven by a President committed to openness and consultation. This paper seeks little more than to point the reader toward the places where she can find the changes and watch them for herself.*

*Il y a un quart de siècle que j'ai commencé à dire à mes étudiants en droit administratif qu'ils feraient bien de surveiller l'Internet et comment les agences qui les intéressent s'en servent, au moment où ils entreprenaient une carrière à l'ère de l'information. Les changements depuis lors ont été remarquables. L'élaboration de règles, où l'évolution a peut-être été la plus lente, s'accélère maintenant à l'Internet, mené par un Président qui s'est engagé à l'ouverture et à la consultation. Cet article ne vise pas plus que d'indiquer à la personne qui le lit les endroits où elle peut trouver les changements et les surveiller pour elle-même.*

### I. INTRODUCTION

Our exploding experience with technology has extraordinary implications across the full range of governmental activities. As Vivek Kundra, the United States' Chief Information Officer, remarked at a recent press conference in San Francisco, "technology deployed for public service can fundamentally change how a government and its people interact."<sup>1</sup> At the time, he and others were addressing the delivery of government services – creating a common platform for municipal service calls (311) that would permit using Twitter in any city to report a need for pothole repair was the repeated example. The focus in this paper is on a more limited set of developments – not on the delivery of services, but on the formation and to a lesser extent the implementation of policy through agency quasi-legislation.

The Information Age has spawned two dominating changes in visibility/accessibility and, perhaps, participation respecting the development of agency regulations ("tertiary legislation," in EU parlance; "subsidiary legislation," often in national systems) and guidance instruments ("soft law"): first, the emergence of readily searchable, universally accessible Internet data sets permitting immediate, essentially cost-free, and universal access to government information bearing on proposed regulatory actions, the proposals themselves, comments and data supplied by others, and the regulations or guidance documents that result; and, second, the

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<sup>1</sup> "US Chief Information Officer Press conference" (2 March 2010), online: SFGTV <[http://san-francisco.granicus.com/Media-Player.php?publish\\_id=557](http://san-francisco.granicus.com/Media-Player.php?publish_id=557)>.

development of interactive sites permitting persons to enroll for notice of developments of possible interest to them, and to submit commentary on proposals that concern them. My hope for this paper is to spark a conversation about these developments, as and if they are evidencing themselves in our respective legal cultures, and their possible implications for the future of quasi-legislative administrative action.

The legitimacy of permitting unelected officials to create binding legal texts is an enduring problem for any democracy. “In an era when executive authority seems to be growing at the cost of parliamentary accountability,” Genevieve Cartier wrote in the Canadian context, “democratic control over policy-making seems ever more urgent.”<sup>2</sup> The literature about the European Union often invokes a “democracy deficit” in discussing the regulation-like “implementing measures” that emerge there as tertiary legislative instruments, corresponding to agency regulations in the USA.<sup>3</sup> “Implementing measures” emerge from the shadowy process of “comitology,” a hidden and bureaucratic process whose very name suggests arcane mysteries and possible intrigue.<sup>4</sup> Hence the “democracy deficit.” In the United States, one can without difficulty ascribe a similar problem to agency regulations; although adopted following a procedure involving both public notice, public participation, and explanation, nonetheless the adopters are appointed, not elected, officials. They lack the legislative connection of ministers in parliamentary democracies. The possible influence of an elected President arguably increases, rather than diminishes, the problem.<sup>5</sup>

The growth in executive authority Professor Cartier wrote about has proved inevitable in our complex age. A century ago, the U.S. Supreme Court found violation of the Secretary of Agriculture’s rules governing the grazing of sheep in national forests, seen as an inevitable filling in of the details of a statute authorizing his administration of those lands, to be in and of itself a basis for sending someone to jail.<sup>6</sup> Today, regulations emerge from agencies at ten to twenty times the rate Congress produces statutes,<sup>7</sup> and “soft law,” influential though not formally binding,

<sup>2</sup> Genevieve Cartier, “Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?” (2003) 53 UTLJ 217 at 218.

<sup>3</sup> These measures are two levels below the EU’s constitutive treaties and one below its statute-like “secondary” measures – regulations and directives adopted by its Parliament and Council, that acquire legitimacy through the involvement of the European Parliament (and, to a lesser extent, a Council composed of persons who are politically responsible on a national level), as well as the public manner in which they are considered. See e.g., Paul Craig & Grainne De Burca, *EU Law: Text, Cases and Materials* 4th ed (Oxford: Oxford University Press, 2007) at 134; Giandomenico Majone, “Europe’s ‘Democracy Deficit’: The Question of Standards” (1998) 4 Eur IJ 5.

<sup>4</sup> On these processes generally, see Peter L. Strauss, Turner Smith, & Lucas Bergkamp, “Rulemaking” in George Bermann *et al*, eds, *Administrative Law of the European Union* (Washington D.C.: ABA, 2008).

<sup>5</sup> Peter L. Strauss, “Overseer or ‘The Decider’ – the President in Administrative Law” (2007) 75 Geo Wash L Rev 695; Peter L. Strauss, “Presidential Rulemaking” (1997) 72 Chicago-Kent L Rev 965.

<sup>6</sup> *United States v. Grimaud*, 220 U.S. 506 (1911).

<sup>7</sup> Congress enacts four hundred or so public laws annually; estimates of annual regulatory production I have seen range between 4000 and 8000; no one counts soft law instruments, but at technical agencies at least its volume is enormous – particularly as contemporary ideas about rulemaking

is created in greater volumes still. This phenomenon is reflected in a hierarchy of legal texts that I believe can be found in every developed economy:

Foundation document(s), adopted by “the nation”

Hundreds of statutes, adopted by an elected legislature

Thousands of regulations, adopted by politically responsible executive officials

Tens of thousands of interpretations and other guidance documents, issued by responsible bureaus

Countless advice letters, press releases, and other statements of understanding, generated by individual bureaucrat

We understand passably well the ordering and influence of the top three layers of this hierarchy. Legal systems treat each of them as binding text, subject only to the requirements that they be authorized by the superior authority and appropriately adopted following designated procedures; if valid, each of them has legislative effect on government and citizen alike, until displaced by another text validly adopted at the same or a higher level. It is on passing from the second to the third tier that the “democracy deficit” problem rears its head. We understand, too, that the innumerable informal items of the fifth tier, while often in fact influential on private conduct, are denied *any* jural effect. We would find some confusion on the fourth, “soft law” tier – confusion whether these documents are legitimate instruments of agency policy, or a ruse to evade the higher procedural obligations associated with adopting regulations; confusion whether an agency may give them any jural effect and, if so, to what degree; and confusion whether and to what extent they must be respected by the courts.<sup>8</sup> And soft law documents, much less often given the imprimatur of the Ministers, Secretaries or Administrators who head political agencies, present the “democracy deficit” problem in even sharper outline.

In another essay,<sup>9</sup> I have explored the question whether Americans can find a satisfying resolution of the deficit in the “strong unitary executive theory” popular among some American academics – that is, the claim that our elected President is entitled to decide all policy issues Congress may have delegated to the various Departments and administrative agencies of our government. As would not surprise anyone familiar with my earlier writings,<sup>10</sup> I concluded there that reconciling delegated executive authority of a law-making character with democratic ideals on a theory of

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encourage the adoption of malleable standards setting goals for achievement rather than precise rules prescribing particular courses of action. The regulated then earnestly and understandably seek guidance about ways in which they might be able to meet those standards.

<sup>8</sup> On this subject see Peter L. Strauss, “Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element” (2001) 53 Admin L Rev 803; for a similar understanding of the Canadian situation, see Laura Pottie & Lorne Sossin, “Demystifying the Boundaries of Public Law: Policy, Discretion, and Social Welfare” (2005) 38 UBC L Rev 147

<sup>9</sup> Peter L. Strauss, “Legislation that Isn’t: Attending to Rulemaking’s Democracy Deficit” (2010) 98 Cal L Rev at 1351.

<sup>10</sup> Strauss, *supra* note 5.

voter-ratified political will is deeply unsatisfying, if not hazardous to our rule-of-law culture. We tolerate agency specification of, for example, permitted pollutant levels *only* because it involves acts of reasoned judgment, within frameworks established by statutes and subject to judicial review. “We must so construct the President’s relation to government as to permit the enduring belief that we live in a rule-of-law culture of constrained reasonable judgment, even as we recognize the contributions that political will can make.”<sup>11</sup>

My ambitions here are different – to explore the variety of ways in which governmental use of the Internet may engage citizens in the world of quasi-legislation and in doing so, just possibly, provide its own response to the “democracy deficit.” The paragraphs following will draw primarily on the developments at the level of American federal government, with occasional reference to state practice and to the practices of the European Union.<sup>12</sup> Their intention is, simply, to provide a framework for further discussion and documentation of progress in our respective legal systems.

## II. SECRET LAW

*“We bear of tyrants, and those cruel ones: but, whatever we may  
Have felt, we have never heard of any tyrant in such sort cruel,  
As to punish men for disobedience to laws or orders  
Which he had kept them from the knowledge of.”<sup>13</sup>*

The first case in which the United States Supreme Court held a congressional statute to be invalid as an excessive delegation of authority<sup>14</sup> dramatized the problem of secret law. A depression-era statute had given the President certain authority to control interstate commerce in petroleum and its products, as a means of stabilizing prices; and he and the Secretary of the Interior (to whom he had subdelegated this power) had adopted rules in the exercise of that authority. When the validity of this statute came before the Supreme Court (all but one of whose members would find it to be standardless), the government was embarrassed to admit that a reexamination of the relevant documents (which at the time were not publicly available) had revealed that the Secretary had inadvertently revoked the relevant regulation before the lawsuit had been filed.<sup>15</sup> “[I]t was shocking that the government attorneys, the private parties, and the courts had not been aware of the status of the regulation. “The furor resulting from the hot oil case provided the final impetus for the enactment of remedial

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<sup>11</sup> Strauss, *supra* note 9 at n 86.

<sup>12</sup> Drawing on European Union Administrative Law, *supra* note 4.

<sup>13</sup> Jeremy Bentham, *The Works of Jeremy Bentham* (Edinburgh, UK: William Tait, 1843) vol 5 at 547; Erwin N Griswold used this as the epigram to his “Government in Ignorance of the Law--A Plea for Better Publication of Executive Legislation” (1934) 48 Harv L Rev 198, discussed in text at n 17 below.

<sup>14</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>15</sup> *Ibid* at 412-413.

legislation [the Federal Register Act] in 1935.”<sup>16</sup> Just the prior year, only weeks before the argument and decision in the case – perhaps even sensing what would likely transpire – Erwin Griswold (later to become Dean of Harvard Law School and US Solicitor General) had argued passionately and persuasively the need for “a reasonable means of distributing and preserving the texts of ... executive-made law.”<sup>17</sup> The Federal Register, a daily gazette of executive branch documents including rules and rulemaking proposals, was the result.

The Federal Register, like such publications generally, was a useful but imperfect response to the problem of secret law. A bulky daily publication, with an ambitious yet (necessarily) limited index, its effective use required lawyers and librarians. Moreover, it was incomplete. While regulations were included, “soft law” documents – guidance and interpretations – generally were not. Access to “soft law” might be possible – the federal *Administrative Procedure Act* [APA] encouraged its public availability and indexing by provisions prohibiting its use to the disadvantage of private parties unless it was available and indexed<sup>18</sup> – but that access might require travel to one of a limited number of agency reading rooms, or perhaps to a specific agency office. Just what might constitute a qualifying index was nowhere specified, and one can readily imagine many obstacles to its detail. If not precisely secret, then, regulatory law was often obscure and access to it expensive.

Providing further relief from the problems of secret law is perhaps the most obvious use of the Internet. In 1994 the Federal Register and in 1996 the Code of Federal Regulations (where adopted regulations are eventually collected) were embedded and made readily searchable at the website of the Government Printing Office,<sup>19</sup> one of the first important federal e-government projects. They are now available as well on for-profit and non-profit sites such as Lexis and Cornell’s Legal Information Institute.<sup>20</sup> Each agency’s electronic reading room, required by law,<sup>21</sup> holds regulations, guidance, interpretations, staff manuals – any quasi-legislative document in which the public might be interested.<sup>22</sup> If Boolean search is enabled, the documents are not only there, but also exquisitely indexed, in a manner no print edition or document filing system could hope to achieve. The interventions of

<sup>16</sup> Mary Whisner, “Practicing Reference . . . A Manual ‘to Inform Every Citizen’” (2007) 99 *Law Libr J* 159 at 160, citing Morris L. Cohen, Robert C. Berring & Kent C. Olson, *How To Find The Law*, 9th ed (St. Paul: Westlaw, 1989) at 265.

<sup>17</sup> Griswold, *supra* note 13. Griswold was on the staff of the Solicitor General’s office until 1934, when *Panama Refining* was briefed; Thus he could easily have been aware of the coming firestorm; his article was published in the December, 1934 issue of the *Law Review*; argument in *Panama Refining* was held that month, and the decision announced in January 1935.

<sup>18</sup> 5 U.S.C. 551(a) (1, 2).

<sup>19</sup> Code of Federal Regulations, online: US Government Printing Office <<http://www.gpo.gov/index.html>>.

<sup>20</sup> See Cornell University Legal Information Institute, online: Cornell University Legal Information Institute <<http://www.law.cornell.edu/cfr/>>.

<sup>21</sup> Required in America at the national level by the *Electronic Freedom of Information Act* Amendments of 1966, Pub. L. 104-231, Oct. 2, 1996, 110 Stat. 3048, amending 5 U.S.C. §552(a)(2).

<sup>22</sup> See e.g. online: FAA <[http://www.faa.gov/regulations\\_policies/](http://www.faa.gov/regulations_policies/)>, collecting a wide range of soft law documents as well as FAA regulations.

librarians and lawyers are no longer required (although they may still be useful); if the document is in the electronic library, it cannot be “off the shelf” and on someone else’s desk.

One of the more important regulations issued by the Department of Transportation’s National Highway Traffic Safety Administration [NHTSA] has been its Standard 208,<sup>23</sup> requiring the installation first of seatbelts and then of airbags in American automobiles. Understandably, manufacturers and others have had questions about the requirements of the standard, and interpretation of its provisions, which they have addressed to NHTSA’s General Counsel. His interpretive letters responding to their inquiries have always been public documents, but access to them once depended on either visiting his office in Washington, D.C. or finding an industry group or member that had made its own collection. One can imagine both the expense of hiring a lawyer to perform that search, and the imperfections of the filing system she would encounter. Enter the website NHTSA has been maintaining for years, collecting the opinion letters of its Chief Counsel, making them available for Boolean search,<sup>24</sup> and promising their reliability.<sup>25</sup> Its enterprise so impressed General Motors and an industry group that had begun electronic recordkeeping years before NHTSA supplemented its paper files, that they each donated their electronic records of earlier letters for inclusion in the searchable repository. Now using an Internet connection half a continent (or half the world) away from Washington, anyone wishing to learn NHTSA’s interpretations of Standard 208 (or any of its other regulations) reliably has that information in seconds. The visibility of government law, hard and soft, has been exponentially increased.

To be sure, even this simplest and most obvious use remains a work in process. The European Union offers a single search-enabled Internet gateway to “legislation,”

<sup>23</sup> Federal Motor Vehicle Safety Standards And Regulations, 49 CFR Parts 552, 571, 585, and 595

<sup>24</sup> See National Highway Traffic Safety Administration, online: NHTSA: <<http://isearch.nhtsa.gov/>>.

<sup>25</sup> See National Highway Traffic Safety Administration, online: <<http://www.n-h-t-s-a.dot.gov/portal/site/nhtsa/menuitem.4d1e17245-cfafde89-ec0f-210dba046-a0>>. The Chief Counsel’s promise, “The Chief Counsel’s interpretations, issued in the form of letters responding to questions from the motor vehicle industry and the public, represent the definitive view of the agency on the questions addressed and may be relied upon by the regulated industry and members of the public,” may be contrasted by the disclaimers many agencies post with their soft law (responding to unfortunate signals sent by judicial review cases). The Food and Drug Administration, for example, attaches this standard disclaimer to its guidance (“soft law”) documents:

This guidance represents the Food and Drug Administration’s (FDA’s) current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. You can use an alternative approach if the approach satisfies the requirements of the applicable statutes and regulations. If you want to discuss an alternative approach, contact the FDA staff responsible for implementing this guidance. If you cannot identify the appropriate FDA staff, call the appropriate number listed on the title page of this guidance.

See, e.g. Guidance for Industry, FDA Staff, and Third Parties - Inspection by Accredited Persons Under The *Medical Device User Fee and Modernization Act* of 2002 and the *FDA Amendments Act* of 2007; Accreditation Criteria, online: <<http://www.fda.gov/Medical-Devices/Device-Regulation-and-Guidance/GuidanceDocuments/ucm089702.htm>>.

both enacted<sup>26</sup> and under consideration,<sup>27</sup> where “Legislation” is understood to comprise all binding texts (i.e., tertiary as well as secondary measures), as well as “certain important non-binding acts.” There is no uniform way to access either EC or American agencies’ soft law files.<sup>28</sup> Other national practices remain highly variable. At the state and local level in the USA, access even to regulations may still be haphazard, and soft law is not yet readily accessible.<sup>29</sup> Converting paper documents to electronic ones requires resources and incentives; both may be in short supply. (This problem will prove even more prominent in the following sections of this essay). One readily imagines, however, that this kind of use of the Internet will be the fastest to become universal, with the result that the world of “secret law” will shrink significantly, if not wholly disappear.<sup>30</sup>

### III. KNOWING WHAT QUASI-LEGISLATORS KNOW AND WHAT THEIR PLANS ARE

In American contemplation, the “democracy deficit” associated with quasi-legislation creates often rigorous judicial attention to the rationality of its exercise. Although (absent possible implications for important rights) American courts barely consider the rationality of legislation or the regularity of legislative procedures when they review legislation for constitutionality, the procedures prescribed for quasi-legislation and the rationality of the judgments it reflects are strongly checked, particularly in matters of high economic or social consequence. One characteristic opinion, reviewing an Environmental Protection Agency rule with major economic

<sup>26</sup> See Europa, Eur Lex, online: <<http://eur-lex.europa.eu/en/legis/index.htm>>; see Cynthia Farina, Sidney Shapiro and Thomas Susman, “Transparency and Data Protection in ABA Section of Administrative Law and Regulatory Practice” in Bermann *et al.*, *supra* note 6 at 21 ff.

<sup>27</sup> See *ibid.* Europa Pre Lex, online: <<http://ec.europa.eu/prelex/apcnet.cfm?CL=en>>.

<sup>28</sup> In the Department of Transportation, for example, the FAA guidance is accessed directly from a “Regulations & Policies” tab prominent at the top of its home page; NHTSA guidance, however, much less prolix, requires one to know to follow the FOIA link obscure at the bottom of the home page to FOIA Electronic Reading Room.

<sup>29</sup> The California Office of Administrative Law, for example, offers what appears to be comprehensive access to regulations adopted by California agencies but no access to soft law, other than manuals of the Department of Social Services, online: OAL <<http://www.oal.ca.gov/>>; the web site of its Department of Agriculture gives no hint that that vital department harbours any soft law. Online: CDFR <<http://www.cdfa.ca.gov/Regulations.html>>. In New York, the equivalent office warns on its website, indexing state agencies, that “If you are seeking regulations regarding a specific area, a number of New York State agencies now make their rules and regulations available online. Others document their statutory authority.” Online: Government of New York <<http://www.g-o-r.state.ny.us/Regulatory-Reform/current-regulations.htm>>.

<sup>30</sup> One cannot doubt that certain documents government agencies use to establish standards for their employees’ behaviour – “law” in the important sense that it marks the practical limit of state tolerance for private actions – will be kept secret in the interest of avoiding manipulative or challenging behaviors. If, for example, state police are secretly instructed to issue speeding tickets only to motorists who exceed the legal speed limit by, say, ten miles per hour, that instruction may rationally accommodate predictable differences in speedometer calibration and also serve to focus attention on major violators; for it to be made public, however, would invite faster driving by many and might eliminate the margin of error the practice creates.

consequences for the coal and electric power industry as well as environmental values, consumed 103 pages of an opinion closely attending to the EPA's reasoning and the factual contentions it had to resolve, before remarking in conclusion, "we have taken a long while to come to a short conclusion: the rule is reasonable."<sup>31</sup>

The last half-century's developments in American administrative law have witnessed an emphatic growth in the transparency associated with both government information and quasi-legislative planning. Integration of Internet resources into these pre-existing trends is already considerably magnifying its effects.

Start with information. As enacted, the federal *Administrative Procedure Act* required only that "matters of official record shall in accordance with published rule be made available to persons properly and directly concerned," with a "good cause" confidentiality exception.<sup>32</sup> The rulemaking procedure generally required public notice of proposed rules with an opportunity for public comment prior to adoption, with a "concise general statement of their basis and purpose" to accompany the adopted rule; in addressing the policy issues involved, the notice need specify "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>33</sup> In 1966, Congress had amended the *APA* to give "any person" strongly enforceable rights to see any information in a government agency's possession, to the extent it did not fall within one of nine rather narrow exceptions – a freedom of information measure [FOIA] now commonplace in world legal systems.<sup>34</sup> In general,<sup>35</sup> data (as distinct from preliminary policy views) was unprotected from such claims; thus, a request for "all studies likely to be considered in connection with your rulemaking proposed April 2, 2010" would likely have to be honoured (although no formal procedural link is made between a citizen's request and a rulemaking to which that request might relate). Perhaps reacting to the enhanced transparency the FOIA had put in place (dramatically reemphasized by Congress in extensive strengthening amendments it enacted in 1974), and/or the suddenly increasing importance of rulemaking brought about by the great expansion of health and safety regulation in the early 1970's, courts asserted that notice and comment procedures could not be effective unless the government made available to the public, alongside its proposal, important studies on which the proposal relied.<sup>36</sup>

Enter the Internet. The *Electronic Freedom of Information Act* Amendments of 1996<sup>37</sup> envisaged moving FOIA activity to the Web – agencies are to have FOIA links on their website, which explain the *Act*, permit the filing of electronic requests, and – as importantly – are to serve as repositories for frequently requested material, so that it

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<sup>31</sup> *Sierra Club v. Costle*, 657 F. 2d 298, 410 (D.C. Cir.1981).

<sup>32</sup> 60 Stat. 237, §3(e)

<sup>33</sup> 5 U.S.C. 553(b), Section 4(a) of the original *APA* (emphasis added).

<sup>34</sup> The *American Freedom of Information Act* can be found at 5 U.S.C.552(a) (3) and following.

<sup>35</sup> Protection was afforded classified information, information compromising personal privacy interests, and proprietary information provided by private parties.

<sup>36</sup> Peter L. Strauss, "Statutes That Are Not Static – The Case of the *APA*" (2005) 14 J Contemp Legal Issues 767.

<sup>37</sup> *Supra* note 21.

may simply be found there. Now public dockets could be created, to which any relevant documents, including studies, could be posted for ready availability and comment. Agency reaction to these developments was variable and, generally, slow; the most thoroughgoing effort was made by the Department of Transportation, which (at considerable savings for the Department) converted its entire filing system to electronic form – much of it open to public access. Using its Data Management System [DMS],<sup>38</sup> interested members of the public could see *every* public document associated with a given proceeding, within days of its filing. Supporting studies, early-filed comments and the like were thus available to commenters.

The *E-Government Act* of 2002 emphasized a national commitment to such development. The *Act* requires agencies to accept comments “by electronic means” and to make available in their e-dockets “public submissions and other materials that by agency rule or practice are included in the rulemaking docket...whether or not submitted electronically.”<sup>39</sup> Although the mandate is qualified by “to the extent practicable,” the idea is clearly that the public should be able to find everything in the e-docket that they could find if they went to the agency reading room. Directed to agencies, the *Act* did not itself require creation of the single, unified electronic data system, but the Bush administration, in implementing it, moved all rulemaking to the Internet through a new portal, Regulations.gov,<sup>40</sup> and a unified data management system associated with it, the Federal Data Management System [FDMS]. Works in progress, the early difficulties of the *Act’s* implementation and of Regulations.gov were well captured in a law review article by Beth Noveck, a young law professor who subsequently became a central figure in the Obama Administration’s commitments to open government,<sup>41</sup> and by a report for the American Bar Association<sup>42</sup> based on the work of Cynthia Farina, another law professor who has since become a central figure in Cornell’s Electronic Rulemaking Initiative, discussed below.<sup>43</sup>

One such problem: agency capacity and willingness to migrate to an electronic docket (as DOT had) is mixed, so that for many agencies the FDMS dataset is both incomplete and far from instantaneous, and search capabilities are limited. Even today, not all agencies are uniformly (and timely) putting all materials in rulemaking dockets on to their e-dockets available through Regulations.gov. Changes in

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<sup>38</sup> Now incorporated into the Federal Data Management System, online: FDMS <<http://docketsinfo.dot.gov/>>; the process was complicated by the broader reach of the DMS, which entirely replaced paper dockets at DOT; FDMS, at least initially, could not achieve that universality given variability in the readiness of different government agencies for such a transition. The transition and its difficulties prompted DOT to create a generally helpful guide for FDMS searches, online: FDMS <[http://docketsinfo.dot.gov/FDMS\\_Tips.cfm](http://docketsinfo.dot.gov/FDMS_Tips.cfm)>.

<sup>39</sup> Sec. 206 (c) (d).

<sup>40</sup> Online: Federal Government <<http://www.regulations.gov>>.

<sup>41</sup> Beth Noveck, “The Electronic Revolution in Rulemaking” (2004) 53 Emory LJ 1. Prof. Noveck is currently United States Deputy Chief Technology Officer and Director of the White House Open Government Initiative.

<sup>42</sup> Committee on the Status and Future of Federal e-Rulemaking, *Achieving the Potential: The Future of Federal E-Rulemaking – A Report to Congress and the President* (2008), available online: CERI <<http://ceri.law.cornell.edu/erm-comm.php>> [ABA Study].

<sup>43</sup> See text accompanying note 89 below.

Regulations.gov and FDMA are occurring with regularity. As recently as April 7, 2010, for example, a memorandum from Cass Sunstein, the Administrator of the White House Office of Management and Budget [OMB]'s Office of Information and Regulatory Affairs [OIRA] directed all agencies to "make it easier for members of the public to find and view [rulemaking] information ... [by using] the Regulation Identifier Number [RIN] on all relevant documents throughout the entire 'lifecycle' of a rulemaking ... [-] documents including, but not limited to, notices of proposed rulemaking, final rules, and (to the extent that they are associated with a rulemaking) notices, guidances, environmental impact statements, regulatory impact analyses, information collections, and supporting materials."<sup>44</sup>

The Obama Administration's emphasis on improving government transparency, captured in a presidential *Memorandum on Transparency and Open Government* issued the day after his inauguration, has also produced an explosion in *general* data availability (useful for but not necessarily connected to particular rulemakings). One such development, likely to have a direct impact on rulemakings, is agency development of public libraries of scientific reports; the Environmental Protection Agency [EPA]'s recently launched Health and Environment Research Online database<sup>45</sup> contains over 300,000 scientific studies searchable along a variety of parameters. A central government website, data.gov, not only makes available to public use a rapidly increasing number of machine readable federal datasets, but also links to datasets identified by particular government agencies in response to the OMB's "Open Government Directive,"<sup>46</sup> and to the increasing number of state, local and tribal data sites.<sup>47</sup> Similar initiatives exist – are inevitable – elsewhere.<sup>48</sup> They permit private creation of programs letting the public use data they find for their own purposes – an NGO could create a searchable database to let people "see" the local effects of sea level rises that may be associated with global warming, just as EPA's Toxic Resource Inventory<sup>49</sup> now permits anyone to see what toxins are being released in their

<sup>44</sup> See online: OMB <[http://www.white-house.gov/omb/assets/in-foreg/Increasing-Openness\\_0407-2010.pdf](http://www.white-house.gov/omb/assets/in-foreg/Increasing-Openness_0407-2010.pdf)> While the RIN system has been in place for many years, the problem with using it to track a rule (and electronically map/display its lifetime, in the manner of the European Parliament and Commission sites) is that it has not been consistently used across agencies, or even within a single agency over time. Inconsistency defeats efforts to build rule timelines automatically (actually, it generally makes historical data about rulemaking problematic). The OMB memo is a first step towards defining government-wide consistent practices.

<sup>45</sup> See online: EPA <<http://www.epa.gov/hero/>>.

<sup>46</sup> The directive, issued December 8, 2009 to implement President Obama's Memorandum, online: White House <<http://www.whitehouse.gov/open/documents/open-government-directive>> set April 7, 2010 as a date by which each agency was to publish at least three high-value data-sets in an open (platform independent, machine readable, and unrestricted) format, and every agency subject to the memorandum did so. Online: Federal government <<http://www.data.gov/open>> and White House <<http://www.whitehouse.gov/open/around>>.

<sup>47</sup> See online: OMB <<http://www.data.gov/statedatasites>>; see online: Data SF (San Francisco) <<http://www.datasf.org/>> and online: NYC Government (New York City) <<http://www.nyc.gov/html/datamine/html/home/home.shtml>>.

<sup>48</sup> See online: Government of UK, <<http://data.gov.uk>>.

<sup>49</sup> See online: EPA <<http://www.epa.gov/tri/>>; see e.g. Bradley Karkainen, "Information-forcing Regulation and Environmental Governance" in Grainne de Burca & Joanna Scott eds, *Law and New Governance in the EU and the US* (Portland: Hart Publishing, 2006) 293. A similar utility is promised for 2011 respecting carbon dioxide emissions. Michael Gerrard, "Greenhouse Gas Disclosure Requirements Are Proliferating," (April 1, 2010) 243:61 NYLJ.

neighbourhood. This is not the place to discuss “Government 2.0,” but one can readily imagine the transformative impact. The TRI experience is a forceful illustration of what can happen when “the government exposes capabilities that can then be used by the private sector” – to generate pressures, or to build (open-source) programs (like iPhone applications).<sup>50</sup> “If the government invests in key capabilities that the private sector can then build on, you get this virtuous circle.”<sup>51</sup>

*Transparent planning.* The text of the *APA* does not require the public to learn of potential rulemaking activities before a notice of proposed rulemaking, inviting comment, is published. The notice the *APA* requires need not appear until late in the rule development process. Thus it may be that, as one administrative law scholar who had also been EPA’s General Counsel once put it, “[n]otice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions – a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.”<sup>52</sup> The *Regulatory Flexibility Act* had already begun to change this state of affairs in the print era, with a requirement<sup>53</sup> that agencies semi-annually publish a regulatory agenda briefly describing their planned rulemakings and providing, *inter alia*, a point of contact within the agency to whom submissions might be made or with whom discussions could be held. The Unified Agenda of April 1994 consumed over 1500 pages in the *Federal Register*, with as many as six or seven entries per page; there were about 100 pages of index. Initially one of the most difficult elements of the *Federal Register* to find and search online, it has now been integrated into Regulations.gov.<sup>54</sup> It can be searched only one agency at a time, search capabilities are limited, and – as indicated – the availability of an RIN number assuring access to all matters in ensuing dockets is, for the moment, uncertain.<sup>55</sup>

American Presidents from Ronald Reagan forward have appeared to wish to build on this process as a means of increasing central coordination and perhaps control of rulemaking activities. President Reagan’s Executive Order 12498 added participation in an annual “regulatory plan” to the requirements of cost-benefit analysis of important regulations under the OIRA supervision that he had previously established by his Executive Order 12291. Yet this planning element of what is now a firmly established presidential regime, continued as Section 4 of President Clinton’s E.O. 12866, has remained quite obscure. The literature is full of attention to the problems

<sup>50</sup> See “US Chief Information Officer Press Conference” *supra* note 1 at 24:50.

<sup>51</sup> *Ibid* at 26:00 Development can flow back to government as well. The CeRI initiative discussed below, a private effort to help the government improve the e-rulemaking experience, is one example. Another was provided a few years ago by OMBWatch, an NGO monitoring White House activities. Using federal procurement data the *Federal Funding Accountability and Transparency Act* of 2006 required be made available online, OMBWatch developed <www.fedspending.org> to monitor governmental spending patterns. Impressed, OMB acquired the program and, adapted to its purposes, it can be found online: OMB <www.usaspending.gov>. Information from an E-mail from Gary Bass, OMBWatch (May 6, 2010).

<sup>52</sup> E. Donald Elliott, “Reinventing Rulemaking” (1992) 41 Duke LJ 1490 at 1492-93.

<sup>53</sup> 5 U.S.C. §602.

<sup>54</sup> See online: <<http://www.regulations.gov/public/component/main?main=UnifiedAgenda=240>>.

<sup>55</sup> See text accompanying note 44 above.

and potential of the cost-benefit analysis of individual rulemakings called for by Section 6, the effective central element of this regime. But unlike the situation in the European Union<sup>56</sup> – and for that matter California<sup>57</sup> – where planning is transparent and such consultations as occur begin early, to date neither priority planning nor the early public consultations that might go along with it are well developed in our federal practice. Regulations.gov, for example, offers no chance to submit a request for rulemaking not already undertaken; while the *APA* does provide a procedure for petitioning an agency to engage in rulemaking,<sup>58</sup> this element of its procedures has yet to be given general electronic form. Individual agencies may well do more in the way of providing early notice of projects under development, supplementing this resource. Thus, the EPA has created a rulemaking gateway providing information about the progress of a “priority regulation” from the moment the beginning of work on the project has been approved, without regard to whether it is mentioned in the regulatory plan.<sup>59</sup>

#### IV. CONSULTATIONS

We Americans have long prided ourselves on our notice and comment procedures for rulemaking.<sup>60</sup> While other legal systems may often undertake consultation on proposed regulations, that typically occurs within a limited interest community identified by the agency, out of public view and rarely required as a general matter. Of course American agencies may, and indeed sometimes do, conduct “private” consultations in connection with rulemaking, either before notice or as they are attempting to digest the results of the public comment period.<sup>61</sup> To the extent such private consultations, either inside or outside government, produce consensus around a particular course, they contribute to critical assessments of the public comment process.<sup>62</sup> Yet the private consultations have a certain odour,<sup>63</sup>

<sup>56</sup> The Union’s European Commission publishes periodic workplans of the matters currently under consideration, and its YourVoice site at <[http://ec.europa.eu/yourvoice/index\\_en.htm](http://ec.europa.eu/yourvoice/index_en.htm)>, offers consultations at quite early stages of proposal development. See text accompanying n 4 above.

<sup>57</sup> See online: OAL <[http://www.oal.ca.gov/2009\\_Rulemaking\\_Calendar\\_Office\\_of\\_Adminis-trativ.htm](http://www.oal.ca.gov/2009_Rulemaking_Calendar_Office_of_Adminis-trativ.htm)>, showing proposed timeline of development.

<sup>58</sup> 5 U.S.C. §553(e).

<sup>59</sup> See online: EPA <<http://yosemite.epa.gov/opei/rulegate.nsf/content/about.html?opendocument>>.

<sup>60</sup> Just as *APA* rulemaking was hitting its stride in the late 1960’s, one of the great scholars of the first *APA* generation characterized it as “One of the greatest inventions of modern government.” Kenneth Culp Davis, *Administrative Law Treatise* § 6.15, (Supp. 1970) at 283.

<sup>61</sup> For a sharp critique of this practice at the Federal Communications Commission, see Philip Weiser, “Institutional Design, FCC Reform, and the Hidden Side of the Administrative State” (2009) 61 *Admin L Rev* 675.

<sup>62</sup> Elliott, *supra* note 52.

<sup>63</sup> *C.f. Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), excoriating the practice of private consultations after a comment period has closed. While the opinion has had limited jural effect, and seems not to have discouraged the FCC in particular, see Weiser, *supra* note 61, its practical effect on most agencies’ behaviour appears to have been considerable, reaching also into the pre-notice period to influence the logging of meetings and contacts. See Sidney A. Shapiro, “Two Cheers for HBO: The Problem of the Nonpublic Record” (2002) 54 *Admin L Rev* 853; from September 15, 2009, the White House has made public a database of all visitors, downloadable in machine-searchable form. Online: White House <<http://www.whitehouse.gov/briefing-room/disclosures/visitor-records>> (visited April 22, 2010), and EPA posts the schedules of all its senior administrators’ meetings with

producing strong impulses to transparency – as reflected, for example, in the quite detailed procedures associated with statutory procedures for negotiated rulemaking.<sup>64</sup> And the nature of “hard look” judicial review (considering only such matters as have come into the public record in support of the adopted rule, and effectively requiring agency response to important comments) has given the comment process force.

In the paper process world, the comment as well as the notice stage of federal agency rulemaking provided a limited opportunity. One filed one’s comments in paper, only with the requesting agency, and toward the end of the comment period provided. Consequently, commenters could only expect to address the agency’s proposal, not such information or views as others may have provided. Even if one wanted to read the comments of others, and even if there were time to do so, timely physical access would have been difficult if not impossible. In contrast to the consultation practice that, for example, the European Union follows in respect of its possible legislative initiatives,<sup>65</sup> comments are typically sought relatively late in the regulation-development process – after, for example, initial consultations with OIRA over cost-benefit issues.

Enter the Internet, and many elements of the historic notice-and-comment process might be expected to change. The possibilities of expanded access to materials forming the basis for proposed rules have already been discussed;<sup>66</sup> if filed electronically or converted to electronic form, comments (like soft law documents) can be promptly available nationwide, facilitating response.<sup>67</sup> “Reply” comments become more feasible, and some agencies are in fact experimenting with their use – although “wary of extending an already lengthy process and proliferating the number of comments that must be considered.”<sup>68</sup> Associating the capacity to create a comment, government-wide, with a utility that permits ready identification of proposals open for comment and exploration of any data associated with them – this is the basic design of Regulations.gov – lowers the quantum energy barrier to commenting, perhaps considerably.<sup>69</sup> The ease and costlessness of filing comments

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persons from outside EPA, with RSS feeds from each. Online: EPA <<http://yosemite.epa.gov/o-pa/admpress.nsf/Calendars?OpenView>>.

<sup>64</sup> 5 U.S.C. §561 et seq. Although called “negotiated rulemaking,” the process is more aptly described as negotiated rule development, since if successful its direct result is not a rule, but a notice of proposed rulemaking generated by a consensual effort among the agency and representatives of interested groups. It thus constitutes a proceduralization of pre-notice consultation practice; although encouraged by many (including several Presidents), its costs and limited successes in practice have resulted in only occasional use of it. See e.g. Stuart Benjamin, “Evaluating E-Rulemaking: Public Participation and Political Institutions” (2006) 55 Duke L.J. 893 at 922.

<sup>65</sup> Strauss, *supra* note 4.

<sup>66</sup> See text accompanying note 44 above.

<sup>67</sup> Delays can occur, as agencies must authorize comments to be posted, lest inappropriate or properly confidential matter appear. ABA Study, *supra* note 42 at 56 and n 131.

<sup>68</sup> *Ibid* at 58.

<sup>69</sup> The site permits browsing by an impressive number of topics (or keywords); in providing for RSS feeds that might automate notice of developments of interest, however, the site enables subscription only agency by agency. While some Departments have provided sub-units (the Animal and Plant Health Inspection Service, APHIS, and the Forest Service in the Department of Agriculture, for

on the Internet could broaden the base of commenters, and empower “political campaigns” about controversial rulemaking proposals.<sup>70</sup> Even a physical postcard comment requires a stamp and the effort to write it out, and carries a postmark; an electronic comment might be filed with a simple click on the website of a soliciting NGO, and received with no reliable indicator from where and from whom it in fact came. Within agencies, using computer-based data files (including the possibility of digital processing of mass communication comments) may make the development of rules more efficient. The rulemaking agency now reaches its judgment in a much more transparent setting, if all can readily access the “record” on the basis of which it acts. Finally, the fact of a consolidated, uniform, and freely accessible “rulemaking record” also permits enhanced White House participation in/oversight of the agency decisional process, that in a paper record world would have been largely inaccessible outside the agency.

As earlier remarked,<sup>71</sup> the implementation of these changes was sharply criticized in years before the Obama Administration. Regulations.gov is a site in continuing development, and among the products of the transparency commitments of the Obama Administration<sup>72</sup> has been an “exchange” site for continuing discussion with the public of possible changes.<sup>73</sup> Changes already effected make it possible, if one knows the RIN number of a particular rulemaking,<sup>74</sup> to subscribe for email notification of any additions to that docket. There remain not inconsiderable difficulties about programming (what kinds of searches the FDMS will permit) and agency resources/effort (willingness/ability/time taken to put all material into the electronic database).

Perhaps the most significant issues, captured in 2006 by a Symposium issue of the *Duke Law Journal*,<sup>75</sup> concern the potentially transformative effects of broadscale public participation, converting what has in general proved to be a low-participation level, expert process into a more plebiscitary one. Professor Stuart Benjamin, in one article,<sup>76</sup> finds the unified system of Regulations.gov particularly troublesome; permitting individual agencies to experiment, he argues, might permit learning whether the benefits of e-rulemaking outweigh what he sees as its potential costs – increasing comment quantity without affecting content or result,<sup>77</sup> while making the

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example), others do not – one gets all EPA RSS feeds or none, with no possibility of limitation to the topic, or even office, of particular interest.

<sup>70</sup> On this issue, see generally the work of Stuart Shulman, a political scientist who with others has developed a computerized system for handling mass e-mail comments, briefly described in ABA Study, *supra* note 42 at 53 & n 126. See e.g. Stuart Shulman (2009) “The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking” 1(1) Policy & Internet, Article 2, online: <<http://www.pso-commons.org/policy-and-internet/vol1/iss1/art2>>.

<sup>71</sup> See text accompanying nn 41-42 above.

<sup>72</sup> See e.g. text accompanying n 44 above.

<sup>73</sup> See online: Regulations.Gov <<http://www.regulations.gov/exchange/node>>.

<sup>74</sup> See text accompanying n 44 above.

<sup>75</sup> “Thirty-fifth Annual Administrative Law Issue: The Role of the Internet in Agency Decisionmaking” (2006) 55 Duke LJ. 893 ff.

<sup>76</sup> Stuart Benjamin, “Evaluating E-Rulemaking: Public Participation and Political Institutions” (2006) 55 Duke LJ 893.

<sup>77</sup> Here he cites a prominent FCC rulemaking on media ownership rules, in which over a million comments were received, but treated by the agency as not “terribly helpful or influential.” *Ibid* at 908 and n 43.

rulemaking process more costly for resource-strapped agencies; and increasing the intrusiveness and effects of congressional oversight and judicial review, to similar effect. There might be a case for modest, skeptical experimentation, but the unified full-speed-ahead approach signaled by Regulations.gov involve costs that are too high, benefits that are too uncertain.<sup>78</sup> Professor Cary Coglianese, in another article,<sup>79</sup> remarks that, historically, the median rulemaking has invited only tens of comments, few from individual citizens; while this pattern may be changing with the introduction of electronic comment possibilities, Professor Coglianese (with Professor Benjamin) is skeptical whether quality gains result. If one discards outlier rulemakings inviting a particularly high volume of (politically motivated) commentary from the data, some have reported, he suggests, no dramatic changes in volume – and no changes at all in substantive contribution – have occurred.<sup>80</sup> “Rather than a revolution in citizen participation, the end result from even ambitious attempts at e-rulemaking seems likely to turn out much less interesting than the high hopes many now seem to harbor.”<sup>81</sup> Professor John Figueiredo’s study of the results of e-rulemaking at a single agency, the Federal Communications Commission, similarly found no more than marginal change.<sup>82</sup>

## V. DIALOGUE?

The Obama Administration appears committed to exploiting the world of social media to its fullest. One can hardly find a government site lacking blogs, RSS feeds, twitter pages, facebook links, and the like – and in the service not only of “getting the message out,” but also receiving input in discussion formats open to participant “ratings” that, in theory at least, will drive the most popular submissions into clearest view. President Obama’s open government initiative, coordinated by the White House Office of Science and Technology Policy, has generated ambitious Open Government Plans,<sup>83</sup> numerous “open” websites,<sup>84</sup> and similar commitments –

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<sup>78</sup> See also Stuart Shulman, “Whither Deliberation: Mass E-Mail Campaigns and U.S. Regulatory Rulemaking” 2006) 3 *Journal of E-Government* 41; Stephen Zavestoski, Stuart Shulman, & David Schlosberg, “Democracy and the Environment on the Internet: Electronic Citizen Participation in Regulatory Rulemaking,” (2006) 31 *Science, Technology & Human Values* 383; Steven Balla, & Benjamin Daniels, “Information Technology and Public Commenting on Agency Regulations” (2007) 1 *Regulations & Governance* 46.

<sup>79</sup> Cary Coglianese, “Citizen Participation in Rulemaking: Past, Present and Future” (2006) 55 *Duke LJ* 943.

<sup>80</sup> “According to one recent study of about 500,000 comments submitted on an especially controversial EPA rule [addressing airborne mercury levels], less than 1 percent ... had anything original to say.” *Ibid* at 959.

<sup>81</sup> *Ibid* at 968.

<sup>82</sup> John Figueiredo, “E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission” (2006) 55 *Duke LJ* 969.

<sup>83</sup> See the EPA’s 53-page “Open Government Plan 1.0” available online: EPA <<http://www.e-p-a.gov/open>>.

<sup>84</sup> See e.g. the OSTP website <<http://www.whitehouse.gov/open>>; in general, one can find an open website at a top-level government website rather than agency-by-agency – for example online: Open

proliferating at a dizzying rate, defying delimitation much less assessment in a paper such as this. Beth Noveck, whose early paper was mentioned earlier,<sup>85</sup> has been central to these developments.

And for rulemaking? EPA's elaborate and very recently published "Open Government Plan"<sup>86</sup> includes a heading on "Expanding Public Awareness and Involvement in the Development of Rules and Regulations," but it does not appear to be sponsoring dialogue in that context. Perhaps the commitments and style (to date) of Regulations.gov limits it to an electronic form of the standard "notice and comment" process. The most interesting development in this respect of which I am aware is a university project that one might think a descendant – at least a close relative – of the ABA Report mentioned above.<sup>87</sup> Cynthia Farina, its Reporter, has also been deeply involved in the Cornell Electronic Rulemaking Initiative [CeRI],<sup>88</sup> an interdisciplinary effort that with the support of the National Science Foundation and the Departments of Commerce and Transportation is working generally to facilitate use of the Internet in rulemaking – and specifically to "[a]ssist[], and actively promot[e], agency experimentation in Internet-based ways to elicit public participation beyond just the notice-and-comment process." One effort, very much in line with the ABA study, has been to model ways in which the Regulations.gov site can be made more open, helpful, even educational for the citizen coming to it. Another, very much in progress as I write, is an experiment in converting a rulemaking to a discussion format.<sup>89</sup>

The Department of Transportation currently has pending a rulemaking proposal that would prohibit most "texting" by commercial drivers whose safe conduct it can directly regulate.<sup>90</sup> CeRI has taken the quite extensive proposed rule and explanation, and summarized it thematically on its "regulationroom" website. On different days, different specific elements of the proposal (for example, how is "texting" to be defined; what drivers are covered; what penalties are provided for) are identified for discussion, and participants see and react to each other's comments on that element. In effect, the discussion collects comments focused on particular elements of the rulemaking, where the ordinary comment process is to the whole of a proposal, as well as facilitating some back-and-forth. At the conclusion of the discussion period, the CeRI staff developed a draft summary – again open to participant input – and the final product was submitted to the Department as a public comment on behalf of the participating discussants.

The last steps – aggregation by an outside body and submission of a unified comment – would not be required if the Department itself were running the website. It could itself create the matrix that would permit commenters to focus their

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Government <[www.dot.gov/open](http://www.dot.gov/open)> but not online: FAA <[www.faa.gov/open](http://www.faa.gov/open)> where the Federal Aviation Administration is a subunit of the Department of Transportation

<sup>85</sup> Noveck, *supra* note 41.

<sup>86</sup> See *supra* note 83.

<sup>87</sup> See text accompanying n 42 above.

<sup>88</sup> See online: CERi <<http://ceri.law.cornell.edu/>>

<sup>89</sup> Online: Regulation Room <<http://regulationroom.org/>>

<sup>90</sup> Limiting the Use of Wireless Communication Devices, 75 Fed. Reg. 16391, April 1, 2010 (RIN 2126-AB22); online: Regulations.gov <<http://www.regulations.gov/search/Regs/home.html#search-Results?Ne=11+8+8053+8098+8074+8066+8084+1&Ntt=RIN+2126%25e2%2580%2593AB22&Ntk=All&Ntx=mode+matchall&N=0>>.

contributions on particular issues, in ways that would be transparent to others interested in the same issues and that would not require responders to search the whole body of comments (as at present) to see if there were any on the particular points that might happen to interest them. Agency staff, after the comment period, would have the significant advantage of a disaggregated collection of comments, arranged point by point, as well as any general inputs that might have been submitted.

Is it realistic to expect discussion of the interactive nature CeRI hopes to promote? Will it be too complicated/costly to present proposed rules, often quite complex and with disparate interrelated sections, in a manner that would facilitate such focused discussion, if it *could* be expected? And will open *discussion* actually eventuate? Rulemaking is unlike the construction of a Wikipedia, or even early-stage, free-form consultation on a general question like government openness policy.<sup>91</sup> People have direct stakes in the outcome, possibly momentous ones – and that can both magnify numbers past the relatively few interested volunteers who have thus far appeared in White House on-line consultations, and produce more political behaviour. One can imagine many other questions about the future of the project – strongly suggesting, *inter alia*, that the way forward is by cautious experiment and observation, not across-the-board imposition of a uniform mode of proceeding. Perhaps a threshold determination like that now required for negotiated rulemaking is called for. For the moment, the thing to see is that the presence of the electronic format permits, if it will not necessarily generate, a kind of dialogue about proposed rulemaking that simply could not have been imagined in paper format.

## VI. CONCLUSION

It is a quarter century since I began telling my Administrative Law students that they had better be watching the Internet and how agencies of interest to them were using it, as they entered an Information Age career. The changes since then have been remarkable. Rulemaking, where the pace has perhaps been slowest, is now accelerating into the Internet, driven by a President committed to openness and consultation. This paper seeks little more than to point the reader toward the places where she can find the changes and watch them for herself.

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<sup>91</sup> Cf. President's Council of Advisors on Science and Technology, online: PCAST <<http://pcast.ideascale.com/>> (one of a number of free-form, on-line collaborative discussions the Office of Science and Technology Policy has conducted).



## CONSULTATION DURING RULE-MAKING: A CASE STUDY OF THE IMMIGRATION AND REFUGEE PROTECTION REGULATION

France Houle\*

*Since it prescribed its first regulatory policy in 1986, the Federal government implemented a consultation process with stakeholders and the general public during the rule-making process. This process is not legally mandatory (unlike in the province of Quebec). However, failure to conduct a consultation process results in an administrative sanction: the refusal to approve the new regulation by Cabinet.*

*This article reports on the results of an empirical research project we conducted in 2004 within the Immigration Division of the Citizenship and Immigration Canada Department [CIC]. Our general research question was exploratory in nature. We wanted to know how CIC civil servants understood their obligation to consult with citizens. Our case-study indicates that it is difficult to implement a consultative culture within a department that has a strong long-term commitment to protect the integrity of the Canadian territory.*

*Depuis la mise en oeuvre de sa toute première politique réglementaire en 1986, l'administration publique fédérale consulte les parties prenantes et le public en général lors de l'élaboration d'un projet de règlement. Ces politiques n'ont pas pour effet de rendre la consultation légalement obligatoire (comme au Québec), mais administrativement obligatoire. La sanction du non-respect de cette obligation résulte en le refus par le Cabinet d'approuver le nouveau règlement.*

*Dans cet article, nous faisons rapport sur les résultats d'une recherche empirique que nous avons menée en 2004 avec la section de l'immigration du ministère de la Citoyenneté et de l'Immigration du Canada [CIC]. Notre question générale de recherche était de nature exploratoire : nous voulions savoir comment les fonctionnaires de CIC comprenaient l'obligation qui leur était faite de consulter les citoyens. Notre étude de cas indique qu'il est difficile d'implanter une culture de consultation dans un ministère dont la mission est, depuis longtemps, de protéger l'intégrité du territoire canadien.*

### I. INTRODUCTION

In Canada, common law recognizes a right of citizens to participate in governmental decisions, but only when their individual rights and interests are affected. We are all familiar with the application of the principles of natural justice in administrative adjudication, and the fact that those principles do not apply when the government is about to make a decision of a legislative nature, unless a statute prescribes otherwise. For example, the *Loi sur les règlements* in Québec requires the government to give notice that it is about to approve a regulation and give time to its citizens to

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comment. This notice and comment procedure represents, however, the bare minimum in terms of participatory rights.<sup>1</sup> In general, Parliament and legislatures have not shown great interest in improving the democratic legitimacy of regulations. This leaves the Executive to decide if, how and when it will consult with its stakeholders and the general public. Some governments have implemented consultation processes which are administratively, but not legally, mandatory to achieve this end.<sup>2</sup>

The Federal Government has been active on this front since it prescribed its first regulatory policy in 1986.<sup>3</sup> Since then, consultations with stakeholders and the general public in the rule-making process has become a core element of this policy. Its most recent incarnation is the Cabinet Directive on Streamlining Regulation.<sup>4</sup> A Cabinet Directive is unlike any other guideline. The use of this format indicates that this document is mandatory on all Government officials. This Directive, which came into effect on April 1, 2007, sends a clear signal to the public administration about the intention of Cabinet: it must conduct consultations with those who are affected by proposed regulations.<sup>5</sup> Failure to do so will result in a form of administrative sanction: the refusal to approve the new regulation by Cabinet.<sup>6</sup>

<sup>1</sup> *Loi sur les règlements*, L.R.Q., c. 18.1, s. 10.

<sup>2</sup> For a detailed description of the legal and administrative steps during the federal and Québec regulatory processes, see Luc Gagné, *Le processus législatif et réglementaire au Québec* (Cowansville, PQ: Yvon Blais, 1997) at 269; *Le processus législatif et réglementaire fédéral* (Cowansville, Yvon Blais, 1999) at 424. See also on the federal regulatory process, Justice Canada, “The Regulatory Process”, online: Justice Canada <<http://www.justice.gc.ca/eng/dept-min/pub/legis/rm-mr/part-2/toctdm.html>>. Other relevant readings on the regulatory process include: John Mark Keyes, *Executive Legislation: Delegated Law Making by the Executive Branch* (Markham, Ont.: Butterworths, 1992) at 308; Paul J. Salembier, *Regulatory Law and Practice in Canada* (Markham, Ont.: Butterworths, 2004) at 447.

<sup>3</sup> Although the text of the Regulatory Policy is not available on the Government of Canada website, Carole Kennedy, Director of the *Canada Gazette* Directorate 1994-2007, refers to it. See “A Glance at the *Canada Gazette*, Past, Present and Future” online: Library and Archives Canada <<http://www.collectionscanada.gc.ca/canada-gazette/035001-2000-e.html>>.

<sup>4</sup> *Cabinet Directive on Streamlining Regulation*, section 2.0, online: Government of Canada <[http://www.regulation.gc.ca/directive/directive01-eng.asp#\\_Toc162687221](http://www.regulation.gc.ca/directive/directive01-eng.asp#_Toc162687221)>.

<sup>5</sup> *Ibid* at s. 4.1.

<sup>6</sup> See Treasury Board of Canada Secretariat, *Guide to the Federal Regulatory Development Process*, online: <<http://www.tbs-sct.gc.ca/ri-qr/documents/gfrpg-gperf/gfrpg-gperfb-eng.asp>>. The *Guide* states at Step 6:

Treasury Board Meeting and Decision: TBS-RAS is responsible for briefing Treasury Board ministers on regulatory proposals. Officials of the regulatory organization (preferably at the level of assistant deputy minister [ADM] but no lower than the director level) are sometimes required to be available during the meeting to provide additional information. TBS-RAS will inform you when this is the case, and TBS-RAS will advise as to the time and place of the meeting, which is a Cabinet confidence. The Treasury Board, as a Cabinet committee, may make any of the following decisions:

- Approve or reject pre-publication of the proposed regulation;
- Approve or reject requests for exemptions from pre-publication;
- Send the item to Cabinet or one of its other committees for consideration;
- Refer the matter back to the responsible minister for further consideration and information; and

This government orientation is not surprising given the advances in the theoretical work achieved by scholars since the model of the welfare state was questioned regarding its capability to implement successfully a Rawls-like system of distributive justice. Indeed, many scholars in different disciplines, such as political science, economics and law have proposed new approaches to explain how governments are now functioning.<sup>7</sup> “New public management” and “Reinventing government” were two of the normative theories that were put forward in the eighties and nineties.<sup>8</sup> Today, scholars such as Lester Salamon suggest that these two approaches are no longer useful because the changes that were proposed have mostly been implemented.<sup>9</sup> Salamon is of the view that the challenge now is to better understand how the governments we have produced function: “one that acknowledges the existence and likely persistence of ‘third-party government’ and that focuses more coherently and explicitly on the distinctive challenges that it poses.”<sup>10</sup>

Salamon calls this approach the “New Governance.” First, he uses the term “governance” instead of “government” to emphasise “what is perhaps the central reality of public problem-solving for the foreseeable future—namely, its collaborative nature, its reliance on a wide array of third parties in addition to government to address public problems and pursue public purposes.”<sup>11</sup> He argues that collaboration is necessary “because problems have become too complex for government to handle on its own.”<sup>12</sup> Second, he uses the term “new” to recognize that these “collaborative approaches, while hardly novel, must now be approached in a new, more coherent way, one that more explicitly acknowledges the significant challenges they pose as well as the important opportunities they create.”<sup>13</sup>

This article is dedicated to learning more about the implementation of the “New Governance” model within the Canadian Federal Government. In order to illustrate some of the challenges that third party government poses, I report on the results of an empirical study I conducted in 2004 within the Immigration Division of the

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- Defer the item to another meeting.

Approved submissions are sent to PCO for action (see Step 7). Your TBS-RAS analyst will inform you of any follow-up actions that may be needed, refusals of regulatory proposals by the Treasury Board, or proposals that are deferred”.

<sup>7</sup> See e.g. William Niskanen, *Bureaucracy and Representative Government* (Chicago: Aldine, Atherton, 1971) at 241; John A. C. Conybeare, “Bureaucracy, Monopoly, and Competition: A Critical Analysis of the Budget-Maximizing Model of Bureaucracy” (1984) 28 *American Journal of Political Science* 479; André Blais & Stéphane Dion, “Are Bureaucrats Budget Maximizers? The Niskanen model and Its Critics” (1990) 22 *Polity* 655; Patrick Dunleavy, *Democracy, Bureaucracy and Public Choice: Economic Explanations in Political Science* (London: Pearson Education, 1991) at 286.

<sup>8</sup> On this point, see Daniel Mockle, “La gouvernance publique et le droit” (2006) 47 *Les Cahiers de Droit* 89 at paras. 67-86.

<sup>9</sup> Lester M. Salamon, *The Tools of Government: A Guide to the New Governance* (Oxford, Oxford University Press, 2002) at 8.

<sup>10</sup> *Ibid* at 8.

<sup>11</sup> *Ibid*; In fn. 26, he notes that he is indebted to George Frederickson, *The Spirit of Public Administration*, (San Francisco: Jossey-Bass, 1997) at 78-96, for his suggestion to use the term “governance.”

<sup>12</sup> *Ibid*. “...because disagreements exist about the proper ends of public action, and because government increasingly lacks the authority to enforce its will on other crucial actors without giving them a meaningful seat at the table.”

<sup>13</sup> *Ibid*.

Citizenship and Immigration Canada Department [CIC].<sup>14</sup> This case-study shows the difficulty in implementing a consultative culture within a department that has a strong long-term commitment to protect the integrity of a national territory.

### A. Context

The first regulatory policy of the Federal Government came into effect in 1986.<sup>15</sup> Its main feature was that it required departments and agencies to analyse the socio-economic impact of any new regulatory requirements or regulatory changes.<sup>16</sup> From then to now, a Regulatory Impact Analysis Statement [RIAS] accompanies a draft regulation and both documents are published in Part I of the *Canada Gazette* for notice to and comments by interested parties.<sup>17</sup> The content of a RIAS mainly derives from a functional perspective as well as a utilitarian analytical framework. It requires a regulatory authority to demonstrate that a problem exists that can be best addressed through the implementation of a new regulation. Before making a final determination on the choice of the instrument, the regulatory authority must conduct a socio-economic analysis of the impact of adding a new regulatory requirement or changing an existing one. Finally, it must examine the impact of the new measure and balance its benefits against its costs. It is only when the regulatory authority can convince the government that the proposed regulation will result in the greatest net benefit to the Canadian society (the public interest) that it will be approved by the Governor-in-Council (the Cabinet). But, before this final approval, the regulatory authority must submit its analysis to public scrutiny. This is when the requirement for a regulatory authority to seek comments from the public comes into play.<sup>18</sup>

Enhancing the accountability of regulatory authorities and the transparency of the regulatory process were viewed as central for successful regulatory reforms. In particular, regulatory authorities needed to broaden their views on the complexity of the problems they encountered. They could no longer reduce problems to their simplest form in order to be able to apply their own rules and procedures. For example, they could no longer resort to their legal power to regulate and be satisfied that that was sufficient justification for making new rules. In other words, a government could not regulate simply because a statute empowered it to do so. It

<sup>14</sup> France Houle, "L'effectivité des études d'impact de la réglementation dans le processus réglementaire fédéral" (in progress).

<sup>15</sup> Kennedy, *supra* note 3.

<sup>16</sup> Government of Canada Privy Council Office, *Government of Canada Regulatory Policy*, online: PCO-BCP <[http://beyondfactoryfarming.org/documents/Fed\\_Reg\\_Policy99.pdf](http://beyondfactoryfarming.org/documents/Fed_Reg_Policy99.pdf)> [Regulatory Policy 1999]. The 1999 policy document superseded the 1986 policy which is no longer available online.

<sup>17</sup> See "Consultation", online: *Canada Gazette* <<http://canadagazette.gc.ca/consult/consult-eng.html>>. An example posted at the time of writing are the "Regulations Amending the Canadian Aviation Regulations (Parts I and IV — Conduct of Flight Tests)", Vol. 144, No. 48 — November 27, 2010.

<sup>18</sup> Since its first appearance on the Canadian federal regulatory scene, the basic content of the impact analysis statement has not changed significantly. It is divided into six sections. Sections 1, 2 and 3 are called *description, alternatives, benefits and costs*. Sections 5 and 6 are called *compliance and enforcement* and *contact person*. Section 4 is called *consultation*. The regulatory authority must describe who was consulted and the mechanisms that were used to conduct consultations. It must also include a discussion on the results of the consultation and the name of any group still opposed to the regulation. This section of the RIAS is revised after the notice and comment procedure is completed. The regulatory authority must state if comments received lead to a modification of the proposed regulation and, if not, the authority must explain the reasons why it chose not to change it.

needed to justify the soundness of the regulation from an economic and/or social perspective (by providing a regulatory impact analysis statement). Regulatory authorities also needed to learn to take several parameters into consideration when devising regulatory programs, and not only the ones that would serve the maximisation of their budget and their field of competence. Indeed, when regulatory authorities have adopted a narrow analytical framework in the past, it led them, for example, to copy one regulatory system on top of the other, without really addressing the particular needs of the social and economic systems into which regulations will operate.<sup>19</sup>

These bureaucratic failures were understood as a direct consequence of the lack of constraints placed on departments and agencies to justify any regulatory initiatives based on their soundness from social and economic perspectives. This lack of accountability of regulatory authorities was notably addressed through the obligation to produce a RIAS: regulatory authorities would justify their decision to regulate by showing that a problem existed and that the best solution to solve it would be to adopt a regulation because the net benefits for the population would be greater than their inconvenience.<sup>20</sup>

Improving transparency was another key issue to the betterment of regulations. Consultation with the stakeholders and the general public aims at achieving two goals. The first goal is to ensure that the regulatory authority has not misunderstood the problem; the second is to ensure greater voluntary compliance with the new regulatory requirement. It is believed that by submitting its regulatory policies to economic and social actors, the regulator enriched, not impoverished its process. Since a regulatory authority purports to know the cause at the root of a problem and the best cure, why not submit its views for scrutiny to those who are affected by its proposed regulations? On the one hand, if affected parties disagree with the government, perhaps their comments may bring the regulatory authority to partially or entirely rethink its approach. Even if such comments are not so well accepted, their mere existence will give a clear signal to the regulatory authority that further persuasion is needed before it can adopt its regulation and achieve a measure of voluntary compliance. On the other hand, if affected parties agree with a proposed regulation, chances are that voluntary compliance with the new requirement will be higher. The theory behind these assumptions is that the binding force of the law comes from the acceptance of the rule by those who are subjected to it.

Different types of information are contained in a RIAS to provide to those who would like to participate in the rule-making process the relevant background information to evaluate by themselves whether the regulation will achieve its intended goals. The consultation mechanism put into place by the Canadian government is a two-step process. First, the regulatory authority consults its stakeholders at the stage of the elaboration of the regulatory policy. This is an informal procedure and the only record available is the short summary that one can find in the first version of the

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<sup>19</sup> On this issue, see any of the writings, *supra* note 7.

<sup>20</sup> On this issue, the writings of George Stigler on regulatory capture are of particular interest. George Stigler "The Theory of Economic Regulation" (1971) 2 *Bell Journal of Economics and Management Science* 3; See also Jean-Jacques Laffont & Jean Tirole, "The Politics of Government Decision Making: A Theory of Regulatory Capture" (1991) 106 *Quarterly Journal of Economics* 1089; M.E. Levine & J.L. Forrence, "Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis" (1990) 6 *JL Econ & Org* 167.

RIAS.<sup>21</sup> Once the government decides to go ahead with its project of making a regulation, a second round of consultations occurs. It is at this stage that a RIAS is pre-published with the proposed regulation in Part 1 of the *Canada Gazette*. During this formal consultation process, the stakeholders and the general public are invited to submit their comments. At the end of the consultation period (which varies but does not appear to be less than 30 days), comments are analysed and may be used to modify the draft regulation. After the regulations are approved by the Governor-in-Council, they are published in Part II of *Canada Gazette* with a final version of the RIAS integrating a summary of this second round of consultations.

### B. Methodology

In 2004, I completed the primary research phase of a project studying, among other things, the consultation process followed by the different divisions of Citizenship and Immigration Department during the formulation of new Immigration and Refugee Protection regulations. This primary research consisted of a series of interviews conducted over a period of twelve months with as many divisions of the Department as possible.<sup>22</sup>

I interviewed civil servants working in 11 different divisions of the Department focusing on immigration matters, as it was the subject-matter of the proposed regulation. These civil servants were either in charge of, or involved in, the consultation process that was followed during the formulation of the regulation. They were working in the following divisions: legal, medical, cost recovery, sponsorship, selection, enforcement, ports and border, citizenship, administrator of regulatory matters (coordination of consultations), refugee resettlement, and visa policy.

To formulate interview questions, I used relevant federal policies as a starting point: the Regulatory Policy<sup>23</sup> and the Regulatory Process Management Standards<sup>24</sup> which is incorporated in the former. These policies set the standards to solicit the views of stakeholders affected by proposed regulations and it is these standards that were applied by CIC at the time we conducted the interviews. In the section dedicated to consultation, one can read:

Regulatory authorities proposing new regulatory requirements, or changes to existing regulatory requirements, must carry out timely and thorough consultations with interested parties. The consultation effort should be proportional to the magnitude of the impact of the proposed regulatory change. Notice of proposed

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<sup>21</sup> A RIAS [Regulatory Impact Analysis Statement] is published with the proposed regulation. In this RIAS, there is a section entitled “consultation” summarizing the first round of consultation and the format to conduct it chosen by the regulatory authority. For a description of the content of the RIAS, see “Regulatory Impact Analysis Statement” online: Department of Justice Canada < <http://canada2.justice.gc.ca/eng/dept-min/pub/legis/rm-mr/part4/rias-reir.html> >.

<sup>22</sup> See Houle, *supra* note 14.

<sup>23</sup> The latest version of the Regulatory Policy is published on the web site of the Privy Council Office of the Canadian Federal Government online: PCO-BCP <[www.pco-bcp.gc.ca](http://www.pco-bcp.gc.ca)>.

<sup>24</sup> The standards were established by Treasury Board of Canada and they are applicable to all Departments’ Managers. The standards appear at the end of the *Regulatory Policy 1999*, *supra* note 16.

regulations and amendments must be given so that there is time to make changes and to take comments from consultees into account.

Regulatory authorities must clearly set out the processes they use to allow interested parties to express their opinions and provide input. In particular, authorities must be able to identify and contact interested stakeholders, including, where appropriate, representatives from public interest, labour and consumer groups. If stakeholder groups indicate a preference for a particular consultation mechanism, they should be accommodated, time and resources permitting. Consultation efforts should be coordinated between authorities to reduce duplication and burden on stakeholders.

Regulatory authorities should consider using an iterative system to obtain feedback on the problem, on alternative solutions and, later, on the preferred solution.

Consultations should begin as early as possible in order to get stakeholder input on the definition of the problem, as well as on proposed solutions.<sup>25</sup>

Relevant federal policies therefore highlight the importance of timely, thorough and proportionate consultation as well as the need for a clear and iterative consultation process. These ideas were used to design the study's questions and to analyze its findings.

### C. Findings

On the specific subject of consultations, interviews focused on four general themes: 1) Knowledge about Stakeholders; 2) Dynamic of Consultations; 3) Reasons Underpinning Consultations; 4) Procedural Aspects of Consultations.

#### 1. Knowledge about Stakeholders

The main objective of this theme was to ascertain whether the civil servants in charge of the consultation process, in each division included in the research sample, had a clear idea of who should be considered a stakeholder.

A stakeholder is an old legal concept. This person was originally the one who held money or other property while its owner was being determined. However, in the twentieth century, the word stakeholder took another meaning: it was used to describe a person or an organization with a legitimate interest in a project or entity. In this sense, a stakeholder is a term used to speak of any interested party in the regulations to be adopted, be they individuals or groups affected by them.

In the Federal Regulatory Process Management Standards, it is said that authorities must be able to identify and contact interested parties including, where appropriate, representatives of labour and consumers' groups.<sup>26</sup>

Were civil servants, who were involved in or in charge of consultation within CIC, able to identify their stakeholders? The results of the interviews revealed that civil servants divide stakeholders into two groups: governmental stakeholders and civil

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

society stakeholders. Governmental stakeholders include other governments, such as other divisions in CIC and federal departments and agencies as well as provincial and municipal governments. All of the participants identify these parties as governmental stakeholders. The civil society stakeholder is a more loosely defined category. It can include practitioners, NGOs and public interest groups as well as any individual affected by the regulatory policy. Each civil servant is in charge of making a determination as to who is a stakeholder for the purpose of consultation within his or her division. As one participant put it:

[ ... ] you want to make sure that you consult widely enough that you're hitting your target audience, but not so widely that you're diluting opinions, because that could be a problem.<sup>27</sup>

Although there is some value in letting civil servants of each division determine their stakeholders, the interviews showed there is some confusion among the CIC civil servants with regard to the identification of their stakeholders, the difference between the two stages of the consultation process and the very meaning of the concept of consultation itself.

Concerning the identification of the stakeholders, some participants were able to clearly name the complete list of their stakeholders. Others were able to name two or three of their main stakeholders. Finally, some participants were not able to name any of their stakeholders or gave vague answers such as the "Canadian public." Knowing who is going to be consulted in advance is the starting point to a transparent procedure. It is also a more efficient way to avoid undesirable lobbying practices. Individuals and groups intending to participate in the rule-making process should have their name registered in the lobbyist registry.<sup>28</sup>

On the meaning of the concept, some participants were of the opinion that stakeholders include only experts such as practitioners and NGOs. Other participants were more of the view that any person or group affected by the proposed regulation, whether or not they have any particular expertise on the subject-matter, should be included. In fact, for them the concept of stakeholders was much closer to the idea of that of a client of a Department than that of a stakeholder.

One criticism that can be made is that this definition is too broad at the first stage of the consultation process; that is to say, at the stage of the development of the regulatory policy. During the first round of consultations, participation should be limited to those whose aim is to influence the development of a policy in a way they consider to be in the public interest. Fixing boundaries on who, among possible stakeholders, can participate meaningfully to a consultation process aimed at quality discussions and debates on regulatory policy options. The aim is quality, not quantity. It is at this stage that the perceived problems and possible solutions are discussed and

<sup>27</sup> Interview 413. Notes on file with author.

<sup>28</sup> *Lobbying Act*, RSC 1985, c. 44 (4th Supp.), ss. 6-10. The registry of lobbyists is the principal means provided under the *Lobbying Act* to ensure transparency with regard to lobbying of public office holders. For specific information about the registry, see the section on "The Registry of Lobbyists" in the brochure published by the Office of the Registrar of Lobbyists entitled, *A Summary of New Requirements in The Lobbying Act*, June 2008, online: ORL <[http://www.ocl-cal.gc.ca/eic/site/lobbyistlobbyiste1.nsf/vwapj/Info\\_booklet\\_Eng.pdf/\\$FILE/Info\\_booklet\\_Eng.pdf](http://www.ocl-cal.gc.ca/eic/site/lobbyistlobbyiste1.nsf/vwapj/Info_booklet_Eng.pdf/$FILE/Info_booklet_Eng.pdf)>.

the choice of instruments made. It is the most important round of consultations, the one that really matters and this is the main reason for which it is crucial to ensure the quality of this process.

Administrative case law with respect to the choice of interveners during a policy-making exercise of a regulatory agency offers useful guidelines. There are two general rules: a) when a regulatory board has to select persons or groups who will be admitted to intervene during the proceedings, the board must take into account the advantages to hearing contributions by responsible and informed persons, and; b) the necessity to save time and energy. Finally, it should be clearly recognized that it is up to the Department to select its stakeholders and invite them to submit their views on a regulatory policy. In addition, those who are not on the list, but wish to be, should be able to request that they be added to the list and state their reasons for wanting to participate in the rule-making process.

On the basis of the information gathered by CIC during the first round of consultations, the proposed regulation and the accompanying RIAS are published in the *Canada Gazette*. This, in turn triggers the second stage of the consultation process during which the members of the general public in general, including CIC clients, are invited to submit comments. At this point in time, the regulatory policy is decided and it is unlikely that it will be changed, save for minor details. Therefore, this second step of the consultation process should be viewed more as a formality. Indeed, it is interesting to note that in the final RIAS, the one published with the approved regulation, this second step is not called consultation but prepublication note.

## 2. Dynamic of the Consultations

The objective pursued by this set of questions was to form a better understanding as to how the participants approached consultations they undertook with government stakeholders or civil society stakeholders. The gist of the conversation was to find out whether the participants approached consultations with a particular mindset depending on which type of stakeholder they consulted.

Eight participants said that the dynamic of the relationship was not the same with civil society stakeholders. Three of the eight participants were of the view that civil society stakeholders' perspectives were different, but that they were equally important.<sup>29</sup> When they were asked to elaborate on this point, they added that some groups and practitioners have a better understanding of how things work at the operational level and that this knowledge is crucial to designing efficient and fair regulations. This indicates that these civil servants approached consultation with an open mind.

Five of the eight participants stated that civil society stakeholders' perspectives were not equal in importance to government stakeholders. They thought that the civil society stakeholders' perspective was too narrow, not solution-oriented, and confrontational. They also stated that government stakeholders had a better understanding of immigration operations and, as a result, their views have more weight than those of the civil society stakeholders.<sup>30</sup> One participant said:

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<sup>29</sup> Interviews 802, 212 and 309. Notes on file with author.

<sup>30</sup> Interviews 413, 608, 359, 111, 705. Notes on file with author.

They are advocates, their role is strictly to be a watchdog and that's good, you need that, but it's not often solution oriented. Also because they are always criticizing, it's very difficult to find a way to solve problems that are going to (inaudible) to others. That makes it difficult because then they will charge that we're not consulting with the right people, that only they are the right people to consult on the refugee issues and yet (inaudible) not solution oriented enough. That's not their role, their role is to be a watchdog so you know it creates a lot of tension sometimes.<sup>31</sup>

These results indicate that these civil servants do not approach consultations with a mind as open as one would likely hope for. Finally, three participants said that the dynamic of the relationship between both categories of stakeholders, and especially NGOs was the same.<sup>32</sup> When they were asked to elaborate on the similarities, they were not able to explain their answers. This may indicate a lack of frankness. If these two last figures are added up, two-thirds of the participants do not appear to have a positive attitude toward consultations. This raises the question of the level of good faith required to engage in a meaningful consultation process and build long-term relationships with the stakeholders.

These findings also suggest that there is a need to define more clearly the purpose of consultations during the development of a regulatory policy. It would be the responsibility of the Department to clearly state in its consultation documentation what they wish to achieve with the consultations in which they are about to engage. For example: What is on the table for discussion and debate? Is it possible to discuss their views on what the problem is and the solutions they propose? What are the cost and the benefit of the proposed solution? What is the impact on rights and freedoms? and so on. In sum, more training of the civil servants, focusing on specific objectives would be useful.

### **3. Reasons for Consulting**

The objective with this theme was to form a better understanding of the perception of the participants on whether they view consultation as an important mechanism in the rule-making process and, if yes, why? Not surprisingly (it is part of the official discourse in the public administration), all of them said that they were of the opinion that consultations are a very important mechanism in the rule-making process. Some were able to substantiate their support with solid reasoning, while others were very vague, indicating a limited understanding of why consultations are important.

Two types of well-founded reasons for consulting emerge from the interviews. Some participants said that consultations were important to ensure that regulations are truly operational. For them, the goal of consultation is to make a better regulation in the sense that it is efficacious: a regulation which accomplishes what it is intended to accomplish. Others said that consultations were important to "flesh out the concerns of the outside world," whether they approved or disapproved of the regulations. These civil servants of the CIC said that when stakeholders disapproved

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<sup>31</sup> Interview 359. Notes on file with author.

<sup>32</sup> Interviews 359, 413 and 705. Notes on file with author.

of the regulation, it is important for them to know why they disapproved, for discussions and debates can occur on the issues. Thereafter, CIC civil servants can help to dissipate a misunderstanding (explaining regulatory choices), to mitigate or to accommodate whenever possible by bringing some changes to the proposed regulations, or even to not go forward with a proposed change when CIC civil servants deem it necessary. As one civil servant stated:

It's ... because you're getting into the political side of things and it's very difficult to, sometimes, foresee the impact of something that you're going to do, which we try to mitigate that through the consultation process.<sup>33</sup>

From this last account, it is interesting to note that for these participants it is crucial that CIC makes acceptable regulations for those affected by it. This concern is linked to the broader issue of democracy as it provides greater transparency in the process of formulating a regulation. As some participants put it:

... the whole intention of the government is to make sure that there's an agreement between the lawmakers and those subject to it. [Consultations] do not necessarily help to make better regulations, but regulations that will be better accepted by the Canadians.<sup>34</sup>

Two types of limited understanding of the importance of consultations emerged from the interviews: 1) those who believe that consultation is useful for identification purposes, that is to say to meet people, to put a face on a name and to know them better; 2) others thought that consultations served the purpose of exchanging information and to educate stakeholders about immigration processes. These purposes are not completely irrelevant – they occur during a consultation process, however, they are not the primary reasons why consultation is done.

These findings also suggest that there is confusion around the objectives of the consultation process. During the first round of the consultation, the main focus of the issues – acceptability of policy choices based on principles or whether the policy choices are operational – should also be on the table for discussion. Too often, there is still no real dialogue between the regulator and the stakeholders, only two parallel monologues. When expectations are not clearly stated, a sense of frustration and of wasting time and energy grows exponentially.

#### 4. Procedural Aspects of Consultations

Here the objective was to form a view of the perception of the participants on issues such as: How much time is devoted to consultations? How to determine the scope of the consultation? What forms do consultations take? At which stage of the rule-making process are consultations conducted? How are the comments received processed?

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<sup>33</sup> Interview 608. Notes on file with author.

<sup>34</sup> Interview 705. Other participants shared similar views: interviews 212, 413. Notes on file with author.

The perceptions of the participants to the quantity of time they spent on consultations during the rule-making process varied from one interview to the other. However, all participants seemed to be of the opinion that too much time was devoted to consultations. Indeed, some participants used qualifications such as “huge, massive, hundreds.” But for some of them, the consultation process also included the consultations conducted by Deputy Minister Robillard on the Green Paper (“Trempe Report”) in 1997:<sup>35</sup> “[In the *Immigration and Refugee Protection Act (IRPA)*] situation, we were consulting for at least three years before we actually published the draft regulation.”<sup>36</sup> However, the “Trempe Report” gives only general legislative policy orientation and is by no means a document which can be cited in the RIAS as proof that consultations occurred with stakeholders on the specifics of the regulations (as one can read in some RIASs accompanying the final IRP Regulations and published in the *Canada Gazette*, Part II). One question that this last practice raises is whether the division in charge of writing this RIAS had time to conduct meaningful consultations as opposed to merely a formality.

Another participant said that he spent about 5 to 10 percent of his time on consultations, but qualified his answer by adding it is a lot “because after a while it adds up.” When asked to put a percentage on the time they spent consulting, the participants’ answers varied significantly. One participant said:

It takes up well over 50 percent of the time of policy officers. Depending on where you are in the cycle, it can be 100 percent. [...]during some periods of getting ready for the *IRPA* regulations, the only thing we were doing was consultation. And that means preparing the documents, setting up meetings, sending the documents out, reading with the individuals, talking with them, receiving their comments, feeding back their comments. Often, for periods of six months, or eight months, or nine months, the only thing we did is consulting. I would say, we do a lot consulting. But consulting is one of those things you can never do enough of. You can always do more. The problem is you can always do more and you can always find someone else that you should have talked to. Particularly immigration is one of those areas of public policy where it seems everyone has an opinion and we talk about engaging with the public!<sup>37</sup>

This answer suggests that this civil servant was overwhelmed by the consultation process. This may mean that CIC did not control the process very well during the drafting of the new Immigration and Refugee Protection Regulations. On the one hand, since the entire regulation was completely redrafted, the task of coordinating the workload was no doubt daunting and this may explain the reaction of this civil servant. On the other hand, the situation faced by the CIC may illustrate the need to

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<sup>35</sup> Canada, Legislative Review Advisory Group, “Not just Numbers: A Canadian Framework for Future Immigration” (Ottawa: Citizenship and Immigration, 1997) at 168 (Chair: Robert Trempe).

<sup>36</sup> Interview 111. Notes on file with author.

<sup>37</sup> Interview 802. Notes on file with author.

better plan the rule-making procedure when a regulation is re-done entirely, as opposed to modification to some parts or provisions of a regulation.

On the question as to how to determine the scope of the consultation, almost all participants were of the view that the criteria of proportionality should guide their decision. This is not surprising since Treasury Board guidelines are clear on this aspect of the procedure.<sup>38</sup> Proportionality is assessed through two main criteria: whether the change is contentious or not and the extent of the change proposed to the regulations: “If it is a small modification which is not contentious, consultations should be very small.”<sup>39</sup> The first criterion is relatively easy to apply. The main stakeholders will voice their concerns quickly and clearly. The second criterion is less clear. A participant was of the view that consultations should be considered less extensive when the change is purely technical. However, when asked what he meant by the words “purely technical” this participant did not answer. It would be useful for Treasury Board to clarify the concept of proportionality.

As to the form of consultations, one participant stated clearly that although it is mandatory to consult, the government does not impose a rigid procedural form. It can be done formally or informally, during a face-to-face meeting, on the telephone or in writing (paper or electronic). “We followed the process as best we could I guess and we did have lots of informal consultations. People calling up, writing, asking for a meeting and so we would meet with them or respond.”<sup>40</sup>

On the procedural steps followed for consultations on the regulations, most of the participants were not able to describe all of them. Some participants referred to papers and documents prepared on the policy orientation in the proposed regulations which were sent out and stakeholders were invited to make their views known. They were not able to state very clearly whether this occurred before or after the first RIAS was issued with the proposed regulation in the *Canada Gazette*.

A minority of participants referred to a unit which was created within CIC and that was put in charge of the consultations process. In fact, a unit was created especially to manage the entire rule-making process engaged in by CIC to re-write the Immigration and Refugee Protection Regulations.<sup>41</sup> The role of this unit was to check that the whole Regulatory Policy was followed before sending the regulations to Treasury Board. As long as the consultations occur, this unit was satisfied when the goals of the policy were formally met. The task of this unit was not to check the quality of the consultations conducted by each division of CIC. As long as the division reported that consultations were conducted, this was sufficient to let its section of the regulation continue its way in the system.

This unit was also in charge of receiving all the comments, classifying them “in a spread sheet or a table,”<sup>42</sup> sorting them out using criteria such as the importance of the comment, its repetitiveness or, contrarily, presenting some significant differences, and, finally, dispatching the relevant comments to each division of CIC. Therefore, it seems that each division did not receive all the comments, although one participant

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<sup>38</sup> Canada, Treasury Board, “Guidelines for Effective Regulatory Consultations” online: Treasury Board of Canada Secretariat < <http://www.tbs-sct.gc.ca/ri-qr/documents/gl-ld/erc-cer/erc-certbeng.asp>>.

<sup>39</sup> Interview 212. Notes on file with author.

<sup>40</sup> Interview 705. Notes on file with author.

<sup>41</sup> Immigration and Refugee Protection Regulations SOR/2002-227.

<sup>42</sup> Interview 309. Notes on file with author.

said that they read all the comments, but others thought that the unit was summarizing all of them. In my opinion, this unit does not have the qualifications to exclude or summarize comments. They should only classify them and direct them to the relevant division.

In the batch of comments received, the division would sort them out further using other criteria such as whether or not the division had in the past thought about a particular issue raised by a stakeholder:

What we are trying to find is things that we hadn't thought about or issues, comments, or concerns that we hadn't already addressed. [...] what is missing, what is new, where they've raised issues that we haven't thought about. Is there any potential problem?<sup>43</sup>

Other divisions set aside the comments they qualified as representing “extreme and/or disconnected views with reality” and, therefore, “irreconcilable with what needs to be achieved under the statute.”<sup>44</sup> These findings suggest that each division is in charge of deciding the criteria they will use to include or exclude comments. There should be some discussions among CIC as to the proper criteria to be used for the purpose of sorting out comments in order to reach a good level of uniformity.

As far as transparency goes, some participants said that sometimes they will take the time to respond to some comments, but it was not possible to find out more on this point. It is also useful to know that the comments are not posted on the CIC web site, but one can theoretically access them through an access to information request.<sup>45</sup> These requests are managed by a unit within CIC which decides to grant access to the information in all or in part based on the provision of the *Access to Information Act*.<sup>46</sup> Further inquiry would be needed to form a better view of the decision-making power of the civil servants staffing this unit (is it real or merely formal). In any case, the chances of the unit having access to all the comments, and uncensored, are very unlikely.

## II. THE AARHUS CONVENTION

Although consultations in Canada during the rule-making process are still at a relatively early stage of development, the findings of this empirical research indicate that there are flaws in the consultation process followed by CIC. This suggests that governmental policy guidelines and standards should be thoroughly examined. In order to conduct a useful examination, a first step could be, in addition to more empirical research, to conduct comparative research between the content of the Canadian guidelines with that of other jurisdictions. In this regard, it would be useful for the federal government to turn its attention to the work of the *European*

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<sup>43</sup> Interview 111. Notes on file with author.

<sup>44</sup> Interview 413. Notes on file with author.

<sup>45</sup> Generally, in Canada, the system of access to federal government information has suffered from significant challenges. See, for example, the federal Information Commissioner's most recent report on access and delay; Information Commissioner of Canada, *Out of Time* (A Special Report to Parliament) April, 2010.

<sup>46</sup> R.S., 1985, c. A-1.

*Commission* in general and the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* [*Aarhus Convention*] conceived at Aarhus, Denmark in 1998 in particular.<sup>47</sup>

The *Aarhus Convention* is an example of a legally binding European instrument canvassing rules of conduct for an efficient and legitimate consultation mechanism. If the *Aarhus Convention* is seen as an innovation in the field of public participation, it is because of the importance of the subject it covers in the field of environment. Environmental measures have the characteristic of affecting a broad range of citizens, from the average citizen to farmers and agricultural organisations. Furthermore, the environmental policy sector is a field where the interests of the public with respect to openness and transparency frequently enter in conflict with the interests of businesses in keeping their data secret. Therefore, the *Aarhus Convention* gives individuals a right to access environmental information that is kept in the hands of public authorities.<sup>48</sup>

In the preamble of the *Convention*, the parties recognize “that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them.”<sup>49</sup> In other words, the *Convention* goes further than Canadian standards by not only acknowledging that the public needs to be informed, but also that the institutions need to make sure citizens know how to access the information. Also of interest in this *Convention* is that instead of putting forward a formal method for consultation, it developed a series of precise obligations for states to follow when they consult their populations on environmental matters.<sup>50</sup>

### III. CONCLUSION

After more than 20 years of consultations during the rule-making process it would be appropriate to determine whether some or all of the consultation process should be legally mandatory. On this point, two distinct legal avenues could be discussed. The first avenue would develop an argument based the principles of natural justice. The question could then be whether these principles can be adapted to support systems of new governance involving “third-party government” as Salamon puts it.<sup>51</sup> The starting point of the discussion could be the decision of Evans J.A. in *Apotex*,<sup>52</sup> for he proposed an interesting development to the doctrine of legitimate expectations.

This doctrine, as explained by the Supreme Court, “is part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can only create a right to make representations or to be consulted.”<sup>53</sup> As Evans J.A. rightly pointed out in *Apotex*, the Supreme Court specifically said “that the doctrine

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<sup>47</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the *Aarhus Convention*), 25 June, 1998, 2161 UNTS 447, online: UNECE < <http://www.unece.org/env/pp/> >.

<sup>48</sup> *Ibid* at art. 4 (1).

<sup>49</sup> *Ibid* at preamble.

<sup>50</sup> *Ibid* at art. 6.

<sup>51</sup> Salamon, *supra*, note 9 at 8.

<sup>52</sup> *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264 (C.A.). Leave to SSC denied [2000] S.C.C.A. no 379.

<sup>53</sup> Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525 at 528.

has no application to the exercise of legislative powers”<sup>54</sup> as it would “place a fetter on an essential feature of democracy.”<sup>55</sup> In the realm of the exercise of delegated legislative powers, however, Evans J.A. stated that similar considerations do not apply because these powers are not subject to the “same level of scrutiny as primary legislation that must pass through the full legislative process.”<sup>56</sup> He concluded that “in the absence of binding authority to the contrary, the doctrine of legitimate expectations applies in principle to delegated legislative powers so as to create participatory rights when none would otherwise arise, provided that honouring the expectation would not breach some other legal duty, or unduly delay the enactment of regulations for which there was a demonstrably urgent need.”<sup>57</sup>

The second avenue could take a fresher look at this issue by examining case-law pertaining to consultation with First Nations. This case-law is interesting because it is based, *inter alia*, on the fiduciary duty between government and Aboriginal people to support the view that the state exercises its authority in the name of Aboriginal people.<sup>58</sup> It would be of interest to explore the idea as to whether the same argument can be made when the state exercised its authority to govern all citizens on its territory as it was put forward by Evan Fox-Decent in a text on the fiduciary nature of state legal authority. As the author explains: “there is something deeply fiduciary about the state's relationship with the people over whom it asserts power, and that the fiduciary nature of this relationship explains the state's legal authority to announce, administer and enforce law.”<sup>59</sup> Simply put, the fiduciary nature of state legal authority may prove to be a powerful analytical tool to support the view that the state owes its citizens a legal duty to consult.

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<sup>54</sup> *Apotex*, *supra* note 52 at para. 102.

<sup>55</sup> *Canada Assistance Plan*, *supra* note 53 at 559-560, cited with approval by Evans J.A. *ibid.* at para. 109.

<sup>56</sup> *Apotex*, *supra* note 52 at para. 110.

<sup>57</sup> *Ibid.* at para. 126.

<sup>58</sup> There are several Supreme Court decisions on this subject, but of particular importance, see : *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

<sup>59</sup> “The Fiduciary Nature of State Legal Authority” (2005) 31 *Queen's LJ* 259 at 259.

## THE DELIBERATIVE CITY

Hoi Kong\*

*In this paper, I will argue that general administrative law concerns about the legitimacy and effectiveness of rule-making have special force in the municipal zoning by-law context. In particular, I will argue that a particular, civic republican conception of legitimate state action offers the best justification for municipal regulation and provides the best normative foundation for developments in municipal consultation processes. In Part II, I will argue that the consultative processes in Quebec's zoning laws reflect a commitment to civic republican ideals, but that because of specific features of municipal regulation, these ideals are incompletely realized. In Part III, I will argue that a particular municipal institution – the ward council – enables the zoning process to better approximate civic republican ideals. I conclude this paper by arguing that ward councils not only strengthen the normative justifications for municipal regulation, they contribute to its effectiveness.*

*Dans cet article, je vais soutenir que les préoccupations du droit administratif général au sujet de la légitimité et l'efficacité de l'élaboration de règles ont une importance particulière dans le contexte de la réglementation municipale sur le zonage. En particulier, je vais soutenir qu'une certaine conception civique républicaine de l'action légitime de l'état offre la meilleure justification de la réglementation municipale et le meilleur fondement normatif pour les développements des processus de consultation municipaux. Dans la partie II, je vais soutenir que les processus de consultation des lois sur le zonage du Québec reflètent un engagement envers les idéaux civiques républicains mais qu'à cause de certains aspects précis de la réglementation municipale, ces idéaux ne sont pas complètement atteints. Dans la partie III, je vais soutenir qu'une institution municipale particulière – le conseil de quartier – fait que le processus de zonage se rapproche mieux des idéaux civiques républicains. Je termine l'article en soutenant que les conseils de quartier non seulement renforcent les justifications normatives de la réglementation municipale, ils contribuent à son efficacité.*

### I. INTRODUCTION

As others in this special issue have noted, scholars and practitioners of administrative law have long been concerned with how to design effective consultative rule-making

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processes. In his contribution, Professor Peter Strauss argues that advances in technology have the potential to make administrative rule-making consultations in the United States more accessible and transparent.<sup>1</sup> In a similar vein, Professor France Houle examines how Canadian civil servants have responded to the recent *Cabinet Directive on Streamlining Regulation*,<sup>2</sup> which makes stakeholder consultations a mandatory part of the Federal Government's regulation-making process.<sup>3</sup> Two general concerns motivate the scholarly focus on the design of consultative processes in the rule-making context. First, as Strauss notes, this focus reflects a general concern about the democratic legitimacy of rule-making by the executive branch.<sup>4</sup> Second, as Houle argues, governments face increasingly complex governance challenges and as a consequence, have turned to collaborating with stakeholders in order to ensure that their governance initiatives are effective. Administrative law scholars are elaborating normative theories and developing analytical tools to assess these emerging forms of collaboration.<sup>5</sup>

In this paper, I will argue that the concerns about the legitimacy and effectiveness of rule-making have special force in the municipal zoning by-law context.<sup>6</sup> In particular, I will argue that a particular, civic republican conception of legitimate state action offers the best justification for municipal regulation and provides the best normative foundation for developments in municipal consultation processes. Before I turn, in the main body of this paper, to the detailed substantive and institutional arguments, I will very briefly introduce this paper's theoretical position and I begin with the normative theory that is the counterpoint to my position.

Pluralist theories of democracy have exerted considerable influence on the theoretical writing on municipal law. These theories place a premium on government's capacity to respond to citizen preferences and they understand citizen autonomy to be defined primarily in terms of the pursuit of private preferences.<sup>7</sup>

<sup>1</sup> Peter Strauss, "Implications of the Internet for Quasi-Legislative Instruments of Regulation" (2010) 28:2 Windsor YB Access Just.

<sup>2</sup> Treasury Board of Canada Secretariat, *Cabinet Directive on Streamlining Regulation*, Section 2.0, online: TBS <<http://www.tbs-sct.gc.ca/riqr/directive/directive01-eng.asp>>.

<sup>3</sup> France Houle, "Consultation During Rule-Making: A Case Study Of The *Immigration And Refugee Protection Regulation*" (2010) 28:2 Windsor YB Access Just.

<sup>4</sup> He writes: "The legitimacy of permitting unelected officials to create binding legal texts is an enduring problem for any democracy." *Supra* note 1

<sup>5</sup> Professor Houle cites Lester Salamon's New Governance Approach as a particularly influential account of these developments. *Supra* Note 3. In his presentation at the conference, Professor Denis Lemieux applied the New Governance Approach to environmental regulation. See Dennis Lemieux, "Economic Instruments and Environmental Regulation" (Paper Delivered At the Sixth Administrative Law Discussion Forum, Québec City, 25 May 2010), [Unpublished].

<sup>6</sup> Some authors classify Canadian municipalities as administrative bodies, albeit with political functions. See e.g. René Dussault & Louis Borgeat, *Administrative Law: A Treatise*, vol. 1 (Toronto: Carswell, 1985) at 188-89 and Pierre Issalys & Denis Lemieux, *L'Action gouvernementale: précis de droit des institutions administratives*, 3rd ed (Cowansville: Yvon Blais, 2009) § 5.5.

<sup>7</sup> The literature on such theories is voluminous. For the contrast drawn in the main text, see Frank Michelman, "Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy" (1977-78) 53 Ind LJ 145 at 148. For prominent contemporary articulations of the pluralist position, see William A. Fischel, "Public Goods and Property Rights: Of Coase, Tiebout and Just Compensation" (August 7, 2000), online: Dartmouth College <<http://www.dartmouth.edu/~wfischel/Papers/00-19.pdf>>. See also William A. Fischel, *The Homevoter Hypothesis* (Cambridge: Harvard University Press, 2001) [Fischel, *Homevoter*]; Edward

Perhaps the most prominent exponent of this theory, Professor William Fischel, argues that American homeowners are passionately engaged in local government because they seek through zoning regulations “insurance” for their homes. According to Fischel, home values are dependent on their surroundings, and it is difficult, if not impossible to purchase private insurance to protect against neighborhood change. As a consequence, he claims, local government becomes the vehicle through which homeowners control their surroundings to protect home value. For Fischel, local government is where homeowner’s private preferences are cashed out.<sup>8</sup>

In this paper, I will offer a contrasting, civic republican theory of municipal institutions, which rests on a different conception of the relationship between the state and citizens, of citizen autonomy and of policy making. Rather than primarily consisting of freedom to pursue preferences, autonomy in this view is conceived of as freedom from domination. In civic republican theory, it is unjustifiable for the state merely to give effect to the private preferences of citizens. To be justified, state action must rest on publicly defensible reasons, reasons, that is, which appeal to some understanding of the public good.<sup>9</sup> To permit otherwise would allow the state to affect some citizens’ choices in ways that are not defensible to them. Such an outcome would subject citizens to state action that is merely an expression of will, not a manifestation of public reasons, and domination is the fact of being vulnerable to this kind of state action.<sup>10</sup> Although authors have drawn a distinction between pluralism and civic republicanism in the local government context,<sup>11</sup> none has worked out a civic republican approach to local government law with the degree of detail and attention to the Canadian, and in particular, the Quebec context that I attempt in this paper.

In Part II, I will argue that the consultative processes in Quebec’s zoning laws reflect a commitment to civic republican ideals, but that because of specific features of municipal regulation, these ideals are incompletely realized. In Part III, I will argue

Zelinsky, “Metropolitanism, Progressivism and Race” (1998) 98 Colum L Rev 665. For a particularly influential development of the initial Tiebout insight, see Vincent Ostrom *et al.*, “The Organization of Government in Metropolitan Regions: A Theoretical Inquiry” (1961) 55 American Political Science Review 416. For a critical survey of writing on the model, see Wallace E. Oates, “The Many Faces of the Tiebout Model” in William A. Fischel, ed, *The Tiebout Model at Fifty* (Cambridge, Mass.: Lincoln Institute of Land Policy, 2006) 21. For Canadian contributions to the literature, see Andrew Sancton, *Merger Mania: The Assault on Local Government* (Kingston: McGill-Queen’s University Press, 2000) at 74-75, 91-92, 167; Robert L. Bish, “Local Government Amalgamations: Discredited Nineteenth-Century Ideals Alive in the Twenty-First” (March 2001) C.D. Howe Institute Commentary 150, online: C.D. Howe Institute <<http://www.cdhowe.org/pdf/bish.pdf>>.

<sup>8</sup> Fischel, *Homevoter*, *ibid.*

<sup>9</sup> For an articulation of this requirement of reasoning in terms of the public good, see T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) at 287: “No one should be criticized for confronting his fellow citizens with arguments that he thinks pertinent to any moral or political issue, however difficult or divisive, provided only that he claims no special knowledge or authority that precludes rational inspection and challenge.” For a general defense of civic republican legal theory, see Samantha Besson & José Luis Martí, “Law and Republicanism: Mapping the Issues” in Samantha Besson & José Luis Martí, eds, *Legal Republicanism: National and International Perspectives* (Oxford: Oxford University Press, 2009) 3.

<sup>10</sup> On this conception of autonomy, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997) c. 1.

<sup>11</sup> See the overview of the literature in Robert C. Ellickson & Vicki Been, *Land Use Controls: Cases and Materials* (New York: Aspen Publishers, 2005) at 47-50.

that a particular municipal institution – the ward council – enables the zoning process to better approximate civic republican ideals. I conclude this paper by arguing that ward councils not only strengthen the normative justifications for municipal regulation, they contribute to its effectiveness. I begin by working out in more detail the civic republican position that I advance and by considering the deliberation-enhancing features of the law of zoning in Quebec.

## II. CIVIC REPUBLICANISM AND THE DELIBERATIVE FAILURES OF MUNICIPAL LAW

Quebec zoning laws' consultative processes facilitate public deliberation. By affording citizens the opportunity to shape the norms that govern them, these processes aim to place municipal officials in a position to consider the interests of those affected by the regulation. By so limiting the likelihood that the state will act in ways that are not justifiable to those subject to regulation and by providing opportunities to contest proposed state action, these processes serve civic republican ends. They prevent non-domination (and not mere non-interference), because they provide opportunities for the state to justify its actions (or non-actions) to citizens and they enable citizens to engage actively in self-rule.<sup>12</sup> Civic republican theorists have disagreed about the capacity of deliberative processes such as these to yield civic republican ends and before I turn to consider the details of Quebec's zoning regime, I will briefly engage this debate.

### A. Civic Republicanism and Deliberative Democratic Institutions

Professor Richard Bellamy has argued that pervasive and persistent disagreement about the substance of political, moral and legal decisions is an inescapable feature of political life,<sup>13</sup> and that the civic republican injunction against domination requires an institutional response to this state of affairs that extends to citizens "equal concern and respect as autonomous reasoners."<sup>14</sup> Bellamy argues that democracies with thriving political party systems provide just such institutions. It is in these systems, Bellamy argues, that citizens can participate on equal political terms with one another. He writes:

So long as a system of equal votes, majority rule and party competition – however interpreted – offers a plausible system for giving citizens an equal say in the ways collective arrangements are organized – including those of the democratic process – then a

<sup>12</sup> Bellamy argues that it is this focus on self-rule that distinguishes civic republicanism from liberal theories which are concerned primarily with limits on the power of government. Richard Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (Cambridge, U.K.: Cambridge University Press, 2007) at 156: "Seeing freedom as liberty from mastery rather than freedom from interference brings out this common rationale (that relating to individuals as autonomous agents who should be allowed to choose and think for themselves, even when that involves making mistakes), while revealing why we should see limited government in terms of popular controls rather than *a priori* restrictions on certain kinds of governmental intervention".

<sup>13</sup> For this point, he draws on Professor Jeremy Waldron's work. See e.g. Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346.

<sup>14</sup> Bellamy, *supra* note 12 at 191.

self-constituting democratic constitution that avoids dominating through arbitrary rule will have been secured.<sup>15</sup>

Modern political parties have particular significance for Bellamy because, he argues, they track broad ideological differences that cut across a whole range of issues in society.<sup>16</sup> According to him, political parties offer citizens bundles of policy proposals that reflect the policy compromises and inputs of interest group coalitions that operate within a broadly shared ideological framework. Political parties, Bellamy argues, enable citizens to engage in public reasoning by voting on these policy bundles.

Moreover, Bellamy identifies seven features of public reasoning which, taken together, exemplify the civic republican virtue of non-domination. They are: 1) a commitment to openness and transparency; 2) an ethos of public-spiritedness, which guides political proceedings; 3) the presence of publically available rules, reasons and conventions; 4) a focus on the public good rather than private interests; 5) the use of reasons that are accessible to all members of the public; 6) the fact that reasoning is undertaken by the public; 7) the production of decisions that will be found acceptable by all members of the public.<sup>17</sup> Bellamy argues that political parties, of the kind for which he advocates, facilitate political discourse which evidences all these features of public reasoning.<sup>18</sup>

Although Bellamy's main theoretical opponents are "legal constitutionalists" who advocate for constitutionally entrenched rights, the substantive content of which is determined by the judiciary, he also directs criticisms towards deliberative democrats who advocate for deliberative institutions, such as citizens' juries, which are designed to minimize the likelihood participants will appeal to "prejudiced, uninformed or unreasoned arguments."<sup>19</sup> Bellamy notes that experts typically constitute such bodies and their agendas, and that because there are no guarantees that these constituting acts track the interests of the citizens rather than the paternalistic views of experts, these institutions create a risk that experts will dominate citizens. Bellamy further argues that proponents of deliberative democracy assume that the outcome of a properly structured deliberation will be a principled consensus, which yields a right answer to contentious public disagreements.<sup>20</sup> But, according to Bellamy, this focus on substantive outcomes is misguided, given the fact of pervasive and persistent political disagreement. Under these conditions, he argues, right answers are unattainable,<sup>21</sup> and the appropriate focus of civic republican analytical attention should instead be on deliberative procedures and institutions that evince the seven features of public reasoning identified above. Such procedures and institutions, he argues,

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<sup>15</sup> *Ibid* at 220-21.

<sup>16</sup> Bellamy identifies two broad sets of such cleavages — the centre-periphery and the right-left. *Ibid* at 233-39.

<sup>17</sup> *Ibid* at 179.

<sup>18</sup> *Ibid* at 221-39.

<sup>19</sup> *Ibid* at 190.

<sup>20</sup> *Ibid* at 188. Bellamy argues further that the deliberative democratic institutions can sometimes exacerbate domination. *Ibid* at 189. I address that critique in my discussion of the institutional design features of ward councils. See below.

<sup>21</sup> See Waldron, *supra* note 13.

provide effective safeguards against domination, in particular, because they increase the likelihood that political activity will yield mutually acceptable compromises. According to Bellamy, compromises of this sort evidence a due regard for citizens' substantive views of policy.<sup>22</sup>

Bellamy's argument is primarily concerned with debates about the role and appropriateness of judicial review, in the context of constitutional rights. Whatever the merits of the argument in that context, they do not apply in the rule-making context and, what is of particular relevance to this paper, his arguments against deliberative democracy do not apply in the context of the creation of zoning by-laws. Let us begin by taking off the table Bellamy's claim that deliberative democrats are committed to right answers to policy disagreements. A commitment to deliberative democracy does not necessarily entail a commitment to right answers. One might argue instead that the value of deliberative democratic procedures lies in the fact that they provide citizens with opportunities to participate directly in the state's decision-making. As we shall see below, if designed appropriately, these procedures provide occasions for officials to engage in public reason-giving and for citizens to engage in self-rule.<sup>23</sup> These features of appropriately designed deliberative procedures provide civic republican safeguards against domination by the state and a civic republican can advocate for these procedural safeguards without reference to arguments about the correctness or even the wisdom of the substantive outcomes that result from these procedures.

Now that we have considered and rejected Bellamy's arguments linking theories of deliberative democracy to claims about right answers to political disputes, we can turn to address his claim that because experts control the agendas of deliberative democratic institutions such as citizen's juries, and there are no guarantees that these experts, when deciding upon the content of these agendas, are responsive to the interests of citizens. This concern about expertise is reflected in Bellamy's general argument about the role of expertise in political decision-making. He writes:

It might be argued that some political decisions are purely technical, regarding the choice of the most appropriate means to agreed ends. However, putting to one side the fact that experts frequently disagree even in quite technical areas, such as nuclear power, most policy assessments tend to involve politically contentious moral and ideological judgments at some level or another.<sup>24</sup>

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<sup>22</sup> Bellamy defends the value of such compromises when he writes: "compromise often goes deeper than ... attempts to 'split the difference'. Instead, there is a genuine effort to integrate the different concerns and the various weightings they have for those involved. ... For a genuine process of 'hearing the other side' produces compromises that are not only strategic alternations of the means to better pursue self-interested ends but also promote changes to these ends. In this way, the various sides are shown not only a formal respect as rights-bearers but also equal concern with regard to their substantive views of what their rights are and the ways they wish to exercise them." Bellamy, *supra* note 12 at 193-94.

<sup>23</sup> See below, Part III.

<sup>24</sup> Bellamy, *supra* note 12 at 169.

There are two related arguments here: the first targets the specific role of experts in creating deliberative democratic institutions and the second addresses the general role of expertise in political decisions. The first argument about the role of experts can be answered by noting that some deliberative democratic institutions are constituted by actors with democratic pedigree, and not by experts. A number of such institutions, including the ward councils, are created at the initiative of ordinary citizens and under the authority of legislation.<sup>25</sup> Moreover, as we shall see, ward council members are democratically elected and their agendas are set by elected officials.<sup>26</sup> The composition and agendas of these institutions are established through democratic means, not by experts and as a result, Bellamy's first argument against deliberative democratic institutions simply does not apply to a significant set of these institutions.

Bellamy's second, more general argument about the role of expertise in political decision-making leads him to the conclusion that "the only peers entitled to choose between alternative collective moral and political choices are not the community of experts in these (specialized regulatory) fields but the community of all moral and political reasoners."<sup>27</sup> This argument specifically targets the claim that judges are worthy of deference on constitutional matters because they possess relevant expertise. One may accept Bellamy's claim in the context of judicial review, yet argue that the claim requires more nuance in the context of the administrative state. One of the central rationales for administrative agencies is that they have specialized expertise that legislatures do not<sup>28</sup> and one of the key reasons for regulations is that legislatures lack the expert knowledge and time necessary to generate legislation that tracks the on-the-ground developments in specific regulatory domains.<sup>29</sup> In the context of the administrative state, it may be true that "the community of all moral and political reasoners" indirectly creates, through legislation, the framework within which administrative agencies work, but legislation also delegates to the administrative agencies the authority to make specific regulatory choices that have "collective moral and political" dimensions.

<sup>25</sup> See below. For a description of deliberative institutions that are not constituted by experts, see Gessica Gropp *et al* "La Participation citoyenne et le développement des communautés: fiches descriptive de 10 expériences de participation citoyenne", Doc. 2, online: Institut national de santé publique <[http://www.i-n-s-p-q.qc.ca/Developpement-Social/docs/participation\\_citoyenne\\_10\\_experiences.pdf](http://www.i-n-s-p-q.qc.ca/Developpement-Social/docs/participation_citoyenne_10_experiences.pdf)>.

<sup>26</sup> See below, Part II.

<sup>27</sup> Bellamy, *supra* note 12 at 169.

<sup>28</sup> John Willis, "Canadian Administrative Law in Retrospect" (1974) 24 UTLJ 225 and John Willis, "Lawyers' Values and Civil Servants' Values" (1968) 18 UTLJ 351. For the rise of expertise in municipal governance during the New Deal era, see C. Richard Tindal & Susan Nobes Tindal, *Local Government in Canada* (Toronto: Nelson Education, 2004) c. 2. For an examination of how the idea of planning as a science emerged in this era, see Robert H. Nelson, "Zoning Myth and Practice: From Euclid Into the Future" in Charles M. Haar & Jerold S. Kayden, eds, *Zoning and the American Dream: Promises Still to Keep* (Chicago: Planners Press, 1989). For an examination of this movement, stressing its anti-corruption motivations, see Gerald Frug, *City Making: Building Communities Without Building Walls* (Princeton: Princeton University Press, 1999) at 51-52. In the American administrative law context, see Richard Stewart, "The Reformation of American Administrative Law" (1974-1975) 88 Harv L Rev 1667 at 1678 and Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens, Georgia: University of Georgia Press, 1988) at 36-38 and Cass R. Sunstein, *After the Rights Revolution* (Cambridge, Mass.: Harvard University Press, 1990) c. 1.

<sup>29</sup> See generally Harry Arthurs, "Regulation-Making: The Creative Opportunities of the Inevitable" (1970) 8 Alta L Rev 315.

Of course there is much debate about how and whether these choices and delegations are subject to democratic controls.<sup>30</sup> Nonetheless, the very fact of this delegated authority suggests that the binary choice offered by Bellamy – the community of experts *or* the community of all moral and political reasoners – is, in the context of the administrative state, not clear-cut.<sup>31</sup> In addition, this binary opposition misses the complex interplay between expert and citizen opinion in the administrative state. There may be some circumstances in which experts provide necessary guidance to ordinary citizens and enable the latter to make informed judgments about public policy issues.<sup>32</sup> For instance, ombudsman offices, through their investigative and reporting functions assist citizens in monitoring government action;<sup>33</sup> human rights commissions often have similar educational roles,<sup>34</sup> as do entities charged with managing and overseeing victims of crime compensation funds.<sup>35</sup> In addition, there may be conditions under which it is only with the input of those affected by regulation that policy makers, including experts, can create effective regulation.<sup>36</sup> This is particularly the case where private commercial actors<sup>37</sup> or

<sup>30</sup> For an overview of this debate in the American context, see Steven P. Croley, “Theories of Regulation: Incorporating the Administrative Process” (1998) 98 Colum L Rev 1 and in the Canadian context, see Genevieve Cartier, “Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?” (2003) 53 UTLJ 217 at 218. For a civic republican defense of the administrative state, which argues that administrative agencies, because of their expertise and delegated authority, are better positioned to engage in public reasoning than legislatures or courts, see Mark Seidenfeld, “A Civic Republican Justification for the Bureaucratic State” (1991-1992) 105 Harv L Rev 1515 at 1542. He writes: “Administrative agencies, however, fall between the extremes of the politically over-responsive Congress and the over-insulated courts. Agencies are therefore prime candidates to institute a civic republican model of policymaking.”

<sup>31</sup> For a detailed civic republican analysis of the administrative state, which acknowledges the complex interplay between legislatures and administrative agencies to whom legislatures delegate authority to agencies precisely because these agencies are better positioned than the electorate at large or its elected representatives to engage in detailed policy-making, see Henry S. Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Public Policy* (Oxford: Oxford University Press, 2002) at 224. He writes: “there are good reasons for us to hope that agencies develop substantive expertise in the course of pursuing projects that we, through our legislature, have decided that they ought to pursue.”

<sup>32</sup> On the capacity of regulation to perform this function, generally, see Cass R. Sunstein, “Interest Groups in American Public Law” (1985-86) 38 Stan L Rev 29; see also Glen Staszewski, “Reason-giving and Accountability” (2009) 93 Minn L Rev 1253.

<sup>33</sup> See e.g. the reporting functions set out in the *Public Protector Act*, R.S.Q. c. P-32, s. 27.

<sup>34</sup> See e.g. the discussion of the educational mandate of the Ontario Human Rights Commission in Mary Cornish *et al*, *Enforcing Human Rights in Ontario* (Aurora, Ont.: Canadian Law Book, 2009) at 70-82.

<sup>35</sup> For an overview of services provided by Victims’ Services in Saskatchewan, see Victims Services Branch, online: Government of Saskatchewan <<http://www.justice.gov.sk.ca/victimsservices>>.

<sup>36</sup> See Jason Corburn, “Bringing Local Knowledge into Environmental Decision Making” (2003) 22 Journal of Planning Education and Research 420.

<sup>37</sup> This is one of the standard arguments for recourse to government by contract, and in particular, by public-private partnerships. For an historical overview of these debates, see William J. Novak, “Public-Private Governance: A Historical Introduction” in Jody Freeman and Martha Minow, eds, *Government By Contract* (Cambridge, Mass.: Harvard University Press, 2009) 23. For the specific advantages of public-private partnerships, see E.S. Savas, *Privatization and Public-Private Partnerships* (New York: Seven Bridges Press, 2000) at 238-41. For an overview of the uses of these partnerships in Canada, see Conference Board of Canada, *Steering A Tricky Course: Effective Public-Private Partnerships for the Provision of Transportation Infrastructure and Services*, online: Conference Board of Canada <<http://www.conferenceboard.ca/documents.aspx?did=2751>>. For a general assessment of private-

citizens,<sup>38</sup> and not officials, have the requisite level of on-the-ground knowledge for regulation to be effective. In this paper, we shall see that municipal processes incorporate both kinds of expert-citizen interplay.

In this section, I have staked out specific theoretical ground in contemporary civic republican debates. In particular, I have argued that, *contra* Bellamy, deliberative democratic institutions are not ruled out by civic republican theory and in particular, by civic republican accounts of the administrative state. With the theoretical space thus narrowed, I turn now to consider some of the consultative processes of Quebec municipal law and to examine how they manifest a commitment to civic republicanism.

## B. Consultation Requirements

Municipal law statutes in Canada and Quebec impose notice, publicity and consultation requirements on municipal councils when they pass zoning by-laws.<sup>39</sup> In Quebec, after a municipal council has adopted a draft by-law, the clerk or secretary treasurer of the municipality must submit a certified copy to the relevant regional authority.<sup>40</sup> He or she must post in the office of the municipality notice of a public meeting to discuss the proposed by-law and must publish the notice in a newspaper.<sup>41</sup> In addition, legislation prescribes that the municipality shall hold a public hearing on a draft by-law, at a date, time, and place of the council's choosing.<sup>42</sup> At that meeting the mayor or the mayor's designate presides, and according to the legislation, shall explain the draft by-law and hear anyone who wants to express an opinion about the draft.<sup>43</sup> Some jurisdictions require additional consultations at the sub-municipal (borough or ward) level<sup>44</sup> and some consultations are conducted by a specialized office of a municipality, either at the request of the municipal council, or pursuant to applicable legislation.<sup>45</sup> If the by-law does not contain provisions that are potentially subject to referendum, the draft by-law is adopted after the public meeting, with or without changes.<sup>46</sup>

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public partnerships, including their democratic and efficiency dimensions, see Pauline Vaillancourt Rosenau, "The Strengths and Weaknesses of Public-Private Policy Partnerships" in Pauline Vaillancourt Rosenau, ed, *Public-Private Policy Partnerships* (Cambridge, Mass.: MIT Press, 2000) 217.

<sup>38</sup> See e.g. the initiatives described in Archon Fung, "Deliberative Democracy, Chicago-Style: Grass-roots Governance in Policing and Public Education" in Archon Fung & Erik Olin Wright, eds, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (New York: Verso, 2003) 111.

<sup>39</sup> These requirements are subject to judicial oversight. See *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512 and Marc-André LeChasseur, *Zonage et urbanisme en droit municipal québécois* (Montreal: Wilson & LaFleur, 2009) at 70.

<sup>40</sup> *An Act Respecting Land Use Planning and Development*, R.S.Q. c. A-19.1, s. 124 [L.A.U.].

<sup>41</sup> *Ibid.* at s.126. Failure to provide notice in the manner prescribed may result in the by-law's being quashed. See William Buholzer, *Halsbury's Laws of Canada-Planning and Zoning* (Markham, Ont.: LexisNexis, 2008) at 386.

<sup>42</sup> L.A.U., *supra* note 40 at s.125.

<sup>43</sup> *Ibid.* at s. 127.

<sup>44</sup> See *Charter of ville de Lévis*, R.S.Q. c. C-11.2, s. 86(1); *Charter of ville de Québec*, R.S.Q. c. C-11.5, s. 74.1.

<sup>45</sup> See *Charter of the ville de Montréal*, R.S.Q. c. C-11.4, s. 83.

<sup>46</sup> L.A.U., *supra* note 40 at s. 134. Buholzer notes that unlike other provincial legislation, Quebec law does not require an additional public hearing if council alters a draft by-law after the public hearing. Buholzer, *supra* note 41 at 395.

For those provisions of draft zoning by-laws which are subject to referendum requirements,<sup>47</sup> the degree of citizen scrutiny is even greater. If a draft zoning by-law contains a provision that is subject to a referendum, the person responsible for explaining the by-law in the public meeting must identify the provision and explain the right that certain persons have to make an application to submit the provision to approval to qualified voters for approval.<sup>48</sup> After this meeting, the council must adopt a second draft by-law, and no provision in this second draft by-law can be included that does not relate to a matter included in the first draft by-law.<sup>49</sup> A summary of this draft by-law may be produced by the municipality and may be made available free of charge to anyone who requests it.<sup>50</sup> The legislation then sets out the conditions under which an application for a referendum concerning such a draft by-law may be made<sup>51</sup> and requires that the municipal clerk or secretary treasurer issue a public notice of the second draft by-law that includes information about who may sign onto an application with respect to which provisions, as well as the requirements for a valid application.<sup>52</sup> If no valid applications are made, council must adopt the draft by-law without change.<sup>53</sup> If a valid application has been received, the by-law must be approved by qualified voters, in accordance with the relevant legislation.<sup>54</sup> If a provision receives a majority of affirmative votes (or the amount specified in the provisions governing the referendum), the by-law is deemed to be approved by the qualified voters<sup>55</sup> and comes into force, subject to subsequent approval processes to ensure conformity with the objectives of the relevant land use planning and development plan.<sup>56</sup>

These process requirements impose on state officials a requirement to make public their decisions, to open them to direct citizen scrutiny and to justify them directly to citizens. They therefore appear to satisfy the civic republican criteria for non-domination that we considered above. Yet several well-established criticisms of municipal governments suggest that such processes fail to function effectively, in part because municipal governments themselves are imperfect forums of deliberation. I turn now to raise these criticisms, before introducing institutions that can answer them. We will see that in addition to providing a justificatory account of municipal law, civic republicanism can generate institutional design proposals.

### C. The Deliberative Failures of Municipal Councils

Consider first a criticism of the representativeness of municipal institutions. Municipal governments are susceptible to being dominated by local majorities who are indifferent or hostile to minority interests, and therefore they can systematically

<sup>47</sup> For the comprehensive list, see *L.A.U.*, *supra* note 40 at s. 123.

<sup>48</sup> *Ibid.* at s. 127.

<sup>49</sup> *Ibid.* at s. 128.

<sup>50</sup> *Ibid.* at s. 129.

<sup>51</sup> *Ibid.* at s. 130.

<sup>52</sup> *Ibid.* at s. 132.

<sup>53</sup> *Ibid.* at s. 135.

<sup>54</sup> *Ibid.* at s. 136.1. The relevant legislation is *An Act Respecting Elections and Referendums in Municipalities*, R.S.Q. c. E-2.2 [E.R.M.].

<sup>55</sup> *Ibid.* at s. 576.

<sup>56</sup> See *L.A.U.*, *supra* note 40 at ss. 137.15, 137.16.

fail to represent those interests. An extensive literature suggests that standard public law problems of majoritarianism are intensified when political jurisdictions are small.<sup>57</sup> In small jurisdictions there is a high risk of homogeneity and, as a consequence, of persistent majority control of political institutions. This theoretical insight has been borne out by experience.<sup>58</sup> In its most intense form, this majority control can result in the physical exclusion of minorities from municipalities. Because municipalities have extensive control over land use regulations within their jurisdictions, majorities within already homogeneous municipalities can reinforce that homogeneity by enacting exclusionary measures. “Exclusionary zoning” occurs in wealthier municipalities, where residents seek to protect property values and limit demand and expenditure on social services by preventing lower-income residents from residing within their borders. A standard mechanism of exclusionary zoning is a by-law that limits residential housing to single-family units on large lots. Because only higher income households can afford this kind of housing, such by-laws exclude lower income households.<sup>59</sup>

In addition to this problem of majoritarian dominance, there is a second way in which municipal institutions can fail to represent significant democratic interests. Municipal governments are susceptible to being dominated by intensely motivated and well-resourced minorities, and therefore may act in ways that are contrary to the preferences of the majority.<sup>60</sup> The general situation of small group dominance has been addressed extensively within public choice literature and in broad outlines, it is as follows. The individual preferences of members of a group which represents the majority of the population on a given issue can be of relatively low intensity. These individuals will not be sufficiently motivated to publicly influence government policy and thereby give effect to their preferences. Nonetheless, when aggregated, their preferences can outweigh those of any other group. By contrast, individuals in a second group may each have intense preferences with respect to an issue. This group may numerically constitute a minority within the jurisdiction and, when aggregated, the weight of their preferences may be lower than the aggregated preferences of the majority. Yet the individuals in this minority can be highly motivated to shape government policy, and when those who share such preferences are well-resourced, they can influence government to give effect to their preferences.<sup>61</sup>

This scenario describes land developers’ influence within municipalities. Developers are well-resourced and highly motivated to influence municipal land use

<sup>57</sup> See e.g. Carol M. Rose, “New Models for Local Land Use Decisions” (1984-85) 79 Nw UL Rev 1155 at 1159-60; Christopher Serkin, “Big Differences for Small Governments: Local Governments and the Takings Clause” (2006) 81 NYUL Rev 1624.

<sup>58</sup> See e.g. Richard C. Schragger, “Consuming Government” (2003) 101 Mich L Rev 1824 at 1834, Sheryl D. Cashin, “Localism, Self-Interest and the Tyranny of the Favored Quarter: Addressing Barriers to the New Regionalism” (2000) 88 Geo LJ 1985 at 1991-2015, Richard Briffault, “Our Localism, Part II: Localism and Legal Theory” (1990) 90 Colum L Rev 346 at 393.

<sup>59</sup> On exclusionary zoning and its effects generally, see Richard Briffault, “Localism and Regionalism” (2000) 48 Buff L Rev 1 at 25-26 and Myron Orfield, *Metropolitics* (Washington, D.C.: Brookings Institution, 1997) at 5-6.

<sup>60</sup> Neil K. Komesar, *Law’s Limits: The Rule of Law and the Supply and Demand of Rights* (Cambridge, U.K.: Cambridge University Press, 2001) c. 4.

<sup>61</sup> On this point about the relative advantages of small and large groups, see Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Mass.: Harvard University Press, 1971) at 58-59.

regulation. Residents who constitute the majority within a municipality may prefer land use regulations that are at odds with those sought by developers, but because each of these residents is significantly less motivated than developers to participate in planning processes, they will not participate or will not participate as intensely, and their preferences will go unsatisfied.<sup>62</sup> In addition, participation in land use processes may represent a cost to residents that they cannot afford, either because they cannot afford to spend to participate (i.e., by paying for child-care or transportation costs) or because work obligations prevent them from participating.<sup>63</sup> As a result, the minority preferences dominate over those of the majority and municipal institutions fail to represent a democratically significant set of interests.

Consider next a more direct criticism of participatory processes in municipalities. Citizen involvement in these processes is voluntary and the empirical literature strongly suggests that when participatory processes are of this nature, some groups are significantly over-represented. Those individuals who have significant time and intellectual and monetary resources tend to participate most effectively in voluntary processes.<sup>64</sup> By contrast—as we have just seen—individuals whose work or family circumstances make it burdensome to participate in voluntary institutions typically under-engage. Moreover, among those who do participate in voluntary participatory settings, there are individuals who are unable to express themselves in the vernacular of the educated professional classes. The empirical literature suggests that such individuals tend to defer to those more comfortable in that vernacular.<sup>65</sup> At the municipal level of governance, this problem is compounded by the structure of meetings that are open to the public. In general, citizens have very limited time to speak and as a result, often do little more than air grievances that do not occasion reasoned engagement.<sup>66</sup>

<sup>62</sup> Komesar, *supra* note 60. For an argument that site-specific land-use decisions are highly likely to evidence capture, precisely because there is insufficient legislative log-rolling and deliberation, see Rose, *supra* note 57 at 1159-60.

<sup>63</sup> Organizations that support deliberative processes sometimes attempt to overcome these limitations by covering transportation costs, providing child-care services or offering modest stipends. See e.g. Josh Lerner, “Participatory Budgeting in Canada” in Daniel Chavez & Einar Braathen, eds, *Progressive Cities* (Oslo: Norwegian Institute for Urban and Regional Research, forthcoming), online: Transnational Institute <[http://www.tni.org/archives/newpol-docs\\_pbcanada](http://www.tni.org/archives/newpol-docs_pbcanada)> and Daniel Schugurensky, “The Tango of Citizenship Learning and Participatory Democracy” in Karsten Mundel & Daniel Schugurensky, eds, *Lifelong Citizenship Learning, Participatory Democracy and Social Change* (Toronto: Transformative Learning Centre, 2004) 607.

<sup>64</sup> Elena Fagotto & Archon Fung, “Empowered Participation in Urban Governance: The Minneapolis Neighborhood Revitalization Program” (2006) 30 *Journal of Urban and Regional Research* 638 at 643.

<sup>65</sup> Lynn Sanders, “Against Deliberation” (1997) 25 *Political Theory* 347.

<sup>66</sup> See e.g. Heather Campbell & Robert Marshall, “Public Involvement and Planning: Looking Beyond the One to the Many” (2000) 5 *International Planning Studies* 321 at 331. In the Canadian context, see Mariana Valverde & Ron Levi, “Freedom of the City: Canadian Cities and the Quest for Governmental Status” (2006) 44 *Osgoode Hall LJ* 409 at 441 for a description of such unreflective discourse.

provincial law requires cities contemplating zoning changes to hold public meetings and consultations in often complicated and expensive ways. This obligation gives a platform to those who oppose inclusionary measures; they are generally more educated and better equipped to participate in meetings, petitions and phone calls to councilors than those who are the potential beneficiaries of inclusionary zoning measures. In Toronto, predictably, most of the “untold number of community

The literature suggests, then, that municipal governments are susceptible to a variety of conditions that lead to deliberative failures. Municipal councils can be dominated by majority or minority interests that are unresponsive to segments of the electorate, and municipal processes can be overly solicitous of certain privileged voices. The challenge for the remainder of this paper lies in considering one kind of institution, the ward council, which is capable of overcoming these conditions. I begin by setting out the structure of the ward councils before turning to argue that they respond to the deliberative failures of municipal governments.

### III. WARD COUNCILS AS DELIBERATIVE INSTITUTIONS

#### A. The Structure of Ward Councils

The structure of ward councils is complex and I will begin my discussion of them by laying out that structure in some detail. Section 35 of the *Charter of Ville de Québec*<sup>67</sup> provides that “the city council shall, by by-law, divide the territory of the city into wards within which a ward council may be established.” Section 35.1 provides that on the application of 300 persons who are electors within the ward, or who represent a commercial, industrial, institution or community institution situated in the ward, the procedure to establish a ward council can begin. The procedure consists of a public meeting, in which a poll is held to decide on the establishment of the ward council.<sup>68</sup> Following a majority vote of eligible voters, the city council may decide to establish a ward council.<sup>69</sup> The city council determines, by by-law, the formalities for calling and holding ward council meetings, the responsibilities of general members and boards of directors, the term limits of the latter, as well as any other operational matters.<sup>70</sup> All persons of full age who reside in the ward and persons of full age who represent a commercial, industrial, institutional or community institution situated within the ward are general members of the council and are entitled to vote on matters that come before the council.<sup>71</sup> The legislation provides that councils are to be funded by the city, and that a ward council is under an obligation to report to the city council.<sup>72</sup> The city is under an obligation to identify a set of subject matters, and establish a public consultation process with the ward council on those matters.<sup>73</sup> In addition, the ward council may on its own initiative, give advice to the city council, the executive committee or a borough council on any matter concerning the ward.<sup>74</sup>

Each ward council is managed by a board of directors (*conseil d'administration*). The members of the board are elected every two years by ward members.<sup>75</sup> Each board of

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meetings” around the new bylaw degenerated into angry shouting matches (citations omitted).

<sup>67</sup> *Charter of ville de Québec*, *supra* note 44.

<sup>68</sup> *Ibid* at ss. 35.3-35.4.

<sup>69</sup> *Ibid* at s. 35.5.

<sup>70</sup> *Ibid* at s. 35.13.

<sup>71</sup> *Ibid* at s. 35.15.

<sup>72</sup> *Ibid* at ss. 35.16, 35.17.

<sup>73</sup> *Ibid* at s. 36.

<sup>74</sup> *Ibid* at s. 36.1.

<sup>75</sup> Québec City, Revised By-law, c. F-1, *Règlement sur le fonctionnement des conseils de quartier* (January 30, 2007), s. 47.

directors is comprised of four men and four women.<sup>76</sup> In addition to these eight members of the board there is a ninth who is a representative of a commercial, industrial or institutional establishment in the ward.<sup>77</sup> The members of the board act on a voluntary basis.<sup>78</sup> A city councilor who represents an electoral district situated in whole or in part in the ward can be a non-voting member of the board of directors.<sup>79</sup> It is also a practice for boroughs to put at the disposal of ward councils a facilitator (*agent de consultation*) who is present at all meetings of the ward councils, aids in their preparation, and ensures that the records and agendas of meetings are completed.<sup>80</sup>

In Quebec City, ward councils are mandatorily consulted on some matters. These include: the adoption or modification of an official plan for the ward council; regulations that can modify municipal services in the ward council; a development project that affects the ward; a zoning project or a major renovation of property within the ward, including a public park or recreational facilities; or a project that changes the names of streets or public places in the ward.<sup>81</sup> More generally, ward councils are consulted by the executive committee or the borough councils concerning any project that would modify a zoning regulation and that would be the object of a public hearing or consultation.<sup>82</sup> The practice of consultation seems to incorporate an even broader range of topics.<sup>83</sup> Whenever the city council or its executive committee consults a ward council, the latter must inform the borough of the consultation and the ward council must submit the result of any consultation to the requesting body, as well as to the borough, which can then make recommendations.<sup>84</sup> In addition, a ward council can initiate a consultation on any subject matter that affects the ward.<sup>85</sup> Consultations are supported by the *Service des communications et des directions d'arrondissement*, which is a department within the City of Quebec charged with putting into effect the City's public consultation policy, setting out and putting into place implementation plans for the ward councils, putting into place a training program for members of the ward council and developing effective

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<sup>76</sup> *Ibid* at s. 43.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid* at s. 86.

<sup>79</sup> *Ibid* at s. 44.

<sup>80</sup> Laurence Bherer, *Une lecture institutionnaliste du phénomène participatif* (Ph.D. Dissertation, Université de Montesquieu Bordeaux IV, 2003) at 225 [unpublished]; Laurence Bherer and Sandra Breux, *Les conseils d'arrondissement et les conseils de quartier de la Ville de Québec : similitude, opposition ou complémentarité?* (Montreal: INRS-Urbanisation, Culture et Société, 2003) at 5, online: Villes Régions Monde <[http://www.vrm.ca/travaux\\_vrm.asp?ID=320](http://www.vrm.ca/travaux_vrm.asp?ID=320)>. See also Bherer, *Une lecture institutionnaliste du phénomène participatif*, *supra* at 254-55.

<sup>81</sup> Quebec City, Revised By-law, c. P-4, *Règlement sur la politique de consultation publique* (March 19, 2007), s. 5.1.3.

<sup>82</sup> *Ibid.* The articles setting out the subject matters that require a public hearing or consultation are listed in *L.A.U.*, *supra* note 40 at ss. 125-127.

<sup>83</sup> Bherer, *Une lecture institutionnaliste du phénomène participatif*, *supra* note 80 at 225.

<sup>84</sup> *Charter of Ville de Québec*, *supra* note 44 at s. 72.1; *Règlement sur la politique de consultation publique*, *supra* note 81 at s. 5.1.3.

<sup>85</sup> *Règlement sur la politique de consultation publique*, *ibid.*

communication strategies.<sup>86</sup> Ward councils are required to report to the city and the borough council on its activities in the time and manner prescribed.<sup>87</sup>

Consultations initiated by the city or a borough can take the form of a request for an opinion or of a mandate to hold a public consultation.<sup>88</sup> Ward councils respond to requests for opinion in the course of regular meetings, which are open to the public.<sup>89</sup> By contrast, a public meeting consultation has specific publicity requirements including that the published notice provide a clear and concise statement of the project to be addressed in the consultation and of the relevant issues. A public consultation also has a specific format: the consultation begins with a statement of the issues, followed by a question period and concluding with commentary by the ward council members and an expression of their opinion of the matter.<sup>90</sup> A report resulting from the public consultation must include a summary of the public opinions expressed in the consultation, commentary by the ward council members and recommendations.<sup>91</sup> The report is sent to the body that initiated the consultation and is made available to the members of city council, the executive committee of the city and to the borough council, as well as to anyone who requests it.<sup>92</sup> There is then a public announcement of the means and results of the consultation.<sup>93</sup> Whether the ward council is consulted through the means of a request for an opinion or a public consultation, the entity that originates the consultation presents discrete options to be voted upon.<sup>94</sup> The recommendations of the ward councils are not binding, although according to the Quebec City website they are generally followed.

## B. Ward Councils as Responses to the Deliberative Failures of Municipal Institutions

Now that we have seen the structure and practice of ward councils, let us turn to consider how ward councils offer a civic republican response to the democratic deficits identified above. Consider first the problem of neglected interests. Recall that local governments are particularly susceptible to either majoritarian dominance wherein minority interests are systematically under-considered, or to special interest capture wherein the interests of the majority are disregarded. Ward councils act as a counter-weight to these tendencies by making public the views of ordinary citizens

<sup>86</sup> Quebec City, Service des communications (last visited Apr. 28, 2010), online: Ville de Québec <[http://www.ville.quebec.qc.ca/apropos/vie\\_democratique/administration/services\\_organismes\\_municipaux/dga\\_services\\_soutien/communications.aspx](http://www.ville.quebec.qc.ca/apropos/vie_democratique/administration/services_organismes_municipaux/dga_services_soutien/communications.aspx)>.

<sup>87</sup> *Charter of Ville de Québec*, *supra* note 44 at ss. 35.16-35.17.

<sup>88</sup> *Règlement sur la politique de consultation publique*, *supra* note 81 at s. 5.1.4.

<sup>89</sup> According to Professor Bherer, these requests typically involve minor matters. Bherer, *Une lecture institutionnaliste du phénomène participatif*, *supra* note 80 at 226. For an example of such a request, undertaken in the course of a regular meeting of conseils de quartier, see the minutes posted online: Ville de Québec <[http://www.ville.quebec.qc.ca/docs/pv/conseils\\_quartier/lacite/vieux-quebec/vieux-quebec-capblanc-colline-parlementaire\\_0906171900.pdf](http://www.ville.quebec.qc.ca/docs/pv/conseils_quartier/lacite/vieux-quebec/vieux-quebec-capblanc-colline-parlementaire_0906171900.pdf)>

<sup>90</sup> *Règlement sur la politique de consultation publique*, *supra* note 81 at ss. 3.3.1-3.3.4.

<sup>91</sup> *Ibid* at ss. 3.3.4-3.3.5.

<sup>92</sup> *Ibid* at s. 3.3.4.

<sup>93</sup> *Ibid* at s. 3.3.5. For an example of the format and result of a public consultation at a conseil de quartier, see the report online: Ville de Québec <[http://www.ville.quebec.qc.ca/apropos/vie\\_democratique/participation\\_citoyenne/conseils\\_quartier/vieux\\_quebec/docs/consultation\\_borne-interactive\\_recommandations\\_cq.pdf](http://www.ville.quebec.qc.ca/apropos/vie_democratique/participation_citoyenne/conseils_quartier/vieux_quebec/docs/consultation_borne-interactive_recommandations_cq.pdf)>.

<sup>94</sup> Bherer, *Une lecture institutionnaliste du phénomène participatif*, *supra* note 80 at 226.

and by putting local governments in the position of either accepting or rejecting those views. Local governments must openly consider concerns that a majority or a special interest minority might prefer to ignore. This publicity function of the ward councils is consistent with that of publicity requirements in public law that compel governments to articulate their reasons for action when there is good reason to think that they are pursuing policies that evince a disregard for significant interests.<sup>95</sup> The evidence suggests that ward councils fulfill this publicity function well: although merely advisory in nature, ward council opinions are taken seriously and they affect policy.<sup>96</sup>

There is a serious challenge to this claim about the capacity of ward councils to address representative failings: if these failings are endemic to local governments generally, why should ward councils be exempt? One response focuses on the extent to which ward councils can act as counter-weights to majoritarian dominance within local governments. Ward councils enable groups that are minorities within boroughs or the city but that are concentrated within neighborhoods to have a voice in local government.<sup>97</sup> If majorities within such neighborhoods dominate proceedings and can compel elected officials to attend to a perspective that would otherwise be neglected, they act as a counter-weight to local government majoritarianism. Ward councils provide an institutionalized role for minorities, at least where minorities are concentrated in neighborhoods.

What then of the problem of special interest group capture? At the level of the borough or the city, the checking function of the ward councils is the same as in the case of majority-dominated borough assemblies or city councils. Those assemblies and councils will have to answer to otherwise under-represented groups when such groups are concentrated in neighborhoods. Moreover, if there is a majority in a city or borough that holds a view contrary to those interests that dominate the elected bodies, it will be represented in a variety of ward councils. Because consultations are mandatory in a broad range of subject matters, even if the majority of residents in a borough or city are under-motivated to participate, their voices will be heard through their boards of directors, as we shall soon see.

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<sup>95</sup> For instance, the Minister of Justice is under an obligation to report to the House of Commons any bill or regulation which, in his or her opinion, is inconsistent with the *Canadian Charter of Rights and Freedoms*. *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4.1. Similarly, under s. 33 of the *Constitution Act, 1982* legislatures or Parliament can over-ride a judicial finding that legislation is unconstitutional, if they do so expressly and they renew the over-ride in five year intervals. *Constitution Act, 1982*, s. 33, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Since five years is the maximum term of a government, this compels any government to justify its policy choice before the electorate at least once in its term. For proposals to render section 33 more deliberation-enhancing, see Tsvi Kahana, "The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*" (2001) 44 *Canadian Public Administration* 255.

<sup>96</sup> According to the official Quebec City website (my translation): "To this point, the municipality has followed most of the recommendations of the ward councils. This attests to the importance of these institutions, which are unique to Quebec." Ville de Québec, *Conseils de quartier* (last visited Apr. 28, 2010), online: Ville de Québec <[http://www.ville.quebec.qc.ca/ap-ropos/vie\\_democratique/participation\\_citoyenne/conseils\\_quartier/index.aspx](http://www.ville.quebec.qc.ca/ap-ropos/vie_democratique/participation_citoyenne/conseils_quartier/index.aspx)>.

<sup>97</sup> For arguments in favour of local minority control of municipal institutions, see Sheryll D. Cashin, "Middle Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America" (2001) 86 *Cornell L Rev* 729. And for general arguments in favor of this kind of "inter-institutional diversity", see Heather Gerken, "Second-Order Diversity and Disaggregated Democracy" (2005) 118 *Harv L Rev* 1099.

One might accept these counter-weight functions of ward councils yet still be concerned about the possibility of special interest capture or majoritarian dominance of the ward councils themselves. A response to this concern requires a consideration of the structure of ward council deliberations. Even if special interests or majorities are motivated to dominate ward council they are checked by the deliberative structure of the proceedings. The facilitator and the elected official, as well as professional staff are present to ensure that the relevant policy issues and facts are aired. If special interests or majorities attempt to dominate ward council meetings or public consultations their voices will have to contend with all others present in an environment that facilitates reasoned deliberation.

However, as authors have noted, participation rates in ward council meetings are variable and in some ward councils the level of participation is anemic.<sup>98</sup> In such circumstances, one might worry that there are not sufficient voices to give rise to truly reasoned deliberation.<sup>99</sup> This concern can be met by considering the quorum rules and the structure of the boards of directors. There are three kinds of meetings: annual general assemblies, where the annual business of the ward council is conducted;<sup>100</sup> special assemblies that are convoked at the request of at least one hundred members;<sup>101</sup> regular meetings of the board of directors, which are open to the public and public consultations. Substantive matters are not addressed in general meetings and special assemblies have quorum requirements of 50 members. There is no concern about insufficient deliberation in the first case because no meaningful deliberation occurs and there is no concern about lack of attendance in the latter case, because the quorum requirements are set sufficiently high that they answer that concern. It is in regular meetings, in which attendance is sparse, that many substantive matters arise and that the concern about numbers has most purchase.

In these, quorum is achieved when five members of the board of directors are present. The composition of the board of directors is intended to ensure broad representation. Aside from the member representing a business or organization, each member of the board is an at-large representative and there is no attempt at sectoral representation – the only attempt at demographic representation is the gender division on the board.<sup>102</sup> The at-large nature of the representation, in combination with the deliberative procedures detailed above, aims to limit the extent to which any particular group can dominate the proceedings. The literature on group decision-making suggests that if representation and procedures are constructed in ways that counteract pressures which lead to over-valuing certain perspectives, groups can engage in careful and meaningful deliberation.<sup>103</sup> The literature suggests that even in the absence of broad representation, if the relevant information is made available to them, groups can effectively deliberate about the public good if participants are

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<sup>98</sup> Bherer, *Une lecture institutionnaliste du phénomène participatif*, *supra* note 80 at 257.

<sup>99</sup> In the administrative law literature, this criticism about representativeness has been leveled against civic republicanism. See Stephen P. Croley, “Theories of Regulation: Incorporating the Administrative Process” (1998) 98 *Colum L Rev* 1 at 81-85.

<sup>100</sup> *Règlement sur le fonctionnement des conseils de quartier*, *supra* note 75 at s. 5.

<sup>101</sup> *Ibid* at s. 2.

<sup>102</sup> Laurence Bherer, “La démocratie participative et la qualification citoyenne : À la frontière de la société civile et de l’État” (2006) 18 *Nouvelles pratiques sociales* 24 at 32.

<sup>103</sup> See e.g. Mark Seidenfeld, “Cognitive Loafing, Social Conformity and Judicial Review of Agency Rule-Making” (2001-2002) 87 *Cornell L Rev* 486 at n. 92.

willing and able to engage in such deliberation.<sup>104</sup> And if individuals act in an institutional context that facilitates public-minded reasoning, the likelihood that they will do so increases. Given the institutional parameters within which ward councils operate, the members of the board have strong incentives to consider seriously the public interest.<sup>105</sup>

In the end, even if the problems of democratic under-representation cannot be eliminated from local governments, the structure of the ward councils aims to increase the capacity of under-represented groups to have their concerns heard within the institutions of local government and to ensure that deliberative processes incorporate diverse voices. The ward councils place municipal governments under a civic republican burden of reasoned justification for their actions. It is nonetheless possible that despite the safeguards described above, individuals or groups with intense preferences may exert disproportionate influence in ward council meetings. But if their preferences prevail, I suggest it is because of the *rhetorical force* of the arguments that these individuals and groups can bring to bear on the issues. We shall see that within the forum of the ward council, deliberative procedures can level the rhetorical playing field.

### C. Ward Councils as a Civic Republican Response to Defects in Municipal Deliberation

Recall that a central problem with voluntary consultative processes is that they tend to be dominated by those who have the time to participate and who speak in the vernacular of the educated middle class and that those unable to speak in that way tend to defer to the judgments of those who can. Recall further that the consultative processes within municipalities tend to be perfunctory. The first concern about time and resources can be partially answered by noting that ward councils provide child care for those who participate in meetings and the problem of insufficient time and consideration of issues is met by the very existence of ward councils: they enable

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<sup>104</sup> Parallel institutions can cultivate and strengthen these dispositions. Edmonton provides examples of such institutions. For instance, Neighborhood Leagues are voluntary associations that support community activities and directly engage municipal governance issues. See Ron Kuban, *Edmonton's Urban Villages: The Community League Movement* (Edmonton: University of Alberta Press, 2005). Some modern civic republican writers stress that the state is not the only locus of value-formation and that intermediate organizations, such as Neighborhood Leagues, can serve this function. See Cass R. Sunstein, "Beyond the Republican Revival" (1988) 97 Yale LJ 1539 at 1573. In addition, municipalities can provide resources for citizens to inform themselves about substantive law, so that they may engage their officials effectively. For instance, the City of Edmonton, through its Planning Academy, provides affordable courses on the zoning process that are designed for the public. City of Edmonton, Planning Academy (last visited Apr. 28, 2010), online: City of Edmonton <[http://www.edmonton.ca/city\\_government/planning\\_development/planning-academy.aspx](http://www.edmonton.ca/city_government/planning_development/planning-academy.aspx)>.

<sup>105</sup> Among sources of these incentives is the scale of the wards: the issues typically at stake in ward council meetings affect ward councilors' neighbours, with whom councilors have regular, face to face interactions. On the potential for such interactions to increase decision-makers' sense of accountability, see Robert Ellickson, *Order Without Law* (Cambridge, Mass.: Harvard University Press, 1991). On the capacity of informal norms, developed in such face-to-face encounters, to generate norms that regulate their interactions, see Robert Ellickson, *The Household: Informal Order Around the Hearth* (Princeton: Princeton University Press, 2008) at 102: "Relationship-specific norms are informal expectations about how each participant *should* behave in the future. They emerge from participants' spontaneous (i.e. unnegotiated) successes in coordinating with one another." On the general function that institutional roles play in differentiating public and private motivations, see Michelman, *supra* note 7.

extended deliberation that is not possible within the standard strictures of hearing processes.<sup>106</sup> In the remainder of this section, I will address the potential for *differences in ways of speaking* to influence outcomes. The deliberative resources of ward councils, which aim to counteract this source of influence, come in multiple forms. The City trains ward councilors in how to conduct meetings and as we have seen boroughs provide ward councils with facilitators.<sup>107</sup> Moreover, professional staff and political representatives are present at meetings to provide substantive expertise. These mechanisms aim to level the discursive playing field.

Ward councils do so by setting ground-rules for discussion, structuring deliberation, training participants and distributing the relevant information to all in an accessible form. The experience of participants in similar deliberative institutions suggest that when faced with value-laden, complex and technical planning issues, ordinary citizens from diverse backgrounds can engage in informed discussions.<sup>108</sup> In ward councils in particular, the training provided by the City, the presence of facilitators, of elected officials who have no vote and are there primarily to inform and listen, and of relevant administrators and professionals, structure the deliberative processes. Moreover, the combination of formal procedures and an informal tone in discussions creates the conditions for respectful discussion among equals.<sup>109</sup> Formal procedures limit the ability of participants to dominate meetings, and the informal tone of discussion, coupled with the fact that participants are neighbors who have repeat dealings, reinforces the equality of participants.<sup>110</sup>

#### D. Objections to the Idea of Ward Councils as Forums for Civic Republican Deliberation

A critic might object that deliberative institutions at the local government level can at best approximate deliberative ideals and that approximations can, in certain circumstances, yield outcomes that are worse than institutions that do not take into account these ideals at all. Call this *the argument from second-bests*.<sup>111</sup> In some circumstances, according to this argument, divisions in a polity over issues of values are so great that processes that aim at reasoned deliberation only sharpen

<sup>106</sup> Another possibility for reducing barriers to participation is the moderated online forum. See e.g. Community Research Connections, e-Dialogues for Sustainable Development (last visited Apr. 28, 2010), online: Community Research Connections <<http://crrresearch.org/research-tools/e-dialogues/e-dialogues>>.

<sup>107</sup> *Règlement sur le fonctionnement des conseils de quartier*, *supra* note 75 at s. 46.

<sup>108</sup> Bherer, *Une lecture institutionnaliste du phénomène participatif*, *supra* note 80 at 223. For a survey of Canadian examples, see F. Leslie Seidle, "Citizens Speaking for Themselves: New Avenues for Public Involvement" in Hans J. Michelmann, Donald C. Story, & Jeffrey S. Steeves, eds, *Political Leadership and Representation in Canada: Essays in Honour of John C. Courtney* (Toronto: University of Toronto Press, 2007) 81.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.* On the capacity of informal and formal norms to mutually reinforce practices of reasoned, non-dominating deliberation, see Pettit, *supra* note 10, c. 8.

<sup>111</sup> In the legal literature, the argument from second bests in the design of institutions has been treated most extensively by Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge, Mass.: Harvard University Press, 2006). For a discussion on this point, in the context of deliberative democratic institutions, see Jon Elster, "The Market and the Forum" in James Bohman & William Rehg, eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass.: MIT Press, 1997) 3 at 18.

disagreement and highlight the impossibility of coming to reasoned resolutions. By contrast, the argument continues, with decision-making processes that do not stress deliberation, deep disagreements over values are not brought to open and public view, and there is no expectation that public decision-making involves anything more than responsiveness to private preferences.<sup>112</sup> According to this objection, in a decision-making process where majority preferences determine outcomes, for example, via a simple vote, policy outcomes are achieved without open and divisive public disagreement and the social harms that deliberative processes create are avoided.

There is a second objection that can be advanced by the argument from second bests: if participants in deliberative processes do not abide by the norms of rational deliberation, the objection states, these processes may subvert deliberative ideals more than do alternatives that completely ignore them. For instance, if participants in a deliberative process seek to dominate one another they may undermine the ideals of equal respect more than they would in a simple vote through which they pursue their narrow self-interests.<sup>113</sup> At least in the case of a vote without extensive deliberation, the argument from second bests concludes, the process itself does not subject citizens to manifest domination, although the results may.

The downside risks that the argument from second bests raises are real, but they can be mitigated by good institutional design. Consider first the problem of deep disagreements over values. One way of avoiding public and divisive expressions of differences over values is to remove issues that give rise to such divisions from the ambit of deliberative processes in public institutions. The literature on negotiated rule-making in public law suggests that issues giving rise to deeply entrenched divisions are not appropriate for resolution through negotiation, and authors therefore recommend systematically excluding such issues from negotiated-rule making processes.<sup>114</sup> Authors who have examined the operations of ward councils suggest that issues of land use regulation typically do not give rise to deep clashes of values, and so in general, the objection is inapplicable.<sup>115</sup> However, where such disagreements do arise, the ultimate decision-making authority lies with elected municipal representatives whose decisions are then subject to judicial review, and these institutions blunt the impact of deep disagreements among neighbours.

Consider next the objection pertaining to domination within deliberative proceedings. Here again, we can respond to the argument from second bests by

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<sup>112</sup> For a similar argument, made in the constitutional context, which stresses the potential for deliberative processes to create discord, see Jonathan R. Macey, "The Missing Element in the Republican Revival" (1987-1988) 97 *Yale L.J.* 1673 at 1674. See also Cass R. Sunstein, "The Law of Group Polarization" (2002) 10 *Journal of Political Philosophy* 175.

<sup>113</sup> This example of a failed deliberative process is not merely hypothetical. For an examination of such failures in the context of a specific deliberative initiative in Berkeley, California see Campbell & Marshall, *supra* note 66.

<sup>114</sup> See e.g. Lawrence Susskind & Gerard McMahon, "The Theory and Practice of Negotiated Rule-Making" (1985-86) 3 *Yale J on Reg* 133 at 138-140, 152. On negotiated rule-making more generally in public administration, see Lawrence Susskind & Lawrence Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (New York: Basic Books, 1987). Deliberative democratic theorists have attempted to identify the reasons for which issues can be excluded from discussions in the public sphere. See Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004) at 66-78.

<sup>115</sup> Bherer, *Une lecture institutionnaliste du phénomène participatif*, *supra* note 80 at 259.

incorporating into such proceedings good institutional design principles. The deliberative institutions surveyed above employ trained facilitators who ensure that participants have equal air-time; the processes reframe issues in language and terminology that is accessible to all; they generate rules that stress the values of discussion rather than debate; and they employ membership restrictions that aim to ensure some demographic mix.<sup>116</sup> These and other institutional safeguards answer the objection because they create conditions in which the risk of domination is significantly lessened. Ultimately, objections leveled by the argument from second bests are empirical in nature and require on-the-ground assessments of institutions. Where institutions fail to meet deliberative ideals, and do so in ways that are self-defeating, we should ensure that there are mechanisms that enable institutions to change and avoid these self-defeating tendencies.<sup>117</sup>

Let us consider one kind of institutional change that may respond to both objections from the argument from second bests. Instead of holding a vote to determine what the recommendation from the ward council will be on any given issue and transmitting the result to the borough or city, ward councils might only transmit an opinion to those bodies when the members of the ward council can come to a consensus. In the absence of consensus, all that would be conveyed to the borough or city would be the minutes from the ward council meeting on the relevant issue.<sup>118</sup> Such a change in process would have several advantages. First, in those situations that give rise to deep disagreements about important values, the ward council process would not create winners or losers. Instead, elected representatives who operate at one remove from the directly deliberative institution of the ward council would engage in the weighing of interests necessary to regulate in the face of such disagreement. By removing the capacity to recommend from ward councils under conditions of deep normative disagreement, the sting of having one's neighbours make a public decision against one's deeply held convictions is lessened. Second, the proposed institutional change would provide an incentive to reach consensus, and would disincentivize hold-outs.<sup>119</sup> In cases where there is no consensus, the ward council consultation would not affect the policy of the boroughs or the city, as those bodies would be in the position that they were in before the ward council deliberated. There would be no clear recommendation among the relevant options and

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<sup>116</sup> See Part III, A – C.

<sup>117</sup> On self-defeating regulation, see Cass R. Sunstein, "Paradoxes of the Regulatory State" (1990) 57 U Chicago L Rev 407.

<sup>118</sup> I thank Rod Macdonald for this example of a consensus-favoring default rule, which he observed at play in the Westmount Neighborhood Association. Consensus-favouring default rules carry risks. For instance, participants in deliberations may have a tendency to converge on a consensus because of social pressure to conform, rather than as a result of exercising their independent judgment. One way to capture the deliberative benefits of a consensus rule, while minimizing its conformity-inducing costs, is to ensure that initial heterogeneity is built into the decision-making process. If participants are initially committed to a variety of views, and the decision rule for the group stresses consensus, participants will engage in creative problem-solving activities that attempt to reconcile participants' aspirations. Steven Kelman, "Adversary and Cooperationist Institutions for Conflict Resolution in Public Policymaking" (1992) 11 Journal of Policy Analysis and Management 178 at 194-95.

<sup>119</sup> For an influential account of hold-outs in the property context, see Michael Heller, "The Tragedy of the Anticommons: Property in Transition from Marx to Markets" (1998) 111 Harv L Rev 1621 and for an institutional proposal that aims to overcome hold-out problems, see Michael Heller & Rick Hills, "Land Assembly Districts" (2008) 121 Harv L Rev 1465.

participation in the ward council would be an academic exercise. Participants become involved in ward councils because they are interested in effective action and the possibility of such an inconclusive outcome would incentivize behaviours that conduce to consensus building.

#### IV. CONCLUSION

In this essay, I have argued that municipal processes in Quebec, and in particular, the ward councils evidence features of a civic republican ideal of non-domination. In Part II, we saw that the processes of making zoning by-laws impose what appear to be exigent consultation requirements including, in certain cases, a requirement to hold a referendum. However, in that Part, we also saw that standard criticisms of municipal councils suggest that these consultative processes are insufficient to ensure the kind of deliberation envisioned by civic republican theory. In Part III, I argued that these standard criticisms can be answered by the ward councils and I defended, against a range of objections, the claim that ward councils instantiate civic republican ideals.

I close this essay by considering two more general objections to the approach taken by this paper. A first objection states that a standard conflict in municipal law is between local and regional interests,<sup>120</sup> and that the deliberative procedures I have described in this paper do nothing to address this substantive conflict. A second objection states that issues of local government regulation necessarily involve the pursuit of self interest, and that the present essay's focus on theories of deliberation and on consultative bodies, misses this point.

My response to the first objection is that institutions which require the state to justify its actions have value in themselves. I do not claim to resolve the localism/regionalism debate in this paper, but I do claim that institutional mechanisms that require municipal governments to justify their governance choices to citizens are an improvement over institutional mechanisms that do not. Deliberative institutions of the kind I have described in this paper will not necessarily generate right answers to policy conundrums (indeed, such answers may not exist), but they do facilitate public deliberation and such deliberation respects the autonomy of citizens because it ensures that the state publicly justifies its actions to those who are affected by it.

I advance descriptive and normative arguments in response to the second criticism, which states that questions of local government necessarily implicate the pursuit of self-interests. The criticism is descriptively lacking insofar as it does not account for key features of municipal law. The notice and meeting requirements of municipal law and institutions such as the ward councils suggest that municipal law is concerned with public justifications for state action.<sup>121</sup> In addition, courts impose on municipalities legislative action requirements of good faith and reasonableness, which

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<sup>120</sup> For classic treatments of the issue, in the American context, see Orfield, *supra* note 59; David Rusk, *Cities Without Suburbs* (Washington, D.C.: Woodrow Wilson Center Press, 1993); Richard Briffault, "Our Localism: Part I - The Structure of Local Government Law" (1990) 90 Colum L Rev 1; and in the Canadian context, see Marie-Claude Prémont, "La Fiscalité au Québec: de la cohabitation au refuge fiscal" (2000) 46 McGill LJ 716.

<sup>121</sup> See in particular *L.A.U.* *supra* note 40 at ss. 130-31.

constrain the admittedly broad discretion that municipalities enjoy in this area.<sup>122</sup> The ward councils are simply one more institution that gives expression to this civic republican impetus of municipal law.

The normative response to accounts of municipal regulation, in which self-interest occupies a central place, is that they misunderstand the very nature of legal regulation. Deliberative theorists have responded to the pluralist conception of the state by arguing that it is normatively indefensible.<sup>123</sup> Authors argue that any adequate account of state action requires arguments that are sensitive to the normative particularities of state action.<sup>124</sup> Professor Jon Elster has framed pluralist insensitivity to these particularities as evidencing confusion between the logic of the market and that of the public forum. In the market-place, the only question to be answered is: how are my preferences to be satisfied? But the public forum is driven by an entirely different set of questions.<sup>125</sup> In the forum, we are concerned not only with our own wants, but with how decisions affect others and with questions of justice. In the forum, it is not enough to aggregate private preferences. Rather, citizens deliberate together about what the public good is and about what it requires of the state and of citizens.<sup>126</sup> As we saw in the introduction to this paper, this normative concern animates administrative law's focus on consultation requirements in the rule-making context. This essay has argued that deliberative municipal institutions share this normative concern and I hope that the institutional design considerations and institutions that I have raised here can be transposed to other domains of the administrative state.

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<sup>122</sup> See *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304.

<sup>123</sup> For a specifically American critique along these lines, see Frank Michelman, "Law's Republic" (1988) 97 Yale LJ 1493 at 1499, 1501-03.

<sup>124</sup> Jon Elster, "The Market and the Forum" in Bohman & Rehg, *supra* note 111, 3 at 18.

<sup>125</sup> *Ibid* at 10-11.

<sup>126</sup> *Ibid* at 24-25. Moreover, contrary to some theorists of democratic deliberation, Elster argues that it is not enough to deliberate for the sake of deliberation. It is in the very nature of political action that those engaged in it seek policy outcomes and do not merely pursue the intrinsic benefits of deliberation.



## COMPARATIVE ADMINISTRATIVE LAW: OUTLINING A FIELD OF STUDY

Susan Rose-Ackerman\*  
Peter L. Lindseth\*\*

*Comparative administrative law is emerging as a distinct field of inquiry after a period of neglect. To demonstrate this claim, the authors summarize their edited volume on the topic – a collection that aims to stimulate research across legal systems and scholarly disciplines. After a set of historical reflections, the authors consider key topics at the intersection of administrative and constitutional law, including the contested issue of administrative independence. Two further sections highlight tensions between expertise and accountability, drawing insights from economics and political science. The essay then considers the changing boundaries of the administrative state – both the public–private distinction and the links between domestic and transnational regulatory bodies, such as the European Union. The essay concludes with reflections on a core concern of administrative law: the way individuals and organizations across different systems test and challenge the legitimacy of public authority.*

*Le droit administratif comparé est en train de se manifester comme domaine d'étude distinct suite à une période pendant laquelle il a été négligé. Pour démontrer cette affirmation, les auteurs présentent un sommaire du volume à ce sujet dont ils dirigent la publication – une collection qui vise à stimuler la recherche au sein de divers systèmes juridiques et diverses disciplines d'érudition. Après une série de réflexions historiques, les auteurs traitent de questions-clés qui relèvent en même temps du droit administratif et du droit constitutionnel, y compris la question controversée de l'indépendance administrative. Deux autres sections mettent en lumière des tensions entre l'expertise et l'obligation de rendre compte, puisant dans les sciences économique et politique. L'article traite ensuite des limites changeantes de l'état administratif – d'une part, quant à la distinction public–privé et d'autre part, quant aux liens entre les organismes de réglementation domestiques et transnationaux, telle que l'Union européenne. L'article se termine avec des réflexions sur une préoccupation de fond du droit administratif : la façon dont les individus et les organisations dans des systèmes différents mettent à l'épreuve et contestent la légitimité de l'autorité publique.*

### I. INTRODUCTION

The American political scientist Frank Goodnow published his classic study on comparative administrative law in 1903.<sup>1</sup> Unfortunately, this auspicious beginning did

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not precipitate sustained scholarly interest in the field over the coming century. As a focus of comparative study, administrative law has languished relative to its domestic counterpart, which flourished in the twentieth century with rise of the modern administrative state. The relative neglect of comparative administrative law is now changing, and we aim to contribute to its renaissance with our edited book, *Comparative Administrative Law*.<sup>2</sup> Our goal in that volume and in this essay is to survey the field in order to document renewed scholarly attention to this rich and compelling field of study. Our hope is that these collected essays will help to generate interest in the field and to suggest promising arenas for future research.

Administrative law cannot avoid confrontations with politics. Perhaps even more than constitutional law, it frames the interaction between law and politics; it provides the conceptual vocabulary for their transformation over time in response to social change. In the western tradition administrative law initially reflected the growing distinction between state and society, and it mediated between those seemingly distinct realms. Over the course of the twentieth century, it served a similar mediating function as the regulatory state emerged. It flourished in the space opened up by the instability of the classic triad of legislative, executive, and judicial power. It came to define the often murky terrain between the institutions of government (in which those powers were purportedly “constituted”) and the diffuse and fragmented realm of regulation in all of its many manifestations. Today, throughout the world, at the borders between the private and public sectors and between nation states and transnational bodies, administrative law continues to be a realm of legal contestation and redefinition. It is not just about fair and transparent procedures; honest, hard-working officials; and the protection of individual rights – although these are all important. It also concerns the democratic legitimacy of government policymaking. A fair and open policymaking process helps democratic citizens hold modern government to account in the face of demands for delegation and regulation, both within and beyond the state.

In opting for a broad conception of the field, our goal is to break down boundaries between scholars, not only those from different national or legal traditions, but also those from different disciplinary or doctrinal perspectives. One of us has a background in economics and political science (Rose–Ackerman); the other in the legal and social history of the state (Lindseth). We meet on the common ground of comparative administrative law and regulatory practice. In our edited volume we have drawn from a wide range of legal scholarship, ranging from constitutional law, state and local government law, regulated industries, European integration, transnational litigation, public international law, as well as administrative law more traditionally conceived.

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<sup>1</sup> Frank J. Goodnow, *Comparative Administrative Law: An Analysis of the Administrative Systems National and Local, of the United States, England, France, and Germany* (New York and London: Knickerbocker, 1903).

<sup>2</sup> This essay is adapted from our introduction to Susan Rose-Ackerman & Peter L. Lindseth, eds, *Comparative Administrative Law* (Cheltenham UK: Edward Elgar, 2010). That volume resulted from a conference held at Yale Law School in May 2009 with the support of Yale Law School’s Oscar M. Ruebhausen Fund.

## II. ADMINISTRATIVE LAW AS HISTORICAL INSTITUTION

Because administrative law is intimately bound up with the development of the modern state, the study of administrative law can usefully begin with historical reflections on its interactions with social and political change over the last two centuries. As a phenomenon in western history, the emergence of administrative law has been intimately tied to the increasing “specificity and subjectivity” of public administrative power since the end of the eighteenth century.<sup>3</sup> In Western Europe, and by extension in North America, “administrative power” and “administrative law” emerged in tandem over the course of the nineteenth century, although at clearly different paces.<sup>4</sup> Moreover, owing to quite different institutional and conceptual starting points, the results of this process often differed as well. The substantive and procedural distinctions are now well known: *Rechtsstaat*/*Etat de droit* enforced by specialized administrative judges in the continental tradition, on the one hand; and Rule of Law enforced by the ordinary judiciary in the Anglo–American tradition, on the other.<sup>5</sup>

Despite these differences, the conjunction between a specifically public administrative power within the state and a body of law to constrain that power holds true more broadly, as the experience of other regions of the world suggests. In East Asia, for example, although the term “administrative law” was unknown prior to contact with the West, the prevailing traditional system of government – with its commands from higher to lower level officials; its proliferation of regulatory mandates; its definition of competences; and its ambition for a “professional, disciplined, meritocratic, and rule-bound” body of public servants – suggests that East Asia may well have been something of a pioneer in the development of constraints on specifically administrative action.<sup>6</sup> Traditional East Asian law lacked, however, a realm of “private” right distinct from the realm of public governance. It is also certainly true that, up to the end of the eighteenth century, old regime monarchies in Europe ruled through a corporatist system of privileges and jurisdictions grounded in conceptions of right (notably “property”) that we would today clearly see as private. Nevertheless, it was precisely the progressive extrication of “public” authority from this corporatist old regime by the end of the eighteenth century, as well as the development of a distinct corps of public servants to pursue and defend these new public prerogatives over the course of the nineteenth, that marked the emergence of administrative modernity in the Western world. However, with its eventual contact with the West, East Asian law, through a process of copying

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<sup>3</sup> Bernardo Sordi, “*Révolution, Rechtsstaat, and the Rule of Law: Historical Reflections on the Emergence of Administrative Law in Europe*” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 1.

<sup>4</sup> See e.g. Jerry Mashaw, “Explaining Administrative Law: Reflections on Federal Administrative Law in Nineteenth Century America” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 2.

<sup>5</sup> See e.g. Peter L. Lindseth, “‘Always Embedded’ Administration: The Historical Evolution of Administrative Justice as an Aspect of Modern Governance” in Christian Joerges, Bo Stråth & Peter Wagner, eds, *The Economy as a Polity: The Political Constitution of Contemporary Capitalism*, (London: UCL Press, 2005).

<sup>6</sup> John Ohnesorge, “Administrative Law in East Asia: a Comparative-Historical Analysis” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 5.

(what organizational theorists call isomorphism), began to mimic these basic features of a modern administrative law regime.<sup>7</sup>

Depending on the polity, this emergent corps of public servants in Europe, the United States and elsewhere did not necessarily conform to the Weberian ideal type of bureaucracy.<sup>8</sup> Over the course of the nineteenth century, what united the more bureaucratic forms of administrative power on the European continent with their relatively less bureaucratized counterparts in Britain and North America was the increasing importance of positive law – legislation – in framing the limits of public authority. And as legislatures increasingly democratized,<sup>9</sup> the pressure on the state to intervene in society also increased, whether via a Weberian bureaucracy or other mechanisms. This went along with demands that its agencies and officials operate in a legally constrained, transparent, and accountable fashion.

Moving from the nineteenth to the twentieth century, changes in the underlying functions of the state in the twentieth century influenced the development of administrative law.<sup>10</sup> The rise of industry with monopoly power and the privatization of formerly state – controlled sectors produced a demand for the control of markets to which all developed states responded, albeit in different ways. Moreover, administrative law has sometimes checked populist or democratic demands by giving organized and powerful economic interest groups a way to challenge policy. There is an ongoing tension in the political and historical analysis of administrative law. Public law provisions that are justified as a check on overarching state power can also be a means of entrenching existing private interests. Legal constraints may under some conditions limit the ability of democratic governments to constrain concentrated, monopolistic economic interests.

### III. CONSTITUTIONAL STRUCTURE AND ADMINISTRATIVE LAW

Turning to more present concerns, administrative law has been shaped by differences in constitutional structure across various states – for example, presidential or parliamentary; democratic or authoritarian; federal or unitary; tripartite or more multi-faceted. Constitutional texts and administrative law interact to shape the rights and duties of professional administrators, elected politicians, and judges. Even though public administration and the bureaucracy receive little detailed treatment in the texts of most constitutions, they form the backbone of state functioning.<sup>11</sup>

One way to approach the links between constitutional structure and administrative law is through the lens of political economy, and more particularly through the work of positive political theory [PPT]. Unlike explicitly normative work

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<sup>7</sup> *Ibid.*

<sup>8</sup> Nicholas Parrillo, “Testing Weber: Compensation for Public Services, Bureaucratization, and the Development of Positive Law in the United States” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 3.

<sup>9</sup> See e.g. Charles Tilly, *Contention and Democracy in Europe, 1650-2000* (New York: Cambridge University Press, 2003) at 213-217 for “A Rough Map of European Democratization” over the nineteenth and twentieth centuries.

<sup>10</sup> Marco d’Alberty, “Administrative Law and the Public Regulation of Markets in a Global Age” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 4.

<sup>11</sup> Tom Ginsburg, “Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 7.

in constitutional law and political theory, PPT attempts to model state behaviour in terms of the self-interest of the actors involved.<sup>12</sup>

US-focused PPT would predict that parliamentary systems would provide for lower levels of judicial oversight of the administration than presidential systems. PPT explains judicial review in the US as a result of the legislature's desire to check the executive and its inability to do this effectively on its own. Thus, the legislature is the dominant actor that can assign tasks to the courts. In a parliamentary system the same political coalition controls both branches, and so legislators from the majority coalition would not want the courts to intervene to oversee executive action. In contrast to these expectations, comparative analysis finds that courts in the UK, France and Germany are, in fact, quite active in reviewing administrative actions.<sup>13</sup> Either the theory of legislative dominance has limited force, or other factors prevent the government from constraining the courts. The courts themselves seem to be independent actors at least insofar as they assert jurisdiction and oversee the executive. If judges believe that executive discretion needs to be controlled and if the legislature is doing little, they may step in, grant standing to public interest plaintiffs and limit executive power.<sup>14</sup>

Federalism and central/local relations are a key aspect of constitutional-administrative structure in both the EU and the US. Strong notions of Member State sovereignty in the EU as well as dual sovereignty in the US make it difficult to carry out a coherent policy in either polity. It is all very well to speak of EU-style subsidiarity as a principle for dividing authority, but if the subordinate governments differ in their capacities and organization, and if they must cooperate to achieve policy goals, then simply allocating tasks down the governmental chain will not work. Both central control and cross-government cooperation are needed as well as local knowledge and implementation.<sup>15</sup>

This raises an important general issue. If the structures of administrative and constitutional law hamper competent policy implementation, how ought one to reconcile established legal traditions with pragmatic efforts to better balance expertise and accountability with the protection of individual rights? One of us has argued elsewhere that this challenge inevitably entails a complex mix of "resistance and reconciliation" – normative resistance animated by those constitutional traditions, on the one hand, but also a necessary degree of reconciliation to the demands for efficient problem solving, on the other.<sup>16</sup> The result, however, will almost certainly be suboptimal if judged by the criteria of either perspective alone.

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<sup>12</sup> For a collection of articles that apply the approach to administrative law see Susan Rose-Ackerman, ed, *Economics of Administrative Law* (Cheltenham UK: Edward Elgar, 2007).

<sup>13</sup> M. Elizabeth Magill & Daniel R. Ortiz, "Comparative Positive Political Theory" in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 9.

<sup>14</sup> Tom Zwart, "Overseeing the Executive: Is the Legislature Reclaiming Lost Territory from the Courts?" in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 10.

<sup>15</sup> Fernanda G. Nicola, "Creatures of the State: Regulatory Federalism, Local Immunities, and EU Waste Regulation in Comparative Perspective" in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 11.

<sup>16</sup> Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford: Oxford University Press, 2010).

#### IV. ADMINISTRATIVE INDEPENDENCE AND ADMINISTRATIVE LAW

Administrative independence is often defended as a way to assure that decisions are made by neutral professionals with the time and technical knowledge to make competent, apolitical choices. The heart of the controversy over independence – which we suggest is ubiquitous – usually stems from a disconnect between much modern administration and traditional democratic accountability that flows from voters through elected politicians to the bureaucracy. Attempts to legitimate entities, such as the many so-called “independent agencies,” in traditional democratic terms often stresses the importance of processes that go beyond expertise to incorporate public opinion and social and economic interests. The ideal is an expert agency that is independent of partisan politics but sensitive to the concerns of ordinary citizens and civil society groups. The risk is capture by narrow interests.

To take one example, the independence of agencies is much contested in common law parliamentary jurisdictions where the tension between notions of unitary government policymaking and agency independence are also often in serious tension. Canada, for example, has a particularly vexed history because of a lack of clarity about the place of such agencies in the structure of government. The UK, Australia and New Zealand have, in contrast, given independent agencies a clearer and more well-articulated position in their governmental structures.<sup>17</sup> In the US independent regulatory commissions attempt to address democratic concerns by building in partisan balance. Instead of requiring technocratic expertise or professional credentials, most agency statutes set up a multi-member governing board and require that no more than a bare majority can be from a single political party. For example, in a five-member board, no more than three can have the same party affiliation. As with the US judiciary, the appointment process is highly political. But with fixed, staggered terms and party balance, agencies can, in principle, respond to changing conditions as their membership changes gradually over time.

This feature of US commissions has not been copied in the EU. The European Union has substituted “technocratic for democratic legitimacy.”<sup>18</sup> Agencies have proliferated at the EU level in recent years, but rather than seeking partisan balance based on political party affiliation, Member States are represented on agency boards.<sup>19</sup> This practice is a political compromise, but, in practice, it leads to the dominance of technical experts who are appointed by Member States and interact with their respective specialized ministries. Outside of North America and Europe, the creation and operation of agencies have been influenced by both American and European legal models but often have distinctive features. For example, in Brazil although the independent agency model was borrowed from the United States, Brazilian agencies

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<sup>17</sup> Lorne Sossin, “The Puzzle of Administrative Independence and Parliamentary Democracy in the Common Law World: A Canadian Perspective” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 13.

<sup>18</sup> Martin Shapiro, “A Comparison of U. S. and European Independent Agencies” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 18. See also Giandominico Majone, “Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance” (2001) 2 *European Union Politics* 103.

<sup>19</sup> Johannes Saurer, “Supranational Governance and Networked Accountability: Member State Oversight of EU Agencies” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 36.

are clearly subordinate to the executive.<sup>20</sup> Hence, they have struggled to provide credible commitments to investors both domestic and foreign and to ordinary citizens and civil society groups. In Taiwan an independent regulatory agency for telecommunications ran up against a Supreme Court that struck down an appointments process that gave too large a role to the legislature.<sup>21</sup>

## V. PROCESS AND POLICY

Public agencies promulgate regulations for many different purposes. They seek to correct market failures, protect rights, and distribute the benefits of state actions to particular groups – ranging from the poor or disadvantaged minorities to politically powerful industries such as agriculture or oil and gas. Executive policymaking in democracies raises issues of public legitimacy, and this is a central focus of administrative law in the United States where the notice and comment provisions of the *Administrative Procedure Act* [APA] guide the process.<sup>22</sup> These provisions require agencies to provide notice, hold hearings, and give reasons when they issue a rule. The final rule can then be subject to judicial review, which reaches beyond compliance with the procedural demands of the *APA* both to the rational underpinnings of the rule and to its consistency with the implementing statute.

Discussions of “good” policy by social scientists, risk analysts, and other specialists sometimes clash with the focus of American administrative law on transparency and participation. This tension between technical competence and mechanisms to promote legitimacy may be less evident in other legal systems where the law does little to constrain policymaking processes compared with the adjudication of individual administrative acts.<sup>23</sup> Judicial review, except where human rights or other constitutional prescriptions are at stake, does not usually take on the merits of broad policy choices.

For example, one can compare the way politics and policymaking interact in the contrasting experience of the US and the EU. In the United States an executive order mandates White House review of major regulations produced in the core executive branch.<sup>24</sup> Such oversight extends beyond the implications of a program for the public

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<sup>20</sup> Mariana Mota Prado, “Presidential Dominance from a Comparative Perspective: the Relationship between the Executive Branch and Regulatory Agencies in Brazil,” in Rose-Ackerman & Lindseth, *supra* note 2 at ch.14.

<sup>21</sup> Jiunn-rong Yeh, “Experimenting with Independent Commissions in a New Democracy with a Civil Administrative Law Tradition: The Case of Taiwan” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 15. Other agencies police the accountability of the government itself. The case for independence is particularly strong for such agencies, but so is the need for oversight to prevent either their capture by regime opponents or their lapse into inaction. Given this risk, oversight agencies should be independent of the state but should also be subject to the scrutiny of ordinary citizens and civil society groups. John Ackerman, “Understanding Independent Accountability Agencies” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 16.

<sup>22</sup> U.S. *Administrative Procedure Act*, 5 U.S.C. §§ 553 - 706.

<sup>23</sup> Susan Rose-Ackerman, *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States* (New Haven CT: Yale University Press, 1995); Susan Rose-Ackerman, *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (Cambridge UK: Cambridge University Press, 2005).

<sup>24</sup> The current executive order 12866 is available online: Office of Regulation and Regulatory Affairs, OMB <[http://www.reginfo.gov/public/jsp/Utilities/EO\\_Redirect.jsp](http://www.reginfo.gov/public/jsp/Utilities/EO_Redirect.jsp)>. President Obama issued a

budget and measures the costs and benefits for society at large. The cost–benefit approach has, moreover, been particularly influential in the United States, but, a similar technique, called Impact Assessment [IA], is becoming increasingly common in Europe.<sup>25</sup> There is a lively debate in Europe both over substantive review of policy based on economic principles and over the expansion of public participation and transparency requirements to cover rulemaking. However, this debate has had relatively little impact on administrative law, which has been largely silent concerning the policymaking process as opposed to decisions in individual cases.

Those urging greater reliance on economic criteria need to recognize that these approaches can themselves be tools to obtain political advantage. Thus, in the United States, White House review of regulations under cost–benefit criteria can help the president control the content of major regulations produced by executive branch agencies.<sup>26</sup> A tool, which appears neutral on its face, can be manipulated for political ends. This is possible because any cost–benefit analysis involves many judgment calls. Seldom will there be a single “right” answer that anyone trained in the technique will accept.<sup>27</sup> Thus, in a democratic polity cost–benefit analysis and similar technocratic tools, although useful in focusing policy debates, cannot be the sole criteria for choice.

However one views the debate over *process* as a matter of administrative law, it is a key area of contestation in terms of regulatory *policy*. The traditional tension in administrative law between technical expertise and accountability plays out somewhat differently in the US, the EU, and the UK. Courts can act as a counterweight to the prevailing ethos – upholding expertise in the US, and treating claims of expertise with caution in the EU. The UK courts, however, apparently view both public participation and expertise with caution, and they legitimate administrative action based on a Weberian understanding of a hierarchical, professional, politically neutral civil service.<sup>28</sup>

Many participants in the debate over policy analysis privilege a particular type of expertise derived from science and economics. Others urge more transparent, participatory decision–making processes. The two approaches are compatible so long as state officials recognize that they may not have all the necessary expertise. Participation and transparency can serve not just as rights but also as means to the end of better policy outcomes. Greater public involvement may not only produce more effective policy but also increase the acceptability of the regulatory process both in representative democracies and in entities, such as the European Union, that also seek public legitimacy. As a practical matter, however, regulatory agencies may not

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supplementary executive order 13563 on January 18, 2011. Online: Office of Information and Regulatory Affairs <[http://www.reginfo.gov/jsp/utilities/EO\\_13563.pdf](http://www.reginfo.gov/jsp/utilities/EO_13563.pdf)>.

<sup>25</sup> Jonathan Wiener & Alberto Alemanno, “Comparing Regulatory Oversight Bodies across the Atlantic: The Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 19.

<sup>26</sup> Elena Kagan, “Presidential Administration” (2001) 114 Harv L Rev 2246.

<sup>27</sup> For e.g., the choice of a discount rate and the proper way to monetize morbidity and mortality are both fraught with controversy even among those committed to the method of cost–benefit analysis. Edward R. Morrison, “Judicial Review of Discount Rates Used in Cost–Benefit Analysis,” (1998) 65 U Chicago L Rev 1333; Cass R. Sunstein, “Incommensurability and Valuation in Law,” (1994) 92 Mich L Rev 779 at 796.

<sup>28</sup> Catherine Donnelly, “Participation and Expertise: Judicial Attitudes in Comparative Perspective” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 21.

move toward greater participation and stronger standards of transparency and reason-giving absent a massive public outcry. In the United States the *APA* arguably arose from congressional effort to constrain delegated policymaking under a separation-of-powers system.<sup>29</sup> No such incentives exist in parliamentary systems.<sup>30</sup>

Paradoxically, however, many new regulatory agencies in Europe have introduced accountable procedures on their own initiative even though they are isolated from electoral politics. Case studies from the UK, France and Sweden show that the regulators supported greater public involvement because they needed outside support to survive and could imitate established models in the US and elsewhere.<sup>31</sup> More participatory and transparent processes were seen as a way of increasing their own legitimacy. However, these moves did not always have that effect. Sometimes they simply increased the power of the regulated industry, thus increasing the risk of capture. Agencies reacted to this concern by taking steps to facilitate consumer input.<sup>32</sup>

For policies where a cost-benefit test seems appropriate, one response would be to combine cost-benefit analysis with transparency as a means of blocking agencies from adopting measures that benefit narrow interests. This requirement could have legal force if applied by the courts. As one of us has argued,<sup>33</sup> a judicial presumption in favour of net benefit maximization increases the political costs for narrow groups, which would have to obtain explicit statutory language in order to have their interests recognized by courts and agencies.<sup>34</sup> This proposal raises an important question that is central to the discussion of administrative litigation to which we now turn. What should be the judiciary's role in reviewing the policymaking activities of modern executive branch bodies and regulatory agencies?

## VI. ADMINISTRATIVE LITIGATION

There is a famous adage in French administrative law – *juger l'administration, c'est encore administrer* – “to judge the administration is still to administer.” It recognizes the difficulty, if not impossibility, of separating the process of legal control from the underlying process of administration. External legal control, whether exercised by courts or court-like administrative tribunals like the French *Conseil d'Etat*, will always shape regulatory policy in a myriad of ways. Read most strongly, this French adage implies an ideal of a “self-regulating” administrative sphere that is detached from traditional values of justice and guided by its own sense of policy rationality and its own estimation of the public interest in the construction and regulation of the

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<sup>29</sup> Mathew D. McCubbins, Roger G. Noll & Barry Weingast “Administrative Procedures as Instruments of Political Control” (1987) 3 *JL Econ & Org* 243.

<sup>30</sup> Terry M. Moe & Michael Caldwell, “The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems” (1994) 150 *Journal of Institutional and Theoretical Economics* 171; Rose-Ackerman, *Controlling Environmental Policy*, *supra* note 23 at 7-17.

<sup>31</sup> Dorit Rubinstein Reiss, “Administrative Agencies as Creators of Administrative Law Norms: Evidence from the UK, France, and Sweden” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 22.

<sup>32</sup> For e.g., the Office of Communications (Ofcom) in the UK, or the *Autorité de Régulation de Télécommunications (ART)* in France, opted for increased consumer input in various ways. See *ibid.*

<sup>33</sup> Susan Rose-Ackerman, *Rethinking the Progressive Agenda* (New York: Free Press, 1992).

<sup>34</sup> See also Cass Sunstein, *Risk and Reason* (Cambridge UK: Cambridge Univ. Press, 2002) at 191-228.

market.<sup>35</sup> This adage, moreover, underlies the French *dualité de juridiction*, in which administrative judges, organically attached to the executive, are primarily competent to hear challenges to administrative action.

Historians and jurists, of course, have long understood that this strong reading does not comport well with reality. In his contribution to *Comparative Administrative Law*, Jean Massot, a member of the French *Conseil d'Etat* for over four decades, notes how the French system of administrative justice “progressively became both an extremely powerful judge and an institution at least as independent as its judicial counterparts.”<sup>36</sup> French administrative judges came to realize that, despite the potential impact of their rulings on administrative policy-making in the “general interest,” their office still required independence, procedural fairness, even a willingness to revisit certain aspects of the underlying administrative act in the interest of justice in the particular case.

This tension between justice and administration – between the policy prerogatives of the state pursuing regulatory programs, on the one hand, and the demands of justice in individual disputes, on the other – is a key concern. Administrative litigation raises a set of questions familiar to any student of administrative law: Under what circumstances should we allow a private party to enlist the aid of an independent judge to rule on a dispute over administrative action? Who may seek that aid (standing)? When (timing)? On what issues (scope of review)? To what end (remedies)?

The approaches that particular polities have taken to these questions are deeply bound up with historical choices in response to functional, political, and cultural demands. The American “appellate review” model, for example, was inspired by the relationship between appellate and trial courts in civil litigation.<sup>37</sup> The “office of the administrative judge” in France, by contrast, has focused on its guarantees of independence as well as its substantive ambition to reconcile the rights of individuals with the “general interest” represented by the state.<sup>38</sup> The members of the French *Conseil d'Etat* exercise dual roles as both policy advisors to the government as well as judges of the governments’ administrative acts.

The common law world provides yet another set of models. Thus, in Australia, administrative tribunals charged with merits review examine whether, all things considered, the challenged action is not merely legal but “correct or preferable.”<sup>39</sup> This contrasts with the American system, where forms of agency review are functionally similar to “merits review,” and the British, where there is a distinction between tribunal “appeal” (on law and fact) and judicial “review” (on law alone).<sup>40</sup> Indeed, there is arguably not a crude civil law/common law divide (with continental Europe

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<sup>35</sup> Lindseth, *supra* note 5 at 119.

<sup>36</sup> Jean Massot, “The Powers and Duties of the French Administrative Judge” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 24.

<sup>37</sup> Thomas W. Merrill, “The Origins of American-Style Judicial Review” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 23.

<sup>38</sup> Massot, *supra* note 36.

<sup>39</sup> Peter Cane, “Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 25.

<sup>40</sup> *Ibid.*

largely representing the former, and the UK, US, and Canada the latter).<sup>41</sup> Rather, US and Canadian judges favor deference, at least to some extent. UK judges, by contrast, seem to share the inclination of their more civilian colleagues in Europe, where the influence of French and German administrative justice is pervasive. Both UK and EU courts unhesitatingly substitute their judgment for that of administrators on questions of law.<sup>42</sup>

## VII. THE BOUNDARIES OF THE STATE: PUBLIC AND PRIVATE

Especially in countries with a civil law tradition, the distinction between public law and private law has been central to the development of administrative law. The common law tradition often obscured this boundary, but today all modern states recognize its existence. Given the ubiquity of a distinctive public law, the move over the last several decades to privatize and contract out government services presents a particular challenge. What legal principles should apply to private bodies that carry out formerly public functions or that take on new tasks under contract? Will the trend toward the use of nominally private firms lead to the integration of public and private law, even in states, such as France and Germany, where the public law/private law distinction has deep historical roots?

Privatization has many meanings, but three salient ones can be discerned.<sup>43</sup> First, in its strongest form, privatization means that the state exits entirely from a sector or policy area leaving it to be governed only by the laws that regulate the actions of all private businesses and that frame private interactions. Second, a public utility may be converted into a private firm, with or without a “golden share” remaining in state hands, and placed under the supervision of an independent regulatory agency. Third, the state may decide that a nominally private firm must comply with some public law strictures in carrying out its business, even in the absence of oversight by a specific agency. This last category raises the most direct challenge to traditional public law/private law distinctions, especially in states with a civil law tradition. It also challenges libertarian presumptions about the inherent value of private enterprise compared to public bureaucracies as service providers.

A public law of privatization is needed and must start with a distinction between core government functions that ought not to be privatized and those where the private sector can be brought in under some conditions.<sup>44</sup> Debate over this issue

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<sup>41</sup> Paul Craig, “Judicial Review of Questions of Law: A Comparative Perspective” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 26.

<sup>42</sup> In the UK, the leading cases are *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, and *R v Hull University Visitor, ex p Page* [1993] AC 682. For more detail on the EU, see Paul Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2006), ch. 13.

<sup>43</sup> Daphne Barak-Erez, “Three Questions of Privatization” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 29.

<sup>44</sup> In our volume, Jean-Bernard Auby discusses the way contracts with government can extend public values to private service-delivery firms, but he stresses the risks inherent in programs of private provision for formerly state-supplied services. Jean-Bernard Auby, “Contracting Out and ‘Public Values’: A Theoretical and Comparative Approach” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 30. These concerns have produced legal limits on contracting out in many countries, but they have also generated a range of responses - from careful contract drafting to self-regulatory mechanisms. In our volume as well, Laura Dickinson extends this analysis to the US military, often understood as beyond the scope of administrative law. Laura A. Dickinson, “Organizational Structure

should consider institutional competence and risks to human rights. Different organizational forms may be more or less equipped to instill public law norms. Administrative law must articulate a set of public law principles that ought to apply to some degree to all entities that carry out public policies.<sup>45</sup>

These principles ought to distinguish among suppliers that provide standardized goods and services to public and private entities (for example, office supplies, asphalt roadways, computer systems); those that supply special purpose products but do not deliver services (for example, weapons producers, dam builders); and those that supply the public services themselves (for example, incarceration of convicted felons, primary education, garbage collection, review of applicants for government benefits). Drawing the lines between these categories will not be easy, but each raises distinct issues. The first is governed by market pressures and the law should assure that these pressures apply to government contracts and keep the process free of corruption and favoritism. The second requires greater attention both to the contracting process and to on-going oversight, but the aim is essentially timely and cost-effective contracting.

Finally, if public/private relationships extend to the third category, the law needs to do more than to assure simple contract compliance and to place limits on waste and corruption. Here, the use of private entities is arguably only justified if they take on some of the characteristics of public agencies and hence are governed by administrative and constitutional law principles that apply to government bodies. This includes making policy in a transparent and participatory way, rather than operating behind closed doors to allocate contracts or other benefits to particular sectors. Furthermore, once private firms are selected to implement a public program, they should be subject to duties that are similar to those facing public bodies.<sup>46</sup>

### VIII. THE BOUNDARIES OF THE STATE: TRANSNATIONAL ADMINISTRATION IN THE EU

Some entities with regulatory authority operate beyond the state – perhaps internationally, like the GATT/WTO, or regionally and supra-nationally, like the EU. If their decisions affect rights and duties within states, how should we understand that power in legal terms? Should we understand it as a novel kind of “constitutional” authority, perhaps of an emerging proto-state? Or is it best understood as a denationalized extension of “administrative governance” on the national level? We do not pretend to answer these complex questions here, though one of us has argued extensively for an essentially “administrative, not constitutional”

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and Institutional Culture in an Era of Privatization: The Case of Private Military Contractors in the United States” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 31. She grounds her study in organizational theory by examining the relative impact of inside socialization and sanctions versus outside incentives in influencing behavior, a contrast with broader relevance beyond the specific case she examines.

<sup>45</sup> Barak-Erez, *supra* note 43.

<sup>46</sup> An important variant on the public/private divide arises if a regulated sector, such as banking and finance, is in private hands, but becomes a serious public policy concern in a crisis. If some of the firms are “too big to fail,” the state may intervene under emergency conditions. See generally Irma E. Sandoval, “Financial Crisis and Bailout: Legal Challenges and International Lessons from Mexico, Korea and the United States” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 32 and Giulio Napolitano, “The Role of the State in (and after) the Financial Crisis: New Challenges for Administrative Law” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 33.

understanding of denationalized regulatory power in the EU.<sup>47</sup> Scholars are increasingly looking to administrative law as a framework for understanding the exercise of rulemaking and adjudicative power beyond the state.<sup>48</sup>

Nowhere is this truer than in the legal literature on the European Union. Recently, a group of leading European administrative law scholars launched the Research Network on EU Administrative Law [ReNEUAL] that aims to draft a kind of “restatement” or “best practices” for administrative law in the EU. The ReNEUAL project will not only cover the administrative activities of EU bodies strictly speaking, but also those of national bodies implementing EU law. The project extends to the EU’s participation in a variety of international regulatory and enforcement schemes that can also be understood in administrative law terms.<sup>49</sup>

The process of European integration has not only led to the development of a supranational EU administrative law, but it has also spurred a movement toward a deeply “Europeanized” administrative law on the national level as well. This process of Europeanization has had an impact well beyond those domains where Member States explicitly implement EU law. European integration is increasingly relying on a particular mode of governance – “adversarial legalism” – that was first observed in the United States by the American political scientist Robert Kagan.<sup>50</sup> Adversarial legalism combines centrally formulated prescriptive rules and a diffuse and fragmented process of enforcement which depends crucially on judicial review to ensure compliance. Given its decentralized character, the European Court of Justice has understandably sought to impose some measure of uniformity on national administrative processes in order to ensure effective enforcement of EU rules and standards.

However, a concern arises from the growth of transnational networks – the challenge of safeguarding individual rights as networks spread. The network phenomenon is increasingly global in its scope, although transnational governance in the EU clearly presents the most developed example.<sup>51</sup> In the EU we see clearly the interplay between classic liberal rights (personal freedom, property rights, and other basic interests) and network decisionmaking that affects those rights. The dispersion of decisional power in networks means that one of the central concerns of traditional administrative law – the protection of the individual in the face of overreaching

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<sup>47</sup> Lindseth, *supra* note 16. See also Peter L. Lindseth, “Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community” (1999) 99 Colum L R. 628; and Peter L. Lindseth, “Agents without Principals?: Delegation in an Age of Diffuse and Fragmented Governance” in Fabrizio Cafaggi, ed, *Reframing Self-Regulation in European Private Law* (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2006).

<sup>48</sup> See e.g. Benedict Kingsbury, Nico Krisch & Richard B. Stewart, “The Emergence of Global Administrative Law” (2005) 68 Law & Cont Probs 15; Herwig H.C. Hofmann & Alexander H. Türk, eds, *EU Administrative Governance*, (Cheltenham UK: Edward Elgar, 2006); Herwig H.C. Hofmann & Alexander H. Türk, eds, *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Cheltenham UK: Edward Elgar, 2009).

<sup>49</sup> George A. Bermann, “A Restatement of European Administrative Law: Problems and Prospects” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 34.

<sup>50</sup> Kagan, Robert, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2001); R. Daniel Kelemen, “Adversarial Legalism and Administrative Law in the EU” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 35.

<sup>51</sup> Francesca Bignami, “Individual Rights and Transnational Networks” in Rose-Ackerman & Lindseth, *supra* note 2 at ch. 37.

public power – becomes vastly more challenging in the transnational administrative context. In confronting this challenge on a more global scale, the EU example, even with certain admitted complexities and drawbacks, may be helpful in developing models elsewhere.

## IX. CONCLUSIONS

Administrative law exists at the interface between the state and society – between civil servants and state institutions, on the one hand, and citizens, business firms, organized groups, and non-citizens, on the other. Civil service law and bureaucratic organization charts and rules provide the background, but administrative law’s essential role is to frame the way individuals and organizations test and challenge the legitimacy of the modern state outside of the electoral process. There are two broad tasks – protecting individuals against an overreaching state and providing external checks that enhance the democratic accountability and competence of the administration.

Public law is the product of statutory, constitutional, and judicial choices over time; it blends constitutional and administrative concerns. The Germans speak of administrative law as “concretized” constitutional law,<sup>52</sup> and Americans often call it “applied” constitutional law.<sup>53</sup> The English, with no written constitution, refer to “natural justice” and, more recently, to the *European Convention on Human Rights* [ECHR]. The French tradition of *droit administratif* contains within it a whole conceptual vocabulary – *dualité de juridiction, acte administratif, service public* – that has been deeply influential in many parts of the world. East Asia has a long tradition of centralized, hierarchical, and bureaucratic rule – a sort of “administrative law” *avant la lettre*. And yet, in forging its own modern variants, East Asia has also drawn on Western (and particularly German and US) models.

Administrative law is one of the “institutions” of modern government, in the sense that economists and political scientists often use that term.<sup>54</sup> It is thus amenable to comparative political and historical study, not just purely legal analysis. The distinction between public and private is essential to administrative law, one that common law jurisdictions long sought to downplay by claiming that the same courts and legal principles should resolve both wholly private disputes and those involving the state. Nevertheless, even in the common law world, debates over the proper role and unique prerogatives of state actors are pervasive. Some scholars still assume that one can compartmentalize regulatory activities and actors into either a public or a private sphere. This may be analytically convenient, but it does not fit the increasingly

<sup>52</sup> See e.g. Fritz Werner, “Verwaltungsrecht als konkretisiertes Verfassungsrecht” (1959) *Deutsches Verwaltungsblatt* 527.

<sup>53</sup> See e.g. William D. Araiza, “In Praise of a Skeletal APA: *Norton v. Southern Utah Wilderness Alliance*, Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA” (2004) 56 *Admin L Rev* 979 at 1002 (noting “the maxim that administrative law is applied constitutional law”)

<sup>54</sup> See e.g. Douglass C. North, *Institutions, Institutional Change and Economic Performance* (New York: Cambridge University Press, 1990) at 3-5; James G. March & John P. Olsen. *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press, 1989); James G. March & John P. Olsen. “The Institutional Dynamics of International Political Orders” (1998) 52 *International Organization* 943 at 948.

blurred boundary between state and society. Recent developments have also strained another familiar distinction, between justice and administration. In Europe, for example, courts regularly apply the principle of proportionality – if a policy interferes with a right, then it must be designed in the least restrictive way.<sup>55</sup> As a result, courts have begun to impose standards on government policymaking, at least when rights are at stake. Finally, international legal developments are increasingly influencing domestic regulatory and administrative bodies throughout the world.<sup>56</sup>

Our collective volume, *Comparative Administrative Law*, tries to take account of current developments in the field. It seeks to illuminate both the historical legacies and the present – day political and economic realities that continue to shape administrative law as we proceed into the twenty – first century. Our efforts are necessarily preliminary and are by no means exhaustive. Nevertheless, we aim to capture the complexity of the field and to distill key elements for comparative study. We look forward to further research and writing as the field grows and develops.

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<sup>55</sup> On the German origins of proportionality analysis and its diffusion throughout Europe and beyond, see Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) 47 *Colum J of Transnat’l L* 73-165.

<sup>56</sup> The project in Global Administrative Law centered at New York University, focuses on the administrative law of international organizations, such as the World Trade Organization. Kingsbury *et al*, *supra* note 48. Nevertheless, it often draws on domestic models of the administrative process for inspiration. Our focus is complementary. We emphasize how the practices of multinational and regional bodies have both emerged out of and affected the administrative process in established states.



## **BOOK REVIEW**



**JOHN REILLY, BAD MEDICINE: A JUDGE'S STRUGGLE FOR JUSTICE  
IN A FIRST NATIONS COMMUNITY (SURREY, B.C.: ROCKY  
MOUNTAIN BOOKS, 2010)**

**David Milward\***

Judge John Reilly's new book, *Bad Medicine*, is not by conventional standards an academic monograph. In fact, Reilly makes no pretence towards his book being a scholarly one, and this is possibly one of its greatest strengths. He has a message to deliver, not just for academics and policy makers, but for Canada and possibly the world at large. He disavows the often mysterious and arcane jargon that academia insists must be correct in order to make his message accessible to anyone who may venture to read it, from the most educated to the least educated.

That message is how the Canadian legal system is just not working for Aboriginal peoples in Canada, and in fact only makes things worse. A focal point of this message is how the usual formula of "law and order" and 'send 'em to jail" just does not work for Aboriginal crime, and for crime in general. The whole premise of incarceration is to dissuade people from crime by the threat of punishment as a consequence for committing prohibited acts. The fundamental flaw in this premise, as Reilly well demonstrates, is that many Aboriginal peoples live in extremely horrid personal and social circumstances that easily overpower any hypothetical fear that the criminal law is designed to instil.

But it is not just the criminal justice system. It is the whole legal and political framework in Canada as well, as applied, misapplied, or not applied to Aboriginal peoples. The imposition of certain laws and political structures, like the *Indian Act*, and its attendant band and council system are very much a part of the problem. According to Reilly, this system breeds corruption, dependency, and exploitation of Aboriginal peoples as much as any other oppressive force. A focal point of this criticism is the late Reverend John Snow, former chief of the Stoney people, whom Reilly is adamantly convinced tried to establish himself and his children as a dictatorial dynasty over the Stoney. Of course, Canadian officials do not get to walk away blameless either, since Reilly also accuses them of the time-honoured practice of passing the jurisdictional buck whenever there was a troublesome Aboriginal complaint that called into question the legitimacy of the whole framework.

Reilly offers an intensely personal and compelling account of both past events and the present situation as he sees it. This is part of what I mean when I say he makes no pretence at making this a scholarly work. His work is part social commentary, part political indictment, and part biography. As such, his work is written with an intensely personal style where nobody is spared if there is anything worthy of criticism, not even himself. He is incredibly candid when he describes himself as having been part of the problem, a self-proclaimed right-wing bigoted judge who sentenced many Aboriginal persons to jail because it was what they brought on themselves, it was what the law demanded, and he gave no thought to rocking the boat called the legal system. It took a little longer than overnight to come to different realizations, by his own admission.

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Such honesty is admittedly refreshing. This honesty can be both a strength and a weakness as featured in his writing. One way in which his decidedly personal approach is a strength is that there is no mistaking what he is saying, and where he is coming from. He writes in a clear and brutally honest style so that anybody with a modicum of reading skill cannot mistake his intentions and the message he is trying to convey. In this respect, his mission of accessibility succeeds.

He also shrewdly points out a paradox with the system of today. Reilly still sits as a supernumerary judge, so some people may raise their eyebrows when he makes strong, sweeping, and dare I say political charged, statements in his writing. This can, after all, raise questions about judicial impartiality in an office he still occupies, albeit in reduced capacity. He himself is alive to this, but it only gives him a little more fuel for his fire. The legal and political system places premiums on things like propriety, impartiality, objectivity, and waiting until a complaint is formally established through legal process before the accused can truly be condemned for his or her actions. These features of the system, however, can be exploited to insert so many obstacles in the way of those trying to bring the truth to the light of day. Reilly thus explicitly tells us that, even as he is aware of the constraints that he may be expected to observe, he is going to throw caution to the winds and tell the truth as he sees it. Making sure that people know the truth is more important than his own personal comfort, a lesson he says he learned when he first ordered the Crown to investigate social conditions and allegations of political corruption on the Stoney Reserve over a decade ago.

His intensely personal voice can be both a source of strength, and a source of weakness. There may be instances where adopting a detached scholarly voice would have better served his credibility. Reilly was initially guarded in assessing blame on Chief Snow when he first released his judgment ordering the investigation during a case involving domestic violence by a man named Ernst Hunter. Reilly at this point was aware that the allegations against Chief Snow had the potential to be false, and acknowledged this during his judgment. In the book, however, Reilly makes himself crystal clear that he honestly believes all of the allegations to be 100% true, and indicates that many members of the Stoney nation also believed them to be true. He even goes so far as to call Chief Snow the “most evil man” among the Stoney he has ever met; strong language indeed. There is however another side of the story that Reilly acknowledges only briefly, and in my view inadequately. Chief Snow is, and remains a quite popular former chief among the Stoney. He is still remembered for having resisted the White Paper proposed by Trudeau’s government, for having helped secure a significant land base for the Stoney, for repeated instances of personal generosity towards his fellow Stoney, among other things. Snow’s supporters have also alleged that Snow inherited a massive debt from his predecessor, and was doing the best he could to turn things around when he came back to power. When it is all said and done, the verdict is still out for me on whether Chief Snow is truly what Reilly says he is, and that is partly because Reilly does make a powerful case for substantiating the allegations against Snow. If all of the allegations are true, then Chief Snow was indeed the epitome of what is wrong with giving self-serving Aboriginal elites all the powers and money they need to serve their own self-interest at the expense of their people, and how the current framework fails Aboriginal people miserably. But Reilly barely if at all presents the other side of the story, and in my view it weakens his credibility to some degree.

Reilly, to his credit, is not content to simply describe the problem but also strives to engage in an earnest search for solutions. These include instituting financial accountability mechanisms for Aboriginal peoples overseen by the federal government, revamping Aboriginal education, economic development for Aboriginal peoples, and allocating electoral districts in both Parliament and the provincial legislatures specifically for Aboriginal peoples. Reilly seems content to put these out there as hopeful solutions, but also makes little to no effort to engage in any rigorous analysis of their viability. Any serious proposal has to be accompanied by an earnest effort to analyze its efficacy, and whether it will actually help solve the problem. Efficacy aside, Reilly's book would need to engage with real concerns about whether his solutions would be acceptable to Aboriginal peoples themselves. For example, his financial accountability proposal will readily meet with cries of paternalism and colonialism through bureaucracy. The proposal for greater electoral representation would meet with opposition from some Aboriginal circles that it simply represents overlaying a different kind of colonial structure on Aboriginal communities that used to have their own political systems. Economic development, while ostensibly meant to further the material good of Aboriginal peoples, will engage well known tensions between those Aboriginals who want access to the available benefits and those who believe that economic development often contemplates actions that both violate the natural world and traditional values. Several of the proposals that Reilly makes engage issues that are fundamentally contentious and divisive within Aboriginal communities themselves, and involve a tension between a real desire to preserve Aboriginal cultural values and yet somehow survive in a much changed world. There is however no effort to examine this reality in any depth. Perhaps Reilly simply wanted to put the suggestions out there for food of thought, and that is fair enough, at least for the time being.

Overall I can recommend Reilly's book, notwithstanding some of its problems. It does have an important message that needs to be heard, not just by Aboriginal peoples, but by the rest of Canada and its leaders as well.



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The *Windsor Yearbook of Access to Justice* is a semi-annual, peer-reviewed, faculty-edited journal. The journal is edited with the highest standards and with the assistance of a prestigious Advisory Board. The scope of the journal, suggested in detail on its web site ([www.uwindsor.ca/wyaj](http://www.uwindsor.ca/wyaj)), examines issues about justice and about access to justice from a diversity of disciplinary viewpoints. The editorial board of the *Yearbook* invites the submission of unsolicited English or French manuscripts in hard copy or electronic formats. Manuscripts should be submitted to: Windsor Yearbook of Access to Justice, Faculty of Law, University of Windsor, 401 Sunset Avenue, Windsor, Ontario, N9B 3P4, Canada or to [wyaj@uwindsor.ca](mailto:wyaj@uwindsor.ca)

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