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## Administrative Law

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# ADMINISTRATIVE LAW

by

John L. Hill\* and David C. Kent\*\*

THE state and federal courts in Texas resolved several significant issues relating to administrative law in the past year. As in previous *Surveys*, this Article discusses these decisions in three broad areas: constitutional considerations, administrative adjudications, and judicial review.

## I. CONSTITUTIONAL CONSIDERATIONS

### A. *Due Process*

The application of constitutional due process principles to administrative proceedings is always fraught with uncertainty because no precise formula exists for determining when and to what extent due process protections will apply. The classic constitutional due process inquiry is twofold: Is a protected life, liberty, or property interest involved? If so, what process is due?<sup>1</sup> The answer to these questions will vary according to the status of the parties, the subject matter involved, and the surrounding facts and circumstances. Because of these variations, it is difficult to derive many general principles from the decisions in this area. The protection afforded may range from minimal procedures to the full panoply of procedural due process requirements.<sup>2</sup> One leading commentator has argued that suitably broad principles could be generated if the life, liberty, or property concept were given an expansive reading so as to protect any interest that an individual deems vital to himself.<sup>3</sup> Whatever the merits of this proposal, courts continue to compartmentalize due process rights into the particular life, liberty, or property "cubbyhole" that they deem appropriate.

During the survey period, Texas state courts primarily addressed the first question posed above: whether or not a life, liberty, or property interest was involved. In *Bowen v. Calallen Independent School District*<sup>4</sup> the plaintiff, an ex-teacher, brought suit alleging that the school district's failure to renew his employment contract violated his due process rights. The

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1. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

2. *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970); see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-13 (1978); Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1268 (1975); Comment, *Corporal Punishment in the Public Schools: The Effect of the Eighth and Fourteenth Amendments*, 29 BAYLOR L. REV. 549, 553-56 (1977).

3. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11:14 (2d ed. 1979). See also L. TRIBE, *supra* note 2, § 10-19.

4. 603 S.W.2d 229 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

court held that the plaintiff had no liberty or property interest in his job as a public school teacher.<sup>5</sup> The court stated that a property interest in public employment exists only if the teacher has a legitimate claim of entitlement to future employment as opposed to an abstract desire for, or unilateral expectation of, future employment.<sup>6</sup> The court noted that the plaintiff's liberty interests had not been violated in that he was not restricted in any way from seeking other employment or exercising his rights of free speech.<sup>7</sup> Accordingly, the court held that the plaintiff was entitled to no greater procedural protection than that provided in the school district's policy manual, which protection he in fact had received.<sup>8</sup>

In a related area of the law, a Texas court upheld as a reasonable exercise of the state's police powers the University Interscholastic League's<sup>9</sup> one-year rule, which imposes a one-year ineligibility status upon any high school football or basketball player who transfers from one school district to another.<sup>10</sup> The plaintiff had played high school basketball in the State of Vermont prior to moving with his family to Austin, Texas. Upon learning that he was ineligible to play varsity basketball in Austin because of the one-year rule, the plaintiff brought suit challenging the constitutionality of the administrative rule on numerous due process and equal protection grounds.<sup>11</sup> The court rejected the attacks on the rule because they were founded on the faulty premise that participation in interscholastic high school athletics was a fundamental life, liberty, or property right within the protection of the Constitution.<sup>12</sup> The court upheld the rule as a valid means of controlling recruitment in high school athletics.<sup>13</sup>

In *Downing v. Williams*,<sup>14</sup> a Fifth Circuit opinion, a former staff psychiatrist of a state mental health and mental retardation (MHMR) facility claimed that his discharge from the MHMR facility violated his procedu-

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5. *Id.* at 235.

6. *Id.* at 234 (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972), and its companion case, *Perry v. Sinderman*, 408 U.S. 593 (1972)); see *Martine v. Board of Regents*, 578 S.W.2d 465 (Tex. Civ. App.—Tyler 1979, no writ), discussed in Hill & Kent, *Administrative Law, Annual Survey of Texas Law*, 34 Sw. L.J. 471, 472-73 (1980), *aff'd*, 607 S.W.2d 638 (Tex. 1980).

7. 603 S.W.2d at 234.

8. *Id.* at 235.

9. The University Interscholastic League is a part of the Extension Division of the University of Texas at Austin and is a state agency, even though membership in it is voluntary. See *Saenz v. University Interscholastic League*, 487 F.2d 1026, 1027 (5th Cir. 1973).

10. *Sullivan v. University Interscholastic League*, 599 S.W.2d 860 (Tex. Civ. App.—Austin 1980). [Editor's Note: After this Article went to print the Texas Supreme Court affirmed in part and reversed in part, finding that the "one year rule" violated the equal protection clause of the Constitution. 24 Tex. Sup. Ct. J. 345, 347 (Apr. 22, 1981). This decision will be discussed in next year's *Survey*.]

11. 599 S.W.2d at 863.

12. *Id.*

13. *Id.* at 865. Because no fundamental rights were involved, the rule was upheld under the "rational basis" test: "The State has a legitimate interest in discouraging the recruitment of high school athletes in the more competitive sports. It is not our task to decide the desirability, the necessity or the relative merits of alternative ways in which the recruiting problem might be handled." *Id.*

14. 624 F.2d 612 (5th Cir. 1980).

ral due process rights. Prior to his termination, the plaintiff had been openly critical of the quality of care provided at the facility. The superintendent of the facility directed the plaintiff to follow certain procedures in voicing complaints. The plaintiff ignored the directive and two weeks later was fired for "deliberate insubordination."<sup>15</sup> Upon requesting an administrative rehearing, the plaintiff was offered a hearing before the MHMR facility's grievance committee, which he refused. Thereafter, he filed suit in federal district court under 42 U.S.C. § 1983, alleging a violation of his procedural due process rights. Judgment was rendered for the defendant state facility, and the plaintiff appealed.<sup>16</sup>

In passing upon the due process claims, the Fifth Circuit initially determined that the plaintiff did possess a constitutionally protected property interest in his job, as he was a nonprobationary government employee with an expectation of continued employment.<sup>17</sup> The court divided the procedural protections due the plaintiff into two phases: pre-termination and post-termination. The court stated that in the absence of a full evidentiary hearing prior to termination, the plaintiff was held to be entitled at a minimum to the following pre-termination procedural protections: (1) written notice of the reasons for termination; and (2) an effective opportunity to rebut the reasons, including (a) sufficient time to prepare a written response and (b) a chance to respond orally to the official ultimately responsible for making the termination decision.<sup>18</sup> With regard to the post-termination phase, in which the plaintiff had requested an administrative rehearing, the court held that he was entitled at a minimum to the following: (1) a statement of the causes of termination in sufficient detail to enable him to disprove and correct any errors; (2) the names of the witnesses against him and the nature of their testimony; (3) a reasonable time in which to prepare a defense; (4) a meaningful opportunity to present his defense; and (5) a hearing before an impartial tribunal that has some expertise in the field.<sup>19</sup>

### B. *Confrontation and Cross-Examination*

The rights of confrontation and cross-examination are among the most basic in the American adversarial system of justice.<sup>20</sup> The Texas Supreme Court reaffirmed its strong commitment to these guarantees in *Rector v. Texas Alcoholic Beverage Commission*.<sup>21</sup> The petitioner in *Rector* had appealed from the denial of an application for a wine and beer retailer's off-

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15. *Id.* at 615.

16. *Id.* at 616-17.

17. *Id.* at 618.

18. *Id.* at 618-19. The plaintiff had been denied the opportunity to respond orally to the official who decided to terminate him. *Id.*

19. *Id.* at 619-21. The plaintiff was denied all but the last of these rights. *Id.*

20. See *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959), in which the Supreme Court stated that the rights of confrontation and cross-examination were "relatively immutable" principles with "ancient roots." See also *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-04 (1963); *Collora v. Navarro*, 574 S.W.2d 65, 70 (Tex. 1978).

21. 599 S.W.2d 800 (Tex. 1980).

premises license,<sup>22</sup> asserting error on the basis that the witnesses at the administrative hearing were neither placed under oath nor made available for cross-examination by the applicant. The court of civil appeals held, in effect, that this was harmless error.<sup>23</sup> The court reasoned that any irregularities in the administrative hearing were irrelevant because substantial evidence supporting the administrative order was introduced at the trial court level and it was this evidence upon which the appeal was to be decided.<sup>24</sup> In a *per curiam* opinion the Texas Supreme Court reversed, holding that the applicant was entitled to have the witnesses sworn and subject to cross-examination at the administrative hearing.<sup>25</sup> The court referred to these rights as "basic and traditional tools for searching out the truth."<sup>26</sup> The prime importance of the decision is the court's holding that the violation of a party's due process rights in an administrative hearing will vitiate an administrative order rendered thereafter, even if the order is supported by substantial evidence.<sup>27</sup>

### C. Separation of Powers

The survey period saw continued debate concerning the respective powers of the state legislature and the Texas Supreme Court to regulate the practice of law.<sup>28</sup> *Banales v. Jackson*,<sup>29</sup> a very important decision af-

22. *Id.* Application for this license is made to the county judge, who holds a hearing to decide whether to grant the license. TEX. ALCO. BEV. CODE §§ 61.31-.32 (Vernon 1978). In considering the application, the county judge is performing an administrative function. *Ezzell v. Texas Alcoholic Beverage Comm'n*, 528 S.W.2d 888 (Tex. Civ. App.—Fort Worth 1975, no writ); *Killingsworth v. Broyles*, 300 S.W.2d 164 (Tex. Civ. App.—Austin 1957, no writ).

23. *Rector v. Texas Alcoholic Beverage Comm'n*, 598 S.W.2d 888, 888 (Tex. Civ. App.—Beaumont 1980).

24. *Id.* The Alcoholic Beverage Code provides that appeals from denials of applications for licenses are to be taken to the district court and are to be governed by the substantial evidence rule. TEX. ALCO. BEV. CODE §§ 11.67, 61.34 (Vernon 1978). This traditionally has been interpreted to mean "substantial evidence de novo" review, *i.e.*, the district court's review is not limited to the administrative record; rather the court determines from the evidence presented at the district court level whether substantial evidence exists to sustain the county judge's decision. *See Toot'n Totum Food Stores, Inc. v. Williams*, 561 S.W.2d 937, 938 (Tex. Civ. App.—Amarillo 1978, no writ); *Dienst v. Texas Alcoholic Beverage Comm'n*, 536 S.W.2d 667, 669 (Tex. Civ. App.—Corpus Christi 1976, no writ); *Texas Liquor Control Bd. v. Armstrong*, 300 S.W.2d 146, 147 (Tex. Civ. App.—San Antonio 1957, writ ref'd). By virtue of the Texas Supreme Court's decision in *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503 (Tex. 1978), this may no longer be good law. *See Hill & Kent, supra* note 6, at 481-83. The *Rector* case, however, was tried under this "substantial evidence de novo" form of review. The plaintiff *Rector* called nine witnesses and introduced 25 exhibits into evidence, while the defendant put on seven witnesses and offered three exhibits into evidence. Appellee's Brief at 5. The court of civil appeals may therefore have been justified in its holding by virtue of the principle that a full hearing at a later time cures the denial of a hearing in the early stages of a proceeding. *See Bowles v. Willingham*, 321 U.S. 503, 520 (1944); *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281, 290 (D.C. Cir. 1948); B. SCHWARTZ, ADMINISTRATIVE LAW § 73 (1976).

25. 599 S.W.2d at 801.

26. *Id.*

27. *Id.* at 800; *see Lewis v. Metropolitan Sav. & Loan Ass'n*, 550 S.W.2d 11, 13 (Tex. 1977); *Richardson v. City of Pasadena*, 513 S.W.2d 1, 4 (Tex. 1974).

28. For a discussion of this battle over the power to regulate the legal profession in 1979, *see Hill & Kent, supra* note 6, at 475-76.

29. 601 S.W.2d 508 (Tex. Civ. App.—Beaumont), *motion to review under rule 21c denied, per curiam*, 610 S.W.2d 732 (Tex. 1980).

firming the inherent power of the supreme court to regulate the practice of law, was one of many suits challenging the validity of the supreme court's 1978 order establishing a one-time building fee assessment against members of the state bar to fund construction of the Texas Law Center.<sup>30</sup> The plaintiff in *Banales* sought an injunction preventing the enforcement of that part of the 1978 order authorizing the suspension from practice of those lawyers who refused to pay their assessed fee. He argued that the State Bar Act<sup>31</sup> expressly permitted summary suspension of lawyers only for nonpayment of the annual membership fee, but nowhere authorized such suspensions for nonpayment of a building fee assessment. The plaintiff therefore concluded that the Texas Supreme Court, acting in and limited by its statutory capacity within the State Bar Act, was powerless to order a suspension from the practice of law for nonpayment of the fee.

The Beaumont court of civil appeals ruled against the plaintiff, holding that the 1978 fee assessment and its suspension provision were valid and enforceable.<sup>32</sup> While the court affirmed the validity of the order on statutory grounds,<sup>33</sup> it also elaborated on the inherent power of the supreme court to regulate the legal profession. The court stated that the original State Bar Act "was simply legislative recognition of the inherent power of the judicial department to regulate the practice of law."<sup>34</sup> In a significant passage of the opinion, the court stated:

[W]hen a provision of the State Bar Act conflicts with orders of the Supreme Court regarding attorney conduct as to fees or other related matters, the statutory provisions must yield to the Court's rules, and to its construction thereof and amendments thereto. This is so because the Supreme Court does not share the power to regulate the practice of law with the Legislature. The ultimate constitutional power lies solely within the jurisdiction of the Supreme Court.<sup>35</sup>

The court concluded that the fee assessment was a valid order within the

30. See *Cameron v. Greenhill*, 577 S.W.2d 389 (Tex. Civ. App.—Austin), *aff'd*, 582 S.W.2d 775 (Tex. 1979); *Nance v. Jackson*, No. 124025 (Justice Court, Precinct No. 5 of Travis County, Texas) (cause pending); *Sternberg v. White*, No. 124874 (Justice Court, Precinct No. 5 of Travis County, Texas) (cause pending). See also *Palmer v. Jackson*, 617 F.2d 424, 432 (5th Cir. 1980) (decided on abstention grounds), wherein the court stated:

Many feel that the federal courts ought to take every case that is filed and attempt to solve all the problems of the world. We do not think Congress created the federal courts for that purpose. This case raises questions involving, *inter alia*, a state bar association, a state bar building, and a state constitution. The inclusion of federal constitutional claims in the complaint does not justify federal court involvement in purely state law issues.

31. See TEX. REV. CIV. STAT. ANN. art. 320a—1, §§ 4-5 (Vernon Supp. 1980-1981).

32. 601 S.W.2d at 512.

33. *Id.* The court held that the validity of the 1978 order was established by the state legislature when it adopted the new State Bar Act in 1979, which included the following language: "All dues and fees assessed and in effect on the effective date of this Act shall remain in force and effect until and unless amended pursuant to Section 8 of this Act." *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 320a—1, § 20(c) (Vernon Supp. 1980-1981)).

34. 601 S.W.2d at 511.

35. *Id.* at 512.

inherent power of the supreme court.<sup>36</sup> Because the court upheld the order on statutory grounds, its discussion of the inherent powers of the supreme court is properly viewed as a dictum. Nevertheless, read in light of other recent judicial pronouncements in this area,<sup>37</sup> the *Banales* decision constitutes a clear and emphatic statement of the supreme court's intention to maintain primary control over the legal profession.<sup>38</sup>

## II. ADMINISTRATIVE ADJUDICATIONS

### A. *Investigatory Powers*

The information-collecting and investigatory powers of administrative agencies are enormous. Virtually every statute creating an administrative agency imposes upon the regulated industry or business various record-keeping and reporting requirements.<sup>39</sup> When companies fail to comply voluntarily with these requirements or when more detailed data is required, administrative agencies have at their disposal a selective arsenal of investigatory weapons to obtain the information sought. During the survey period, the federal courts grappled with federal administrative agencies' use of this information-seeking armamentarium.

One of the arms in the agency's ordnance is the administrative subpoena, requiring testimony of witnesses and the production of documents for inspection and copying. While it is well-settled that the scope of an administrative agency's general investigatory powers is broad and need not be based on probable cause,<sup>40</sup> the administrative subpoena power is limited by the fourth amendment.<sup>41</sup> The investigation must be conducted pursuant to a legitimate, congressionally authorized purpose, and any administrative subpoena issued in the course of an investigation must be relevant to that purpose.<sup>42</sup> Furthermore, the subpoena must be issued in good faith, in accordance with statutory procedures, and should not seek information already within the agency's possession.<sup>43</sup>

*SEC v. OKC Corp.*<sup>44</sup> involved an action by the Securities and Exchange Commission to enforce an administrative subpoena duces tecum issued to

36. *Id.*

37. See note 28 *supra* and accompanying text.

38. For a lengthy analysis of this subject, see Jeffers, *Government of the Legal Profession: An Inherent Judicial Power Approach*, 9 ST. MARY'S L.J. 385 (1978).

39. For a discussion of the impact of record-keeping requirements on businesses, see COMMISSION ON FEDERAL PAPERWORK, A REPORT OF THE COMMISSION ON FEDERAL PAPERWORK—FINAL SUMMARY REPORT (1977); M. WEIDENBAUM, GOVERNMENT-MANDATED PRICE INCREASES 7-21 (1975). Professor Weidenbaum cited one estimate that there are over 5,000 types of approved government forms, excluding all tax and banking forms. *Id.* at 12.

40. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

41. *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

42. *Id.*

43. *Id.*

44. 474 F. Supp. 1031 (N.D. Tex. 1979), *appeal dismissed mem.*, No. 79-2427 (5th Cir. Oct. 30, 1980). For other related decisions in the litany of litigation involving these two parties, see *OKC Corp. v. Williams*, 489 F. Supp. 576 (N.D. Tex. 1980); *OKC Corp. v. Williams*, 490 F. Supp. 560 (N.D. Tex. 1979), *aff'd*, 614 F.2d 58 (5th Cir.), *rehearing denied*

OKC Corporation. Although the subpoena allegedly was issued pursuant to a civil investigation by the SEC, OKC argued that the subpoena in fact was to be used in aid of a criminal reference and hence was not issued in good faith. The court determined that the test for good faith is "whether the agency in an institutional sense has abandoned its pursuit of civil action, and not whether certain individual employees of the agency who are involved in the investigation are gathering evidence solely for a criminal prosecution."<sup>45</sup> In this instance, the court ruled that OKC's proof did not rise to the level required to sustain its allegations of bad faith.<sup>46</sup>

OKC also argued that the subpoena was overly broad in calling for the production of irrelevant records. The standard by which claims of irrelevance are measured is whether the subpoenaed documents are plainly incompetent or irrelevant for any lawful purpose.<sup>47</sup> Noting the trend toward broadening the scope of an agency's investigatory powers, the court stated: "Unless it appears from the face of the subpoena that the matters sought do not pertain to the official subject of the investigation . . . a court should be reluctant to declare the subpoenaed documents irrelevant."<sup>48</sup> By this test, the documents were relevant, and the court refused to quash the subpoena or limit its scope.<sup>49</sup>

While the courts tend to support an administrative agency's broad investigatory powers pursuant to an administrative subpoena, the same is not necessarily true in situations involving administrative search warrants, another munition in the agency's selective arsenal of investigatory weapons. Unlike an administrative subpoena, which is issued by the agency itself, an administrative search warrant must be issued by a court.<sup>50</sup> In *State Fair of Texas v. United States Consumer Products Safety Commission*<sup>51</sup> this difference had an important effect upon the determination of the validity of the warrant. The Commission had obtained an ex parte administrative search warrant from a United States magistrate authorizing the Commission to enter the premises of the State Fair of Texas to inspect an aerial tramway ride, the site of a tragic accident. The warrant was served on the state fair and the owners of the tramway. After being refused permission to enter the premises, the Commission moved in court for a show cause order. The state fair and the tramway owners responded by moving to quash the warrant on the ground that the Commission had no jurisdiction to make the

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*en banc*, 617 F.2d 1207 (5th Cir. 1980); *OKC Corp. v. Williams*, 461 F. Supp. 540 (N.D. Tex. 1978).

45. 474 F. Supp. at 1035.

46. "[T]he mere fact that certain employees of the SEC may have expressed concern about the running of the criminal statute of limitations . . . is certainly not enough to establish that the institution as a whole has abandoned the possibility of civil action." *Id.*

47. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943).

48. 474 F. Supp. at 1036. Professor Davis claims that there has been a marked trend since 1972 to expand substantially the government's investigatory powers and "to break down former constitutional protections against governmental prying." 1 K. DAVIS, *supra* note 3, § 4.3.

49. 474 F. Supp. at 1036.

50. B. SCHWARTZ, *supra* note 24, §§ 41, 43.

51. 481 F. Supp. 1070 (N.D. Tex. 1979).



search. The Commission protested that jurisdictional attacks on administrative search warrants were beyond the scope of the court's review. It based its argument on the rule that courts must enforce administrative subpoenas without requiring the agency to demonstrate its jurisdiction.<sup>52</sup>

While acknowledging this rule, the district court held it inapplicable to administrative search warrants.<sup>53</sup> The court noted the practical differences between requiring a business to produce witnesses and documents in response to an administrative subpoena and allowing agency employees physical entry onto the business premises pursuant to a search warrant.<sup>54</sup> Because a search warrant may be issued by a magistrate only upon probable cause, while an administrative subpoena carries no such requirement, the court reasoned that one element of this administrative probable cause is statutory authority for the inspection.<sup>55</sup> Thus, "it follows that a magistrate must examine an agency's statutory jurisdiction as a prerequisite to authorization of the more intrusive investigatory remedy of administrative search."<sup>56</sup> Applying these principles, the court reviewed the Commission's statutory authority to make inspections and the factual information in the record concerning the specific tramway. It concluded that while the tramway was a consumer product within the meaning of the Commission's enabling statute,<sup>57</sup> there was insufficient information to show that the statutory requirements concerning location and possession of the tramway for inspection purposes had been satisfied.<sup>58</sup> Consequently, the court quashed the warrant.<sup>59</sup>

The district court's holding arguably exalts form over substance, resulting in an unnecessary expenditure of time and effort in that the Commission might later obtain the necessary information to demonstrate its jurisdiction for the search warrant. In fact, the court specifically noted that

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52. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214 (1946); B. SCHWARTZ, *supra* note 24, § 44. But see *Marshall v. Nichols*, 486 F. Supp. 615 (E.D. Tex. 1980), in which the court dismissed an action brought by the Secretary of Labor and the Occupational Safety and Health Administration (OSHA) to enforce an administrative subpoena on the grounds that OSHA did "not have jurisdiction or authority to investigate" the incident in question, an accident on an offshore drilling platform. *Id.* at 621. The court stated that the administrative agency had "the burden of demonstrating that it is acting within its authority in seeking enforcement of its administrative subpoena." *Id.*

53. 481 F. Supp. at 1075-76.

54. *Id.* at 1075.

55. *Id.* at 1076. The court based its reasoning on the three principal cases in this area: *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); See *v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967). The court placed particular emphasis on the following language from the *Barlow's* opinion, which it interpreted as establishing a three-pronged function for search warrants: "A warrant . . . would provide assurances from a neutral officer that the inspection [1] is reasonable under the Constitution, [2] is authorized by statute, and [3] is pursuant to an administrative plan containing specific neutral criteria." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978). See generally Comment, *OSHA v. The Fourth Amendment: Should Search Warrants be Required for "Spot Check" Inspections?*, 29 BAYLOR L. REV. 283 (1977).

56. 481 F. Supp. at 1076.

57. *Id.* at 1077.

58. *Id.* at 1079.

59. *Id.*

the Commission could utilize some of the other investigatory tools at its disposal, such as administrative subpoenas, to develop the facts necessary to demonstrate statutory jurisdiction, and hence probable cause, to obtain a search warrant at a later time.<sup>60</sup> Perhaps in anticipation of this argument, the court made the following observation:

Government has long required a hunter to produce his license on request when found in hunting fields. Poaching of all kinds has always been regarded as unacceptable. With the individual's right to privacy and the accountability of governmental agencies on the list of endangered species, it would seem anomalous not to require a federal agency to produce its license from Congress when it hunts. This opinion does no more than that.<sup>61</sup>

### B. *Standing*

In its simplest terms, the doctrine of standing is a determination of whether the plaintiff is a proper party to initiate judicial review. While the doctrine has long been a conundrum of federal law, it rarely has caused problems in state courts.<sup>62</sup> During the survey period, however, Texas state courts delivered two important decisions reconciling various statutory provisions relating to the issue of standing.

Section 19(a) of the Administrative Procedure and Texas Register Act (APTRA) provides that "[a] person . . . who is aggrieved by a final decision in a contested case is entitled to judicial review."<sup>63</sup> The various state agency enabling statutes, on the other hand, written at different times, often include provisions granting judicial review in terms other than "persons aggrieved" by agency actions. For example, the Public Utility Regulatory Act (PURA) provides that "[a]ny party to a proceeding before the

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60. *Id.* at 1076. The court stated:

This holding in no way thwarts the Commission in its preliminary efforts to obtain sufficient facts on which to base an informed assessment of its own jurisdiction. The Commission has a broad spectrum of investigatory tools at its disposal [including subpoenas, depositions, and investigational hearings] . . . . The court today holds only that the Commission must be able to demonstrate its own jurisdiction before seeking the aid of the court in making use of the most disruptive of the arrows in this investigatory quiver.

*Id.*

61. *Id.* at 1082.

62. Professor Cooper has remarked:

In general, the state courts are much more ready than are the federal courts to recognize standing to appeal on the part of any appellant who shows that he is in fact aggrieved by the administrative order. In fact, the whole doctrine of 'standing' (which the United States Supreme Court has described as a 'complicated specialty of Federal jurisdiction') has caused comparatively little trouble in the state courts.

2 F. COOPER, STATE ADMINISTRATIVE LAW 538 (1965) (footnote omitted). For an interesting federal case in this area decided during the survey period, see *Presidio Bridge Co. v. Secretary of State*, 486 F. Supp. 288, 294 (W.D. Tex. 1978) (holding that a business faced with a purely economic injury is not within the "zone of interests" protected by the National Environmental Policy Act, 42 U.S.C.A. §§ 4321-4369 (1977)), and thus lacks standing to challenge governmental actions on the basis of alleged violations of laws concerning environmental impact statements), *aff'd mem.*, 612 F.2d 578 (5th Cir. 1980).

63. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19(a) (Vernon Supp. 1980-1981).

commission is entitled to judicial review."<sup>64</sup> The Texas Water Code provides that any person "affected by" any act of the Texas Department of Water Resources may obtain judicial review.<sup>65</sup> Arguably, these statutes create a right to judicial review broader than that provided in the APTRA.

In two important decisions, the Austin court of civil appeals resolved this apparent conflict in the statutes by imposing the APTRA's "person aggrieved" language onto the other statutes. In *Hooks v. Texas Department of Water Resources*<sup>66</sup> the plaintiff-landowners participated in administrative proceedings before the Texas Department of Water Resources to protest their adjoining landowner's application for a sewage treatment plant waste discharge permit. These plaintiffs were held to lack standing to obtain judicial review of the department's order granting the permit because they never alleged any facts to show they were "aggrieved" by the agency decision.<sup>67</sup> Also, in *City of Houston v. Public Utility Commission*<sup>68</sup> the court held that the city had no standing to bring suit to set aside the Public Utility Commission's rate order.<sup>69</sup> The city was held not "aggrieved" by the order, even though it had been a party to the agency proceeding and thus entitled to review under the PURA.<sup>70</sup>

*Hooks* and *City of Houston* set forth several general principles. First, different requirements exist for standing to participate in administrative proceedings and for standing to obtain judicial review of those proceedings.<sup>71</sup> The fact that the plaintiffs in these cases had the right to participate in their administrative hearings did not automatically entitle them to pursue the actions in court. Secondly, the term "person aggrieved" in section 19 of the APTRA apparently will control over any inconsistent language in the various enabling statutes, unless clearly indicated otherwise. This is in keeping with the APTRA's stated policy of establishing "minimum standards of uniform practice and procedure for state agencies."<sup>72</sup> Thirdly, unless otherwise expressly waived by statute, a "person aggrieved" must have a justiciable interest in the controversy, *i.e.*, some special injury or damage in fact, peculiar to himself and not commonly shared by the public at large.<sup>73</sup> In explaining this concept of injury in fact, the *Hooks* court noted that the injury or damage must be real and substantial:

The word "aggrieved" refers to a substantial grievance, a denial of some legal or equitable personal or property right, or the imposition upon a party of a burden or obligation. The mere fact that a person

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64. *Id.* art. 1446c, § 69 (Vernon 1980).

65. TEX. WATER CODE ANN. § 5.351 (Vernon Supp. 1980-1981).

66. 602 S.W.2d 389 (Tex. Civ. App.—Austin 1980). [Editor's Note: After this Article went to print, the Texas Supreme Court reversed the judgment of the court of civil appeals. 611 S.W.2d 417 (Tex. 1981). This decision will be discussed in next year's *Survey*.]

67. 602 S.W.2d at 393.

68. 599 S.W.2d 687 (Tex. Civ. App.—Austin 1980), *writ ref'd n.r.e. per curiam*, 610 S.W.2d 732 (Tex. 1980).

69. 599 S.W.2d at 690-91.

70. *Id.* at 689-90.

71. 602 S.W.2d at 391-92.

72. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 1 (Vernon Supp. 1980-1981).

73. 599 S.W.2d at 690.

may be hurt in his feelings, or be disappointed over a certain result, or be subject to inconvenience, annoyance, or discomfort, or even expense, does not necessarily constitute a party "aggrieved."<sup>74</sup>

This interpretation was determinative of the rights of the plaintiffs in both cases. Although the plaintiffs in *Hooks* probably were affected by the Department of Water Resources' decision granting their adjoining landowner a waste discharge permit, the court of civil appeals held that they failed to allege or show that they would be harmed or injuriously affected in any way—aesthetically, economically, physically, or otherwise.<sup>75</sup> In the utility rate increase case, the city of Houston failed to demonstrate that it would suffer any injury peculiar to itself; its asserted interests were indistinguishable from the population at large.<sup>76</sup> The line of demarcation between a substantial and an inconsequential injury will be vague in many cases and determined on an ad hoc basis. Indeed, the *Hooks* opinion may inadvertently contribute to this vagueness through language suggesting that "any 'justiciable interest,' however trivial" will confer standing.<sup>77</sup>

The *Hooks* and *City of Houston* cases also raise another interesting question about the differing language in the various statutes. Section 19(a) of the APTRA, which is patterned after the Model State Administrative Procedure Act, allows any "person" to appeal an agency order.<sup>78</sup> This has

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74. 602 S.W.2d at 392.

75. *Id.* at 393. At the administrative hearing, however, the hearing examiner designated the *Hookses* as parties "who may be affected" by the hearing. *Id.* at 391 (citing TEX. WATER CODE ANN. § 26.022 (Vernon Supp. 1980-1981)).

76. 599 S.W.2d at 690. Prior to the enactment of the PURA, an individual ratepayer had no standing to challenge rates, absent some damage peculiar to himself. *Holland v. Taylor*, 153 Tex. 433, 270 S.W.2d 219 (1954). The court in *City of Houston* held that the legislature enacted the PURA with knowledge of this preexisting law and impliedly adopted it by not making some special provision in the PURA to change it. 599 S.W.2d at 690; *cf.* *Public Util. Bd. v. Cental Power & Light Co.*, 587 S.W.2d 782, 786 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (threat of illegal competition posed by the defendant was a particular injury suffered by the plaintiffs, distinguishing them from the public at large). *See generally* B. SCHWARTZ, *supra* note 24, § 159 (concerning competitor standing).

77. 602 S.W.2d at 393. This is one of the troublesome aspects of the opinion. In the language referring to "denial of some legal or equitable personal or property right," *id.* at 392, the court seems to be reverting to the discredited "legal wrong" test for standing, *i.e.*, a party must show an injury to a particular legally protected right of his own in order to have standing, regardless of what actual injury he may be suffering. *See, e.g.*, *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940). This test supposedly was rejected by the United States Supreme Court when it adopted the bipartite "harm in fact" and "zone of interests" test in *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 152-53 (1970); *see* K. DAVIS, *ADMINISTRATIVE LAW TEXT* §§ 22.01-.02 (3d ed. 1972); B. SCHWARTZ, *supra* note 24, §§ 157-158. By using this language suggestive of the "legal wrong" test, the *Hooks* court runs counter to the generally accepted interpretation of "persons aggrieved" as that term is utilized in the APTRA, most state administrative procedure statutes, and the Model State Administrative Procedure Act. "[T]he central inquiry in determining standing [under these statutes] is not whether a person . . . has suffered . . . [a] 'legal wrong,' but simply whether he in fact is aggrieved or adversely affected by the administrative action." 2 F. COOPER, *supra* note 62, at 537. The better approach is that suggested in the latter part of the *Hooks* opinion, which places more emphasis on injury or damage as the true test for standing. 602 S.W.2d at 392. *See also* *New Hampshire Bankers Ass'n v. Nelson*, 113 N.H. 127, 302 A.2d 810, 811 (1973) (rejects federal bipartite test in favor of single "injury in fact" test).

78. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19(a) (Vernon Supp. 1980-1981). The

been commonly understood to allow persons other than the parties to the administrative proceeding to institute suits for judicial review in court, as long as they have a justiciable interest in the controversy.<sup>79</sup> This relatively broad right to appeal agency orders, however, is not on its face reconcilable with statutes such as the PURA, which restrict standing to "parties" to public utility commission proceedings. A logical extension of the *Hooks* and *City of Houston* opinions might suggest that, in the interest of uniformity, the APTRA's broader standard of "persons aggrieved" would control over more restrictive language in the various enabling statutes. At least one earlier opinion, however, poses an obstacle to this extension. In *Galveston Bay Conservation & Preservation Association v. Texas Air Control Board*<sup>80</sup> the trial court struck the petition in intervention of several parties attempting to intervene at the trial court level, but who had not participated in the administrative proceeding.<sup>81</sup> The court of civil appeals affirmed in part because the intervenors, by failing to participate in the administrative hearing, had not filed a motion for rehearing before the agency.<sup>82</sup> The court of civil appeals held that this motion was a statutory prerequisite to instituting any suit for judicial review of an agency order.<sup>83</sup>

### C. Finality of Orders and Exhaustion of Remedies

Section 19 of the APTRA limits judicial review of administrative actions to those orders that are final and appealable. In so doing, it represents a

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1961 Revised Model State Administrative Procedure Act provides in § 15(a) that, "[a] person . . . who is aggrieved by a final decision in a contested case is entitled to judicial review under this Act." 9C UNIFORM LAWS ANNOTATED 136, 158 (Cum. Supp. 1967). The 1946 Model State Act also speaks in terms of a "person . . . aggrieved" in § 12(1) thereof. 9C UNIFORM LAWS ANNOTATED 179, 183 (1957).

79. 2 F. COOPER, *supra* note 62, at 537; Note, *A Survey of Principal Procedural Elements Among State Administrative Procedure Acts*, 22 CLEV. ST. L. REV. 281, 306-07 (1973). For an example of how the distinction between "parties" and "persons" aggrieved may be important, see *Applications for Reassignment of Pupils*, 247 N.C. 413, 101 S.E.2d 359 (1958). Section 5-106(4) of the December 1, 1980, discussion draft version of the 1981 Revised Model State Administrative Procedure Act makes specific provisions granting standing to persons who are not parties to the administrative proceeding, but who are "otherwise aggrieved or adversely affected by the agency action."

80. 586 S.W.2d 634 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

81. *Id.* at 636.

82. *Id.* at 642.

83. *Id.* at 641-42. The Texas Clean Air Act provides that, "[a] person affected by any ruling, order, decision, or other act of the board may appeal by filing a petition in a district court of Travis County." TEX. REV. CIV. STAT. ANN. art. 4477—5, § 6.01(a) (Vernon 1976). Thus, the conflict between "persons" and "parties" was not present. The court of civil appeals, however, by injecting the motion for rehearing requirement into the case, effectively restricted the right of appeal to "parties." This reasoning is unfortunate because it runs contrary to the meaning of "person aggrieved" in the APTRA. When there is a conflict between the APTRA's "persons" and the enabling statute's "parties," the more restrictive language of "parties" probably should control, because it is the enabling statute that creates substantive rights, while the APTRA is a procedural statute. See *Dan Ingle, Inc. v. Bullock*, 578 S.W.2d 193, 193-94 (Tex. Civ. App.—Austin 1979, writ ref'd); *Robinson v. Bullock*, 553 S.W.2d 196, 197-98 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), *cert. denied*, 436 U.S. 918 (1978).

codification of the preexisting law in Texas.<sup>84</sup> A final administrative order is one that leaves nothing open for future disposition. If a right is made contingent upon the occurrence of a future event, the order is not final.<sup>85</sup>

Application of the final order rule produced disturbing results in *Railroad Commission v. Air Products & Chemicals, Inc.*<sup>86</sup> and *Railroad Commission v. Champion International Corp.*<sup>87</sup> These two separate appeals arose from the same administrative order, Railroad Commission Gas Utilities Docket No. 500, a rate increase application filed by Lo-Vaca Gathering Company. One of Lo-Vaca's customers, Amoco Gas Company, intervened in Docket No. 500 and sought a commission order permitting it to flow through to its customers whatever price increases it incurred as a result of Lo-Vaca's rate increase application. The commission severed Amoco's intervention from Docket No. 500 and carried it as Docket No. 1702. On June 18, 1979, the Railroad Commission issued an order in Docket No. 1702, granting Amoco's application and allowing it to flow through to its customers any increased natural gas costs it might incur *in the future* as a result of whatever final order might ultimately be rendered in Docket No. 500. The parties opposing Amoco's application for a flow-through order in Docket No. 1702 duly filed motions for rehearing before the Railroad Commission, which overruled them. They then filed suit and obtained a temporary injunction preventing the enforcement of the flow-through order in Docket No. 1702, although at the time of suit no final order had yet been rendered in Docket No. 500.<sup>88</sup> On appeal the Austin court of civil appeals in *Air Products* reversed the trial court on the ground that the order in Docket No. 1702 was not a final, appealable order.<sup>89</sup> The court noted that the flow-through order in Docket No. 1702 specifically conditioned its effectiveness upon the rendition of a final order in Docket No. 500, which had not occurred at the time suit was filed.<sup>90</sup> Consequently, the court held that the June 18, 1979, order in Docket No. 1702 was not final, the administrative appeal to the district court was a nullity, and the temporary injunction was void for want of jurisdiction.<sup>91</sup>

By the time the *Air Products* decision was rendered, the Railroad Commission had issued its order in Docket No. 500. In *Champion-International* the parties again instituted administrative appeals from the June 18, 1979,

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84. See *Sun Oil Co. v. Railroad Comm'n*, 158 Tex. 292, 296, 311 S.W.2d 235, 237 (1958) (to be reviewable, an administrative order must be final).

85. "So long as matters remain open, unfinished or inconclusive, there is no final decision." *Allen v. Crane*, 257 S.W.2d 357, 358 (Tex. Civ. App.—San Antonio 1953, writ ref'd n.r.e.). See also *Mahon v. Vandygriff*, 578 S.W.2d 144, 147 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (concerning the finality of an administrative order).

86. 594 S.W.2d 219 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

87. 601 S.W.2d 186 (Tex. Civ. App.—Austin 1980), writ granted *sub nom.* Big Three Indus., Inc. v. Railroad Comm'n, 24 Tex. Sup. Ct. J. 176 (Jan. 17, 1981). *Champion International Corp.* and *Air Products & Chemical Co.* settled their cases, and their appeals were dismissed. *Id.*

88. 594 S.W.2d at 220.

89. *Id.* at 222.

90. *Id.* at 221. The temporary injunction was vacated. *Id.*

91. *Id.*

order in Docket No. 1702, sought and obtained from the district court a temporary injunction preventing the enforcement of the order, and again were reversed by the Austin court of civil appeals.<sup>92</sup> The court held that the June 18, 1979, order in Docket No. 1702 still was not final.<sup>93</sup> The court suggested that the parties move the commission to enter a final order and, failing that, file a writ of mandamus to compel the commission to enter such an order. The parties could obtain judicial review of the flow-through order only upon the commission's rendition of a final order in Docket No. 1702.

In *Fincher v. City of Texarkana*<sup>94</sup> the court's interpretation of a final order was taken to an extreme. A police officer appealed to the courts from an order of the Texarkana Civil Service Commission sustaining an indefinite suspension of the officer by the chief of police. The relevant statute requires the commission to state in its decision whether the officer "shall be permanently or temporarily dismissed . . . or be restored to his former position."<sup>95</sup> In this case, the commission merely stated that it "affirmed" the police chief's decision indefinitely suspending the police officer.<sup>96</sup> The Texarkana court of civil appeals held that this was not a final order because it was not in literal compliance with the statute and dismissed the cause for want of jurisdiction.<sup>97</sup>

A doctrine closely related to the finality of orders rule is that of exhaustion of remedies. Exhaustion of remedies generally requires a party to pursue all corrective procedures and remedial steps available within an agency prior to seeking judicial review of an order.<sup>98</sup> Both doctrines are intended to avoid disorderly, premature disruption of the administrative process. Only extraordinary circumstances justify judicial intervention in ongoing proceedings.<sup>99</sup> One exception to the exhaustion requirement arises when the administrative remedy is clearly shown to be inadequate to prevent the threatened injury. This exception is illustrated in *Marshall v. Huffhines Steel Co.*,<sup>100</sup> in which the Secretary of Labor brought an action

92. 601 S.W.2d at 187.

93. *Id.* Although it did not expressly so state, the court apparently based its decision on the fact that the order did not establish the exact flow-through rate to be charged.

94. 598 S.W.2d 22 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.). Two other recent cases dealing with finality of orders as a prerequisite to appeal are *Railroad Comm'n v. Brazos River Gas Co.*, 594 S.W.2d 216 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (partial grant of motion for rehearing precluded existence of a final, appealable order); *Texas Health Facilities Comm'n v. West Tex. Home Health Agency*, 588 S.W.2d 655 (Tex. Civ. App.—Waco 1979, no writ) (cease and desist order held a final, appealable order).

95. TEX. REV. CIV. STAT. ANN. art. 1269m, § 16 (Vernon 1963).

96. 598 S.W.2d at 23.

97. *Id.*

98. B. SCHWARTZ, *supra* note 24, § 173.

99. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Ass'n of Sec. Dealers, Inc.*, 616 F.2d 1363, 1368-71 (5th Cir. 1980), in which the Fifth Circuit relied on both doctrines in dismissing an appeal from a procedural ruling concerning sequestration of parties made by the NASD during the course of an ongoing disciplinary hearing.

100. 488 F. Supp. 995 (N.D. Tex. 1979). *See also Marshall v. Huffhines Steel Co.*, 478 F. Supp. 986 (N.D. Tex. 1979), in which the court denied the employer's motion to dismiss the contempt action.

seeking a contempt order against an employer who refused to comply with an ex parte administrative search warrant. The employer counterclaimed to quash the warrant. The Secretary argued that the employer's counterclaim should be dismissed and its defenses to the contempt order disregarded because the employer had failed to exhaust its administrative remedies within the Occupational Safety and Health Act (OSHA)<sup>101</sup> for protesting the search. The district court rejected this argument because all of the suggested administrative remedies were ex post facto in nature, in that none of them allowed the employer to prevent the search from taking place.<sup>102</sup> Consequently, the exhaustion requirement was held inapplicable.<sup>103</sup>

#### D. Exhaustion of Remedies—Motion for Rehearing

The exhaustion of remedies doctrine has particular significance for the Texas practitioner because of the APTRA's provision for an administrative motion for rehearing. Section 16(e) of the statute provides that a motion for rehearing is "a prerequisite to an appeal."<sup>104</sup> The legislative history of the APTRA indicates that the motion for rehearing requirement was patterned after the motion for new trial provisions in the Texas Rules of Civil Procedure.<sup>105</sup>

As previously noted, apparent conflicts between the APTRA and the various state agencies' enabling statutes have created confusion.<sup>106</sup> This is true with regard to section 16(e) and motions for rehearing as well. For example, the Polygraph Examiners Act specifically sets forth the steps to be taken in appealing from an order of the State Board of Polygraph Examiners, including the following: "Any person dissatisfied with the action of the board . . . may appeal the action of the board by filing a petition

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101. 29 U.S.C. §§ 651-678 (1976).

102. 488 F. Supp. at 996-97.

103. *Id.*; see *Marshall v. Nichols*, 486 F. Supp. 615 (E.D. Tex. 1980) (employer did not have to exhaust administrative remedies to protest an administrative subpoena issued by OSHA when OSHA exceeded its statutory authority and jurisdiction in issuing the subpoena). See also *Camenisch v. University of Tex.*, 616 F.2d 127 (5th Cir.) (holding that a handicapped person need not resort to or exhaust his administrative remedies for complaining about violations of the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701-794 (1975 & Supp. 1980), prior to filing suit, because he possessed an implied private cause of action under the statute), *rehearing denied en banc*, 618 F.2d 1389 (5th Cir.), *cert. granted*, 49 U.S.L.W. 3332 (Nov. 4, 1980) (No. 80-317). The *Camenisch* court stated: "An inappropriate exhaustion requirement could so limit the existence of the private right of action we find today that it would effectively do away with our holding . . . that it was the Congressional intent that plaintiffs have access to the courts to enforce individual causes of action under Section 504." 616 F.2d at 134.

104. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 16(e) (Vernon Supp. 1980-1981). No comparable provision exists in the 1946, 1961, or 1981 versions of the Model State Administrative Procedure Act, and this requirement is rare among other state administrative procedure statutes. See 2 F. COOPER, *supra* note 62, at 582-84. See also K. DAVIS, *supra* note 77, § 22.08.

105. See *United Sav. Ass'n v. Vandygriff*, 594 S.W.2d 163, 168-69 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.); Guinn, *Post Hearing Stage*, in STATE BAR OF TEXAS, TEXAS ADMINISTRATIVE LAW AND PROCEDURE G-4 (1976).

106. See text accompanying notes 63-83 *supra*.



within 30 days thereafter in the district court . . . ."<sup>107</sup> Because of this detailed outline for administrative appeals, one plaintiff assumed that the APTRA's requirement of a motion for rehearing was not a prerequisite to an appeal. The Dallas court of civil appeals disagreed.<sup>108</sup> It noted that the purpose of the APTRA was to "afford minimum standards of uniform practice and procedure for state agencies."<sup>109</sup> In an effort to harmonize the two acts, the court held that the thirty-day deadline for filing suit in the Polygraph Examiners Act began to run only after a party had filed a motion for rehearing and the motion had become final as provided in the APTRA.<sup>110</sup> The court further construed the term "any person dissatisfied with the action of the board" in the Polygraph Examiners Act to mean only a dissatisfied person who had filed a motion for rehearing, thereby exhausting his administrative remedies.<sup>111</sup>

Texas courts have construed the provisions of section 16(e) literally. In *Dow Chemical Co. v. Public Utility Commission*<sup>112</sup> a purported motion for rehearing was held to be insufficient due to the movant's failure to request proper relief. The administrative order in question was an electric rate tariff order. An electric utility company had filed an application for increased rates with the Texas Public Utility Commission (PUC). The PUC's final order required the utility company to file a revised rate tariff, and the company complied with the order. One of the parties protesting the rate increase application filed a document entitled "Disagreement with the Revised Tariff," requesting rejection of the revised tariff.<sup>113</sup> This document contained neither a complaint directed to the agency's findings of fact nor a request for rehearing. The other parties' formal motions for rehearing were all overruled by a single order of the PUC. The court of civil appeals ignored the form of the pleading and looked at its substance to determine its sufficiency, but nevertheless held that the "Disagreement" was not a motion for rehearing within the meaning of section 16(e) because it failed to request any of the relief normally associated with such a motion.<sup>114</sup> Consequently, the plaintiff's cause was dismissed for want of jurisdiction.<sup>115</sup>

The practitioner must not only be certain of the relief requested in his motion for rehearing; he also must take care to specify his grounds of error. While section 16(e) requires that the motion for rehearing be filed, it fails to indicate the degree of specificity required. During the survey period this issue was addressed for the first time by two courts of civil ap-

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107. TEX. REV. CIV. STAT. ANN. art. 4413(29cc), § 23 (Vernon 1976).

108. *State Bd. of Polygraph Examiners v. Hamilton*, 594 S.W.2d 833, 835 (Tex. Civ. App.—Dallas 1980, no writ).

109. *Id.* at 835.

110. *Id.*

111. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 4413(29cc), § 23 (Vernon 1976)).

112. 601 S.W.2d 506 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).

113. *Id.* at 506.

114. *Id.* at 507-08.

115. *Id.* at 508.

peals. In *Railroad Commission v. Missouri Pacific Railroad*<sup>116</sup> the railroad's motion for rehearing stated only that the commission's order "is contrary to the law applicable to the case, and is without support in the evidence."<sup>117</sup> The Beaumont court of civil appeals held that this was a sufficient statement of the ground of error.<sup>118</sup> In *United Savings Association v. Vandygriff*,<sup>119</sup> however, the Austin court of civil appeals held insufficient the statement that the commissioner failed to meet the requirements of section 11.11 of the Texas Savings and Loan Act and section 16(b) of the APTRA.<sup>120</sup>

While these holdings might on their faces appear to conflict, they in fact complement one another. Both courts of civil appeals agreed that pleadings in administrative proceedings are not subject to "the technical niceties of pleadings and practice required in court trials."<sup>121</sup> Both agreed that the purpose of the motion for rehearing is to alert the agency to the error claimed and to allow the agency an opportunity to correct it. This necessarily entails a certain degree of particularity. The Austin court placed particular emphasis on the legislative history of section 16(e).<sup>122</sup> The court concluded that had the legislature not intended to require some degree of specificity in the motion for rehearing similar to that required in a motion for new trial, it could have provided for a mere notice of appeal, akin to that found in Texas Rule of Civil Procedure 354(c) as it then existed.

The *Missouri Pacific Railroad* and *United Savings* decisions do not resolve the question of what constitutes an adequate motion for rehearing. A partial answer may be found by reference to the specific motions involved in the two cases. In the *Missouri Pacific Railroad* case the motion for rehearing stated that the Railroad Commission's order was "without support in the evidence."<sup>123</sup> The court held that this assertion was equivalent to saying that the order was not supported by substantial evidence, the specific standard of review by which the order must be measured.<sup>124</sup> By way of contrast, in the *United Savings* case, the motion for rehearing stated that the savings and loan commissioner erred in failing to adhere to certain sections of two statutes, but did not specify which of ten distinct subsections of those sections had been violated.<sup>125</sup> The court then

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116. 588 S.W.2d 640 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).

117. *Id.* at 641.

118. *Id.*

119. 594 S.W.2d 163 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

120. *Id.* at 170.

121. *Id.* at 169 (quoting *Thacker v. Texas Alcoholic Beverage Comm'n*, 474 S.W.2d 258, 260 (Tex. Civ. App.—San Antonio 1971, no writ)); 588 S.W.2d at 641.

122. 594 S.W.2d at 168-70. The administrative motion for rehearing was patterned after the motion for a new trial in rule 324 of the Texas Rules of Civil Procedure, which at that time was still required as a prerequisite for appeal. See also TEX. R. CIV. P. 324.

123. 588 S.W.2d at 641.

124. *Id.* This type of statement in a rehearing motion is analogous to the general point of error used in appellate briefs. For example, a statement that the court erred in rendering summary judgment may be a sufficient statement of the point of error. See *Blundell v. Lemon*, 596 S.W.2d 239 (Tex. Civ. App.—Texarkana 1980, no writ).

125. 594 S.W.2d at 170.

concluded that the commissioner could not ascertain the particular error from a general reference to those two statutory sections. In discussing this, the court did provide some guidance concerning the requisite degree of particularity:

"The key to pleading in the administrative process is nothing more than *an opportunity to prepare*." . . . A motion for rehearing under Section 16(e) of the Procedure Act is sufficient if it gives the agency sufficient notice of alleged error so as to allow the agency to correct the error or to prepare to defend it.

. . . Technical specificity is not required, it is true, but the agency should not be put in a position of having to guess what error is alleged.<sup>126</sup>

The line of demarcation between a vague, indefinite motion for rehearing and a specific motion for rehearing will not always be clear. It may be predicted, however, that most parties in the future will resort to "technical specificity" as a precautionary measure.

### E. *Primary Jurisdiction*

The doctrine of primary jurisdiction, while closely related to exhaustion of remedies, is a separate and distinct legal principle. Both doctrines concern the timing of judicial review.<sup>127</sup> The United States Supreme Court has stated:

"Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.<sup>128</sup>

Illustrative of these principles are three recent cases dealing with the jurisdiction of the Texas Public Utility Commission. In *Almeda Mall, Inc. v. Houston Lighting & Power Co.*<sup>129</sup> suit was brought against an electric utility by the developers and owners of regional shopping malls. The plaintiffs charged that the utility's refusal to sell electricity through a single meter for the malls' resale to their individual tenants constituted rate and

126. *Id.* at 169-70 (citations omitted; emphasis in original).

127. See B. SCHWARTZ, *supra* note 24, § 165. As explained by Professor Schwartz: "The basic difference is that primary jurisdiction determines whether a court or an agency has *initial* jurisdiction; exhaustion determines whether *review* may be had of agency action which is not the last agency word in the matter." *Id.* at 481 (emphasis in original). See also K. DAVIS, *supra* note 77, § 19.01.

128. *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956); see *D & S Invs., Inc. v. Mouer*, 521 S.W.2d 118, 120 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); *Kavanaugh v. Underwriters Life Ins. Co.*, 231 S.W.2d 753, 755-56 (Tex. Civ. App.—Waco 1950, writ ref'd).

129. 615 F.2d 343 (5th Cir. 1980).

service discrimination prohibited by article 1438.<sup>130</sup> This claim was dismissed for want of jurisdiction on the grounds that the enactment of the Public Utility Regulatory Act<sup>131</sup> vested the PUC with exclusive original jurisdiction over all electric rates, operations, and service.<sup>132</sup> The court held that article 1438, which prohibits rate and service discrimination, is not a grant of general jurisdiction to the courts independent of the administrative framework of the PURA.<sup>133</sup> Relying on the doctrine of primary jurisdiction, the court dismissed the action because the plaintiffs had failed to make a complaint to the administrative agency prior to litigation.<sup>134</sup>

The *Almeda Mall* case should be compared with the result reached in *Central Power & Light Co. v. Del Mar Conservation District*.<sup>135</sup> In 1960 the utility company and the conservation district entered into an agreement providing that the utility company was to pay the conservation district two percent of its gross receipts from the sale of electricity within the district. The utility company further was to charge the same rates in the district as it did in the neighboring city of Laredo. After the passage of the PURA, the utility company applied for and obtained from the PUC an order approving various rates and tariffs. In 1977 the utility company announced that it would no longer honor the 1960 agreement with the conservation district and would start charging higher rates within the district than those in Laredo. When the conservation district brought suit for specific performance of the agreement, the utility company moved to dismiss the suit for want of jurisdiction on the ground that it was a dispute over electric rates and services, within the primary and exclusive jurisdiction of the PUC. While the court recognized the primary jurisdiction doctrine, it held that the suit was not a dispute over rates and services, but rather, one for breach of contract.<sup>136</sup> The court stated that the two percent gross receipts provision was a valid contractual obligation not displaced by the PURA.<sup>137</sup> The part of the agreement relating to equal rate charges was more troublesome because it appeared on its face to deal with rate discrimination. The court, however, upheld this portion as well, basing its action

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130. TEX. REV. CIV. STAT. ANN. art. 1438 (Vernon 1980). The statute provides: "It shall be unlawful for any such corporation to discriminate against any person, corporation, firm, association or place, in the charge for such gas, electric current or power, or in the service rendered under similar and like circumstances." *Id.*

131. TEX. REV. CIV. STAT. ANN. art. 1446c (Vernon 1980).

132. 615 F.2d at 355; *see* *General Tel. Co. v. City of Point Comfort*, 553 S.W.2d 808 (Tex. Civ. App.—Corpus Christi 1977, no writ); *Southwestern Bell Tel. Co. v. City of Kountze*, 543 S.W.2d 871 (Tex. Civ. App.—Beaumont 1976, no writ).

133. 615 F.2d at 355. "Article 1438 . . . does not speak to jurisdiction but merely establishes a cause of action [within the PUC] for the discriminatory acts." *Id.*

134. *Id.*

135. 594 S.W.2d 782 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).

136. *Id.* at 786.

137. *Id.* at 785-86. Shortly after litigation commenced, the utility company instituted proceedings before the PUC to cut off service to the conservation district for failure to pay its bills. In considering the PUC's jurisdiction over the two percent gross receipts dispute, the hearing examiner concluded that this was a contractual dispute and not within the PUC's exclusive jurisdiction. *Id.*

on express language within the PUC rate order.<sup>138</sup>

*Public Utilities Board v. Central Power & Light Co.*<sup>139</sup> also involved a territorial dispute. Two public electric utilities claimed that a municipal utility was illegally extending services outside its designated area of service. The territorial divisions resulted from a PUC certification order that amounted to little more than agency approval of a private agreement between the three utilities dividing the territories. The municipal utility argued that court action was barred by the doctrine of primary jurisdiction because the suit involved interpretation of a PUC certification order, construction of the PURA, and determination of rate and service disputes.

In rejecting these three arguments, the court shed light on the primary jurisdiction doctrine.<sup>140</sup> The court stated that one of the principal justifications for the doctrine is that an administrative agency is best equipped to handle complex technical issues before a matter reaches a court.<sup>141</sup> Another justification is that entrusting jurisdiction initially to the agency promotes uniform interpretation of the agency's rules and regulations, an otherwise unlikely result when issues are presented to various courts and juries.<sup>142</sup> Neither of these justifications was found applicable in this case. Because the certification order was little more than a formalized contract between the parties, the court found that there was no great need for agency expertise to interpret it; nor was agency experience necessary for proper construction of the PURA.<sup>143</sup> The court held that interpretation and construction in this case were inherently judicial functions and would not be usurped by the PUC "unless the legislature by valid statute has explicitly granted exclusive jurisdiction to the administrative body."<sup>144</sup> Because this was not a rate and services controversy within the exclusive jurisdiction of the PUC, the court concluded that the trial court possessed at least concurrent jurisdiction with the agency.<sup>145</sup>

#### F. *Time Limits for Agency Actions*

Section 555(b) of the Federal Administrative Procedure Act (APA) requires administrative agencies to decide issues "within a reasonable

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138. *Id.* at 791-93. The rate tariff approved by the PUC specifically provided that if the revenues approved by the rate tariff "cannot be collected from . . . contract customers, because of some self-imposed impediment, the deficit shall be borne by the company in order that there be no discrimination between customers because of favoritism in rates." *Id.* at 791 (emphasis added). The court interpreted this to have the effect of a "grandfather" clause, thus approving the 1960 agreement. *Id.* at 792.

139. 587 S.W.2d 782 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

140. *Id.* at 786-88. The court distinguished primary jurisdiction from the doctrine of exhaustion of remedies. See note 127 *supra*.

141. 587 S.W.2d at 787; see *Kavanaugh v. Underwriters Life Ins. Co.*, 231 S.W.2d 753, 755 (Tex. Civ. App.—Waco 1950, writ ref'd).

142. 587 S.W.2d at 788; see *Kavanaugh v. Underwriters Life Ins. Co.*, 231 S.W.2d 753, 755 (Tex. Civ. App.—Waco 1950, writ ref'd).

143. 587 S.W.2d at 787.

144. *Id.* at 788.

145. *Id.* at 789.

time.”<sup>146</sup> Reviewing courts are empowered to “compel agency action . . . unreasonably delayed.”<sup>147</sup> Once an agency has acted, however, the power of the courts to grant *ex post facto* relief based on unreasonable delay is greatly circumscribed. The complaining party must be able to demonstrate injury from the delay.<sup>148</sup> In addition, the delay must be due to conditions such as “slothfulness, lethargy, inertia or caprice” on the part of the agency, as opposed to heavy agency workload or understaffing.<sup>149</sup>

*Estate of French v. Federal Energy Regulatory Commission*<sup>150</sup> presented an illustrative application of these principles. In 1958 French, a small Texas gas producer, filed an application for increased rates with the Federal Power Commission. The Commission commenced proceedings in 1963 to determine if the 1959 rate increase application was excessive. In 1971 the Commission issued an order finding that French’s rate increase for the years 1959 through 1964 was excessive. The order required French’s estate to refund not only the excess amount, but also interest accrued from 1959 through 1971. The estate immediately petitioned the Commission to waive the interest payment. This petition was not addressed by the agency until 1978, at which time the Commission not only refused to waive the interest charges from 1959 to 1971, but also assessed additional interest charges from 1971 through 1978. The estate brought suit challenging the two interest charges. The Fifth Circuit, in upholding the interest charges from 1959 through 1971, noted that assessment of interest is a risk inherent in a rate increase application and one voluntarily undertaken by French in 1959 when he filed the application and refund bond.<sup>151</sup> The interest charges from 1971 through 1978, however, were another matter. The court found that the Commission provided no valid reason for the seven-year delay in ruling on the estate’s petition.<sup>152</sup> The court concluded that it would “violate even the most fundamental notions of equity to allow the Commission to assess interest caused by its own delay.”<sup>153</sup> While most claims of unreasonable delay are to be judged on their particular facts, the court here determined that a seven-year delay was *per se* unreasonable.<sup>154</sup>

### G. Rule Making

The APA<sup>155</sup> prescribes that administrative agencies must provide ad-

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146. 5 U.S.C. § 555(b) (1976). “With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.” *Id.*

147. *Id.* § 706(1).

148. *Chromcraft Corp. v. EEOC*, 465 F.2d 745, 747 (5th Cir. 1972).

149. *Id.* at 747-48. See generally *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-66 (1969); *EEOC v. Exchange Sec. Bank*, 529 F.2d 1214, 1216-17 (5th Cir. 1976).

150. 603 F.2d 1158 (5th Cir. 1979).

151. *Id.* at 1167.

152. *Id.*

153. *Id.* at 1168. In addition, the Commission apparently had lost part of French’s file during the 1971-1978 delay.

154. *Id.*

155. 5 U.S.C. § 500 (1976).

vance notice of proposed rules and allow an opportunity for interested parties to present their views about the proposals.<sup>156</sup> The purpose of these provisions is to assure "fairness and mature consideration" of rules of general application.<sup>157</sup> This comports with the concept that a sound rule is based on a broad array of information, with input from those who are to be most affected. At the same time, however, the APA does exempt from the notice and comment requirements "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,"<sup>158</sup> all of which presumably do not require the same broad base of comment and opinion prior to promulgation. There have been relatively few challenges to an agency's reliance on these exceptions, and the majority of them have been unsuccessful.<sup>159</sup>

Two cases decided during the survey period addressed these various exemptions; in each case, the party challenging agency procedure prevailed. In *Marshall v. Hufhines Steel Co.*<sup>160</sup> the plaintiff challenged an amendment by the Secretary of Labor of certain OSHA rules to allow ex parte search warrants for the inspection of business premises. The second case, *Brown Express, Inc. v. United States*,<sup>161</sup> involved an Interstate Commerce Commission (ICC) rule abolishing a forty-year informal policy whereby the ICC previously had given regulated carriers notice of applications for emergency temporary authority permits within their service area. In both cases, the agencies failed to follow the notice and comment procedures of the APA, claiming that the regulations were not subject to such requirements.<sup>162</sup> In both cases, the courts disagreed and vacated the rules.<sup>163</sup>

Although the APA exempts interpretative rules and general statements of policy from the notice and comment procedures,<sup>164</sup> it fails to define those terms. A commonly accepted definition of an interpretative rule is that it states what the agency believes to be the meaning of existing law, but does not itself create or establish new law.<sup>165</sup> A general statement of policy is analogous to a press release, announcing a forthcoming rule or indicating a general course of action the agency intends to take in the future.<sup>166</sup> The rules challenged in both cases, however, effected an immediate change in existing policy. As new law, the rules were neither interpretations nor general statements of policy.

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156. *Id.* § 553.

157. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969).

158. 5 U.S.C. § 553(b)(A) (1976).

159. *See* B. SCHWARTZ, *supra* note 24, § 61.

160. 488 F. Supp. 995 (N.D. Tex. 1979).

161. 607 F.2d 695 (5th Cir. 1979).

162. *See* note 157 *supra* and accompanying text.

163. 607 F.2d at 703; 488 F. Supp. at 1001.

164. 5 U.S.C. § 553(b)(A) (1976).

165. "Generally speaking, it seems to be established that 'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretive rules are statements as to what the administrative officer thinks the statute or regulation means." *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

166. *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).

On its face, each rule in question appeared to be a mere procedural change in internal agency operations, ostensibly falling within the procedural rule exemption.<sup>167</sup> The mere fact that a rule has procedural overtones, however, does not automatically remove it from the APA's notice and comment requirements. Any rule, regardless of its appellation, that has a substantial impact on the regulated industry or an important class of the members or products of that industry must be promulgated in accordance with the APA procedures.<sup>168</sup> Under this test, the courts concluded that both rules were substantive in nature, not procedural, and thus not exempt from notice and comment.<sup>169</sup> The OSHA rule in *Huffhines Steel* was a "180-degree shift in the procedure by which over five million employers are kept in compliance with the [Occupational Safety and Health] Act."<sup>170</sup> As such, it had a substantial impact on the regulated industry. The ICC rule in *Brown Express* changed an informal practice of forty years' duration upon which the regulated industry justifiably had come to rely.<sup>171</sup>

### III. JUDICIAL REVIEW

#### A. Availability of Review

In Texas the step from a state agency to the courthouse is not always an easy one. The right of appeal is often carefully controlled by statute. Contrary to the presumption in federal courts in favor of the availability of judicial review,<sup>172</sup> Texas state courts generally adhere to the view that the right of appeal from an administrative order attaches only in limited situa-

167. 5 U.S.C. § 533(b)(A) (1976).

168. *Pickus v. Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974); *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970). The courts are not bound by the label that the agency attaches to the rule it promulgates. See, e.g., *Brown Express, Inc. v. United States*, 488 F. Supp. 995, 999 (N.D. Tex. 1979); *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970).

169. 607 F.2d at 700; 488 F. Supp. at 1000-01.

170. 488 F. Supp. at 1001.

The Secretary [of Labor] has been invited by the United States Supreme Court and the Fifth Circuit Court of Appeals to reexamine his inspection enforcement procedures, . . . and all that remains is for the Secretary to do so in a manner consistent with the Administrative Procedure Act, which will ensure that the decision reached as a result of that reexamination is not hasty or ill-advised:

*Id.* (citations omitted).

171. 607 F.2d at 702-07. As explained by the court, measuring the degree of reliance involved consideration of substantial economic impact upon the industry. *Id.*

172. The United States Supreme Court has stated the presumption as follows:

[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. . . . [T]he Administrative Procedure Act . . . embodies the basic presumption of judicial review . . . so long as no statute precludes such relief or the action is not one committed by law to agency discretion.

*Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967); see *Heikkila v. Barber*, 345 U.S. 229, 232-33 (1953); *Johnson v. Reed*, 609 F.2d 784, 788-89 (5th Cir. 1980). "There is now virtually a presumption [in federal courts] in favor of judicial review: review is the rule and nonreviewability an exception which must be demonstrated." B. SCHWARTZ, *supra* note 24, § 148.



tions. Generally, appeal is permissible only when provided for by statute or when a constitutional or vested property right has been infringed.<sup>173</sup> In order to obtain judicial review of an agency order, a party in Texas must be able to specify some nexus between the agency and the courthouse.<sup>174</sup> This nexus must take the form of a statutory provision for judicial review or a deprivation of constitutional or vested property rights.

During the survey period, the Austin court of civil appeals examined the nexus requirement in a very significant decision, *Motorola, Inc. v. Bullock*.<sup>175</sup> The court held that section 19 of the APTRA<sup>176</sup> created no substantive rights of appeal, but established only a general procedural method for perfecting an administrative appeal within the substantive framework of the various enabling statutes.<sup>177</sup> In that case, the comptroller of public accounts issued tax deficiency determinations to Motorola in 1976, which Motorola paid under protest. Instead of filing suit for recovery of the taxes within ninety days as authorized by statute, Motorola initiated a claim for

173. *Firemen's & Policemen's Civil Serv. Comm'n v. Blanchard*, 582 S.W.2d 778, 779 (Tex. 1979); *Stone v. Texas Liquor Control Bd.*, 417 S.W.2d 385, 385-86 (Tex. 1967); *Brazosport Sav. & Loan Ass'n v. American Sav. & Loan Ass'n*, 161 Tex. 543, 548-51, 342 S.W.2d 747, 750-52 (1961); *City of Amarillo v. Hancock*, 150 Tex. 231, 234-35, 239 S.W.2d 788, 790-91 (1951); *Duckett v. Civil Serv. Comm'n*, 598 S.W.2d 640, 641-42 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). This judicial philosophy of nonreviewability is in keeping with views that were prevalent during the nineteenth century. See K. DAVIS, *supra* note 77, § 28.02.

174. Without the requisite nexus, a party in Texas may be unable to invoke the court's jurisdiction. For example, a police officer could not appeal an otherwise nonappealable decision of the firemen's and policemen's civil service commission by placing his cause of action within the Uniform Declaratory Judgments Act. TEX. REV. CIV. STAT. ANN. art. 2524—1 (Vernon 1965); *Crawford v. City of Houston*, 600 S.W.2d 891, 894 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (good summation of Texas law concerning nonreviewability). See also *Duckett v. Civil Serv. Comm'n*, 598 S.W.2d 640, 641-42 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

Nor could an employer contest by way of a declaratory judgment action a decision of the Texas Employment Commission when the relevant statute specified other means of obtaining court review. *Campbell v. Texas Employment Comm'n*, 598 S.W.2d 40 (Tex. Civ. App.—Austin 1980, no writ). This was so because the declaratory judgment statute is procedural only and is not a general grant of subject matter jurisdiction to the courts. *Crawford v. City of Houston*, 600 S.W.2d 891 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). "It is settled that the provisions of the Uniform Declaratory Judgments Act, Article 2524—1, V.A.C.S., confer neither new substantive rights upon the parties nor additional jurisdiction on the courts. The Act merely provides a procedural device for the determination of controversies which are within the jurisdiction of the courts." *Id.* at 894. *But cf.* 2 F. COOPER, *supra* note 62, at 636-40 (discussing desirability of broad use of declaratory judgments).

In the same vein, a widow of a former city employee was held to have no common law cause of action against the Texas Municipal Retirement System for negligently failing to notify her husband of his rights under the retirement statute. *Merida v. Texas Mun. Retirement Sys.*, 597 S.W.2d 55, 57 (Tex. Civ. App.—Austin 1980, no writ). Because whatever rights Merida possessed were created by the legislature, her remedies were also prescribed by statutory procedures for judicial review. *Id.* "[If a] cause of action and remedy for its enforcement are derived, not from the common law, but from [a] statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects, or the action is not maintainable." *Mingus v. Wadley*, 115 Tex. 551, 558, 285 S.W. 1084, 1087 (1926).

175. 586 S.W.2d 706 (Tex. Civ. App.—Austin 1979, no writ).

176. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19 (Vernon Supp. 1980-1981).

177. 586 S.W.2d at 708.

refund with the comptroller. Motorola pursued this claim through administrative channels until it received a final denial by the comptroller in 1977, one year later. Upon initiating suit to overturn the comptroller's decision, Motorola discovered that there was no statutory provision for judicial review of a denial of a claim for refund. The only nexus connecting the comptroller's office and the courts was a suit for recovery of taxes filed within ninety days after payment and protest, an avenue ignored by Motorola in 1976.<sup>178</sup> Motorola thereupon argued that section 19 of the APTRA was itself a general grant of authority for judicial review, providing that any person aggrieved by administrative action in a contested case may seek judicial review of such action. The court rejected Motorola's argument, holding that the APTRA merely provides a general procedural guide for judicial review, while the substantive rights of parties are controlled by the enabling law by which a particular agency is created.<sup>179</sup> Section 19 repeatedly incorporated such phrases as "the law under which review is sought," which indicates an intention to leave undisturbed the substantive rights granted under the various enabling statutes.<sup>180</sup> The *Motorola* decision serves to underscore the importance of the nexus requirement in perfecting an appeal.

The doctrine of sovereign immunity poses another potential barrier to judicial review. In numerous situations, a party is aggrieved by governmental action to which the procedural provisions of the APTRA have no application and for which no statutory right of appeal exists. In these instances, the doctrine of sovereign immunity, broadly applied, would stand as a bar to any suit brought for the purpose of reviewing an agency decision "since every review action is in substance an action against the government on whose behalf the agency acted."<sup>181</sup> The private citizen would then be without remedy against illegal government action, unless he could obtain legislative consent or statutory authorization for his suit.

Courts have overcome this potential obstacle by resorting to the legal fiction that the acts of a state official, if alleged to be illegal, contrary to law, or without statutory authorization, are not the acts of the state and

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178. See TEX. TAX.-GEN. ANN. arts. 1.05 (Vernon Supp. 1980-1981), 1.06 (Vernon 1969).

179. 586 S.W.2d at 709-10; see *Dan Ingle, Inc. v. Bullock*, 578 S.W.2d 193, 194 (Tex. Civ. App.—Austin 1979, writ ref'd); *Robinson v. Bullock*, 553 S.W.2d 196, 197-98 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), cert. denied, 436 U.S. 918 (1978).

180. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19(b) (Vernon Supp. 1980-1981) ("[u]nless otherwise provided by statute"); *id.* §§ 19(c)-(d) ("the manner of review authorized by law"); *id.* § (e) ("the law under which review is sought"). The *Motorola* court concluded:

[N]o real or substantial repugnancy exists between Article 1.05, which grants the taxpayer a *substantive right* and the remedial mode by which to question validity of a tax statute, and the *general procedural route* provided by section 19 under which appeals may be made from adverse rulings of state agencies. . . . Nowhere do we find [in section 19] an attempt to grant a substantive right not provided by other statutes or laws.

586 S.W.2d at 709 (emphasis in original).

181. B. SCHWARTZ, *supra* note 24, § 202; see *Southwestern Apparel, Inc. v. Bullock*, 598 S.W.2d 702 (Tex. Civ. App.—Austin 1980, no writ) (application of the doctrine of sovereign immunity). See generally Schoenbrun, *Sovereign Immunity*, 44 TEXAS L. REV. 151 (1965).

hence may be attacked in court.<sup>182</sup> The United States Supreme Court formulated the classic statement of this policy in *Ex parte Young*:<sup>183</sup> an officer who acts illegally is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."<sup>184</sup> The Texas Supreme Court, in a case<sup>185</sup> decided during the survey period, thus summarized the rule: "[A]n entity or person whose rights have been violated by the unlawful action of a State official, may bring suit to remedy the violation or prevent its occurrence, and such suit is not a suit against the State requiring legislative or statutory authorization."<sup>186</sup> In certain situations then, a search for a nexus between the agency and the courthouse is unnecessary because by virtue of the fiction, the suit is one between two private citizens and does not involve the state.

### B. *Substantial Evidence*

In the field of administrative law, the seeming simplicity of the substantial evidence rule is deceiving. To state in the abstract that an administrative order must be supported by substantial evidence is easier than having to define how much evidence is needed to qualify as substantial.<sup>187</sup> In dealing with this problem, the Fifth Circuit has noted that the term "substantial evidence" is not so much a substantive rule of law as it is "a label of convenience that the courts use to define their process of reviewing administrative decisions."<sup>188</sup> The chief significance of the substantial evidence opinions delivered during the survey period stems from the opinions' comments about the meaning of the term in the administrative context.

At the heart of the substantial evidence rule is the concept of reasonableness. Because the agency is presumed to have expertise in its field, the reviewing court is not to weigh the evidence and substitute its own judgment for that of the agency or to decide whether the agency's fact findings are correct.<sup>189</sup> The court merely stands as a bulwark to protect against unreasonable actions. To determine the reasonableness of the agency's decision, the court must review the record as a whole to assess whether there

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182. See *Texas Highway Comm'n v. Texas Ass'n of Steel Importers, Inc.*, 372 S.W.2d 525 (Tex. 1963); *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838 (1958); *Cobb v. Harrington*, 144 Tex. 360, 190 S.W.2d 709 (1945).

183. 209 U.S. 123 (1908).

184. *Id.* at 160.

185. *Director of Dep't of Agriculture & Environment v. Printing Indus. Ass'n*, 600 S.W.2d 264 (Tex. 1980).

186. *Id.* at 265-66.

187. Professor Davis has observed:

[T]he plain reality is that the substantial-evidence rule as the courts apply it is a variable. It is made of rubber, not of wood. It can be stretched north, and it can be stretched east or south or west. And the courts are both willing and able to do the stretching. . . .

K. DAVIS, *supra* note 77, § 29.02, at 530.

188. *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 337 (5th Cir. 1980).

189. B. SCHWARTZ, *supra* note 24, § 211.

is more than a mere scintilla of evidence to support the findings.<sup>190</sup> Beyond this, however, the concept of reasonableness becomes flexible. As stated by one Texas court during the survey period, “[t]he test . . . is whether the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action.”<sup>191</sup> Similarly, the Fifth Circuit recently stated that substantial evidence “‘means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”<sup>192</sup> In another case the Fifth Circuit concluded that “a reviewing court should set aside an agency finding only if, after reviewing the entire record, it so strongly disagrees with that finding that it can conscientiously say that the finding is unreasonable.”<sup>193</sup>

While the issue is not fully resolved, it appears that the more technical and complex the fact finding becomes, the greater deference the court will show to the agency and its presumed expertise. For example, in an appeal from a ruling of the Texas Air Control Board, involving “highly technical and abstruse questions” on air concentrations, the court concluded: “If there were no substantial evidence rules up to this point in time, then this is the case that would have produced it. To ask a court of law, under the facts before us, to order the Board to reverse, modify or reconsider these technical questions would be ludicrous.”<sup>194</sup>

In the past Texas courts often have equated the substantial evidence rule with a consideration of whether the agency’s conduct was arbitrary and capricious.<sup>195</sup> The APTRA, however, has now provided that an agency order can be attacked if it is *either* unsupported by substantial evidence *or* arbitrary and capricious.<sup>196</sup> The Texas Supreme Court apparently has recognized this distinction, for in *Railroad Commission v. Entex, Inc.*<sup>197</sup> it stated without elaboration: “The court may reverse or remand the Commission’s decision if it is not reasonably supported by substantial evidence on the agency record, *or* if it is apparent that the agency action was arbi-

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190. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Lewis v. Metropolitan Sav. & Loan Ass’n*, 550 S.W.2d 11 (Tex. 1977); *Purolator Courier Corp. v. Railroad Comm’n*, 548 S.W.2d 486 (Tex. Civ. App.—Austin 1977, writ ref’d n.r.e.).

191. *United Sav. Ass’n v. Vandygriff*, 594 S.W.2d 163, 166 (Tex. Civ. App.—Austin 1980, writ ref’d n.r.e.) (quoting *Hardy St. Investors v. Texas Water Rights Comm’n*, 536 S.W.2d 85, 87 (Tex. Civ. App.—Waco 1976, writ ref’d n.r.e.)).

192. *Warncke v. Harris*, 619 F.2d 412, 416 (5th Cir. 1980) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971), which quoted *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

193. *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 338 (5th Cir. 1980); cf. *First Fed. Sav. & Loan Ass’n v. Community Sav. & Loan Ass’n*, 592 S.W.2d 418, 419 (Tex. Civ. App.—Waco 1979, writ ref’d n.r.e.) (“The word ‘reasonably’ . . . gives to judicial review a broader scope than it would have if *some* evidence were regarded sufficient to sustain the Commissioner’s order.”) (Emphasis in original.)

194. *Galveston Bay Conservation & Preservation Soc’y v. Texas Air Control Bd.*, 586 S.W.2d 634, 640 (Tex. Civ. App.—Austin 1979, writ ref’d n.r.e.).

195. See *Hill & Kent*, *supra* note 6, at 487-88.

196. TEX. REV. CIV. STAT. ANN. art. 6252—13a, §§ 19(e)(5)-(6) (Vernon Supp. 1980-1981).

197. 599 S.W.2d 292 (Tex. 1980).

trary or an abuse of discretion."<sup>198</sup>

### C. *Scope of Review*

In reviewing fact findings of an administrative agency, courts are limited in the scope of their review to an application of the substantial evidence rule. The limitation does not apply, however, when the court is reviewing an agency's conclusions of law. In that situation, the court is free to apply its own legal analysis and is not bound by the agency's legal conclusions.<sup>199</sup> Nonetheless, courts often defer to an agency's interpretation of its statutes and regulations. During the survey period, the Fifth Circuit considered a case that presented a question of law in the interpretation of an Interstate Commerce Commission tariff.<sup>200</sup> The opinion is instructive particularly because of its discussion of the weight to be given to an agency's conclusion of law. The opinion recites the various "weights" assigned to an agency's interpretations of its enabling statute, regulations, contracts, opinion letters, and tariffs, and offers the following conclusion:

It matters little whether following an agency determination is called "great deference," "great weight," "weighed carefully," "respect," "significant weight" or any similar appellation. It is impossible to quantify exactly the weight an administrative interpretation will be given in a particular situation. The agency determination is simply weighed against other factors, but it is not conclusive because, in the final analysis, "the legal standard to be applied is ultimately for the courts to decide and enforce."<sup>201</sup>

This is an important statement of judicial independence, which private litigants should bear in mind. Courts traditionally uphold an agency's interpretation if it is one of several reasonable alternatives, even if the court does not consider it the most reasonable.<sup>202</sup> The party attacking the agency's position should emphasize, however, that the court is the final arbiter.

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198. *Id.* at 298 (emphasis added). For a criticism of the *Entex* decision, see *Railroad Comm'n v. Lone Star Gas Co.*, 599 S.W.2d 659, 662 (Tex. Civ. App.—Austin 1980, writ *ref'd n.r.e.*).

199. See *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979); *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Udall v. Tallman*, 380 U.S. 1 (1965).

200. *Coca-Cola Co. v. Atchison, T. & S.F. Ry.*, 608 F.2d 213 (5th Cir. 1979).

201. *Id.* at 223 (citation omitted).

202. *Brennan v. Southern Contractor's Serv.*, 492 F.2d 498, 501 (5th Cir. 1974). See also *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 272 (5th Cir. 1979).