S A B E R E S

Revista de estudios jurídicos, económicos y sociales

VOLUMEN 3 ~ AÑO 2005

Separata

A Perspective on Independent Judicial Review in the United States

Andrew F. Popper

UNIVERSIDAD ALFONSO X EL SABIO
Facultad de Estudios Sociales
Villanueva de la Cañada

Avda. de la Universidad,1
28691 Villanueva de la Cañada (Madrid, España)

Saberes, vol. 3, 2005

ISSN: 1695-6311

http://www.uax.es/publicaciones/archivos/SABDER05_15.pdf

A Perspective on Independent Judicial Review in the United States

by

Andrew F. Popper

Professor of Law

American University, Washington College of Law

The majority of WTO member states provide some form of independent judicial review of agency decisions. Vietnam is an aspiring WTO participant and has a system of judicial review not fully independent of the other branches of government. Vietnam should consider taking those steps necessary to insure that the judiciary is free from executive or legislative pressure. This action can be informed, in part, by assessing the judicial review standards and limits in the United States.

Prior to the adoption of the 1996 Constitution, the situation in Vietnam was dire. Two years before the new constitution was adopted, one commentator wrote: "[C]ommercial freedom in Vietnam largely depends upon administrative discretion, the availability and quality of review of administrative action becomes critical. Vietnam has never accepted the Anglo-American notion of judicial review as a genuine attempt to bring administration under the rule of law. Indeed, some political actors view administrative review as a potential threat to political authority, although some influential reformers have vigorously championed review. [footnotes omitted] (Gillespie, "Private Commercial Rights in Vietnam: A Comparative Analysis," Stanford Journal of International Law, SUMMER, 1994, 30 Stan. J Int'l L. 325.

The 1996 Constitution of Vietnam arguably provides for a system of independent judicial review of agency decisions (Hien Phap Constitution, XII, art. 146, 1996) but that mandate has not been fully realized. Since the adoption of the Vietnamese

Constitution, the review process has been undertaken by judges appointed by the executive and arguably subject to both executive and legislative control. This system is not directly at odds with the fairness requirements of the World Trade Organization. “W]TO rules...only require "judicial review," a notion that may include traditional judicial review rather than independent judicial review.” (4 Wash. U. Global Stud. L. Rev. 43, “CHINA'S AMENDED CONSTITUTION: QUEST FOR LIBERTY AND INDEPENDENT JUDICIAL REVIEW.”) The shift to independent judicial review, however, would be consistent with the approach other states have taken to meet the WTO’s competency and legitimacy requirements.

In most countries, including the United States and Vietnam, the executive branch can and does review agency action. In the U.S., many if not most agencies have review boards, appeals boards, and ultimate full independent review by a full commission or administrator. (The Atomic Safety and Licensing Board/Appeals Board at the Nuclear Regulatory Commission is an example of this type of review. 42 U.S.C. 2201 et.seq., 10 C.F.R. 2.785.) If review stops there, however, the notion of fairness and public acceptance of agency power is compromised.

Independent judicial review of administrative action is a fundamental expectation in the U.S. legal system in large part because of the power vested in the executive and legislative branches of government. Independent review stems from Marbury v. Madison, (5 U.S. 137, 1 Cranch 137 (1803)), the first judicial review of executive action in the U.S. Some commentators believe that Marbury’s court based rule of law theme may well be the dominant model for international institutions. “Marbury's rule of law themes may...explain the recent transnational trend toward judicial review. Internationally, there is growing recognition of judicial review across a range of legal systems, including those that blend governmental powers rather than separate them. In the EU, Japan, Canada, South Africa, India, Australia, Latin American countries such as Brazil and Argentina, and international organizations such as the WTO and the United Nations, judicial review is being recognized both in theory and practice as an

important component of judicial power, despite sharp differences among these legal cultures over the distribution of political power among the various departments of government....” [footnotes omitted] (Dean Robert J. Reinstein* and Professor Mark C. Rahdert, “RECONSTRUCTING MARBURY,” 57 Ark. L. Rev. 729 (2005).

The WTO has a “competency and legitamcy” requirement that can be addressed by implementing independent “judicial review of the national regulatory authority's determinations.” (Spring, 1998 10 Geo. Int'l Envtl. L. Rev. 915, "Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision.) Independent judicial review is not the only way to meet this requirement but it is certainly the model that resonates with the major trading partners in the WTO. The U.S.administrative law model of independent judicial review is not mandated expressly by WTO, although that may be the result of deficiencies in drafting the WTO standards and not a substantive rejection of independent judicial review. “The traditional administrative law model [U.S.] fits the WTO in some respects, yet fails to fit when it comes to judicial review of WTO actions. What fits is that principals at the national level can demand that WTO-level rulemaking and adjudications be appropriately transparent and adhere to accepted norms of due process.” (Rutgers Law Review, Summer, 2004, 56 Rutgers L. Rev. 927, SYMPOSIUM 2004: CITIZEN PARTICIPATION IN THE GLOBAL TRADING SYSTEM: PANEL I: OPEN DEMOCRATIC PARTICIPATION SCHEME FOR THE WORLD TRADE ORGANIZATION: Transparency and Participation in the World Trade Organization.”)

While the model may not be a direct fit, the importance of independent judicial review in WTO matters is no longer a debatable proposition. China’s use of courts in reviewing WTO related determinations is one clear indicator of the perceived importance of the use of independent judicial review. (“The WTO's judicial review section requires China to provide independent institutions for "prompt review" of all "

administrative action," , Sylvia Ostry,"SPOTLIGHT: CHINA AND THE WTO: THE TRANSPARENCY ISSUE," 3 UCLA J. Int'l L. & For. Aff. 1, (1998))

It bears noting that China has not been entirely successful in separating the political process including the formal role of the state and national executives from the courts. "China's efforts to make its administrative litigation system conform to the WTO "independent judicial review " standard are worthy of some praise. But the limitations of these measures as discussed above should be noted. Moreover, the fundamental problem of China's lack of an independent judicial review system is rooted in the fact that the CCP and local governments control the courts. To resolve this problem, political reform is needed to change the current relationships among courts, local governments, and the CCP." VERON MEI-YING HUNG, "China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform American Journal of Comparative Law," 52 Am. J. Comp. L. 77, Winter, 2004 [Footnotes omitted]). However, unlike Vietnam, the commitment to maintain a separate and independent judiciary seems clear. "China confirmed that it would revise its relevant laws and regulations so that its relevant domestic laws and regulations would be consistent with the requirements of the WTO agreement and the Protocol on procedures for judicial review of administrative actions. The system of judicial review is one of the most important legal concepts that a modern system of law adopts. It is an old problem for developing countries to place more emphasis on the rights of administrations than on legal remedies. As a result, for most developing countries, it is of vital importance to further strengthen and improve the system of legal remedies and judicial review." (The Honorable Cao Jianming, "WTO AND THE RULE OF LAW IN CHINA,"16 Temp. Int'l & Comp. L.J. 379, Fall, 2002).

The U.S. Administrative Procedure Act [APA] (5 USC 551 et. seq., (Supp. 2005)). could provide Vietnam a structure to articulate the basic procedural rights and

obligations for reviewing administrative actions including WTO assessments. In the U.S., the APA is applicable to all

federal agencie and, in conjunction with the Federal Advisory Committee Act, defines agency action broadly. Entities that issue rules, interpretations and orders or decisions in adjudications are covered under the APA. The APA guarantees notice, comment opportunity for rules, and various process entitlements that are at the heart of procedural due process requirements based on the 5th and 14th Amendments the U.S. Constitution. Importantly, the APA states that any party aggrieved by agency action can secure judicial review outside of those rare situations where a statute prohibits review or where the agency is committed to agency discretion by law (5 U.S.C. 701 et. seq.). The most common venue for such review is the United States Circuit Courts of Appeal, fully independent courts governed by Article III of the U.S. Constitution. This structure is in clear conformity with the WTO fairness requirement.

If Vietnam decides to amend its laws and adopt the APA model for judicial review, it makes sense to take a few steps backward and look at judicial review of agency action in the U.S. It is an imperfect system, full of anomalies and idiosyncracies. The structure of the U.S. model creates the likelihood of genuine detached judicial review– and that is the strongest factor favoring the system. It is also a problematic model, creating all the risks that go along with having courts that are free from direct executive or legislative oversight, not the least of which is that the courts will act more as legislatures, that the judges will become policymakers, thus compromising separation of powers. Putting aside the WTO requirements, given the risks of independent judicial review, why not continue with internal executive review? Such review can be undertaken by experts in given field and can avoid the cumbersome nature of the judicial system. Further, why use independent judges with lifetime tenure who are accountable to no one when a country could use elected officials (or their designees), people with subject matter expertise, who are more accountable to the public than independent judges? Why does the US – a country not shy when it

comes to executive authority– permit Article III judges to engage in judicial review without executive oversight?

Branches of Government

Lets begin with the branches of government. The executive sets priorities, enforces statutes and regulations, establishes and articulates foreign policy, and, most importantly, stands at the head of the administrative state– the federal agency system. (Popper, "The Unpredictable Scope of Judicial Review," Saberes, Law Review of the Law School at Universidad Alphonso X El Sabio, January, 2005.) The president appoints all key agency officials, some of whom serve for a set terms of years, while others serve at the pleasure of the president. The White House controls most major rules and regulations through review at Office of Information and Regulatory Affairs and the Office of Management and Budget and regulates agencies, using cost benefit analysis as a means of determining which rules will be implemented and which will never see the light of day.

The president functions through the federal agencies– the White House does not have any independent enforcement power. It is the agency administrator, appointed by the president, who actually reaches out and touches private citizens and corporations. Agencies are on the premises of our businesses. Agencies are the entities that collect our taxes. Agencies are tactile in nature, visible government experienced by the vast majority of the population. It is the customs office, the Securities Exchange Commission, the Environmental Protection Agency, the Homeland Security Administration that affects the lives of those living in or coming into the United States. One can think of an agency as a small (or in some instances, such as Homeland Security, not so small) monarchies. The agency heads, administrators including cabinet level heads, and commissioners at independent agencies, serve as the leaders of these entities. Under them are administrative law judges, section heads, lawyers, and under them, the technical and support staff. In the U.S., there are 2 million full-

time federal workers and 16 million government contract workers operate, in whole or in part, under the direction of the leaders of the agencies and the President. There is no doubt that they can and do review initial decisions. There is also no doubt that the agencies have vast power, in any language, by any definition.

***

Like the executive, the legislature has great power. Under the General Welfare clause in the Constitution, Congress must set public policy. Further, it must decide the fundamental questions of taxation and spending, must authorize foreign involvement including war, must approve of all appointments initiated by the President including Supreme Court nominee, and must make all substantive law. When all is said and done, because Congress can make law, in the final analysis, Congress wins– it can impeach the President, amend the Constitution, and rewrite the laws of the land. This, too, is power, by any definition.

***

Now, the courts. The courts have the awesome task of checking the abuse of power by both other branches. This task is made more difficult by the fact that the present administration is demanding that courts exercise restraint, not set policy, and limit their involvement in the affairs of the Congress or the Executive (here, executive refers to the entire administrative state). But for the constitutionally mandated independence of the judiciary, the present administration could do permanent damage to the very nature of checks and balances. Notwithstanding the current push to limit the role of the courts in the U.S., the vast body of literature in the field supports the proposition that fully independent courts are vital to the U.S. vision of democracy. (Matthew C. Stephenson, "When the Devil Turns . . .": The Political Foundations of Independent Judicial Review, 32 J. Legal Stud. 59, January, 2003, making the case empirically and otherwise that independent judicial review is vial to the U.S. system of government.)

Various studies tell us that while there may not be wide understanding of the role of courts, they are seen as a credible force against administrative authoritarianism. (Id. at 61 et. seq.) Courts seek to insure that the executive and the legislature stay bounded by constitutional mandate, that the tasks properly arrogated to the executive are performed by the executive, and that tasks arrogated to congress are undertaken by congress. Those affected adversely by agency action in the U.S., i.e. aggrieved by agency action, have a right to review in court, under most circumstances. It is a basic entitlement and it is fair to conclude that participants in WTO will have expectations of similar rights. ("WTO rules require a judicial review mechanism. China has committed itself to the establishment of such a mechanism. Judicial review in this context means that member states of the WTO are required to provide complaining parties with the opportunity to request administrative review and litigation under members' foreign trade laws, administrative regulations, judicial rulings and administrative decisions." Washington University Global Studies Law Review, 2004, 3 Wash. U. Global Stud. L. Rev. 297, WANG JIAFU.)

Judicial Review and the Risks of Judicial Intervention Judicial review of administrative action, however, is not a simple matter. It is easy to envision how a court might use judicial power to take apart carefully conceived executive decisions or how a court might destroy the effect of a law congress enacted. Over the last 100 years, we have had among the most aggressive courts in the world. In some cases, the courts have undone the actions of the President, the agencies, or the congress. The truth is, however, that while this happens rarely, it happens enough to check the abuse of power without taking over the reigns of power.

There is of course the possibility that an independent judiciary could become a primary mechanism for the articulation of public policy– and that would be both unconstitutional (given the separation of powers requirements) and dangerous since judges are not accountable to the electorate. For that reason, there are stringent limits

on judicial action and, paradoxically, it is the constraints on judicial review that make the system work. Limits in judicial review preserve the power of the executive while at the same time not compromising unduly the ability of the courts to set aside unconstitutional or otherwise unlawful actions by agencies.

Chevron-The Main Constraint on Judicial Action

The starting place for understanding the limitation on judicial power is the Chevron decision. (Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In fact, when I first agreed to participate in this program I assumed I would be discussing nothing but Chevron and its progeny. (The progeny of Chevron referred to in this discussion are: U. S. v. Mead Corp., 533 U.S. 218 (2001), Christensen v. Harris County, 529 U.S. 576 (2000), and for the re-emergence of judicial respect as opposed to deference, Skidmore v. Swift and Co., 323 U.S. 134 (1944). These are the primary cases, but obviously not the only cases, that limit judicial review of agency action.

The Chevron doctrine begins with the recognition that agency decisions (executive actions) cannot be set aside easily when reviewed in court because the order of a regulatory body or even the decision of administrative law judge that can becomes the final decision of the agency represents, indirectly, the voice of those the people have elected. Chevron is not all that mysterious: Outside of those situations where congressional intent is unambiguous (meaning there is no question about the purpose of law and the proper interpretation of that law) if an agency's decision is reasonable, sets out the basis and purpose of agency action, and is generally consistent with congressional intention, a court cannot change the decision.

Hard Look Issues

While Chevron prevents courts from imposing political will when the substantive decision of the agency is supported in the record and is in line with the statutes the agency is implementing, it does not prohibit a court from taking a hard look at the

action of the agency. Independent and thorough judicial review of agency action plays a critical role in insuring the competence, effectiveness, and fairness of agency decisions. The problem is that courts are both obligated to take a hard look at agency action and recognize (based on Chevron doctrine) that intrusive action by courts will interfere with the important constitutional notion of separation of powers.

The problem is quite straight forward: Can a judge take a hard look at an agency record and, thereafter, withhold personal/political judgement, when it comes to deciding whether the agency acted in a proper manner or not? Judges who take a penetrating look at a complex agency record often become well-informed about the field that is the subject matter of agency action. Can judges dissociate from their own informational base and render limited opinions? This is a balancing process and each country much find a way to both empower judges to review cases in detail, independent of political influence, while at the same time keeping courts from being the primary source of policy.

Common sense and experience tell us that there is a strong public and constitutional expectation that the courts play a role in the formulation of policy. Major shifts in public policy in the United States have come frequently from the United States Supreme Court and the appellate courts. Civil rights, and for that matter, human rights, have their most profound expressions in judicial decisions, leaving unanswered the matter of the precise role of the courts. It bears noting that while the U.S., a common law country, there are statutory standards that inform courts of their task but like most formalist approaches, these standards do not resolve the more basic problem of limiting or empowering courts.

The section of the Administrative Procedure Act that sets out the judicial review standards is 5 U.S.C. 701-706. In sum, they state the following: When reviewing factual determinations, courts are supposed to make sure there is substantial evidence in the record to ensure that the decision is properly supported. An agency action should be set aside if it is arbitrary, capricious, or an abuse of discretion, or otherwise

not in accordance with law. If the decision is contrary to constitutional rights, constitutional powers, privileges or immunities, the decision should be set aside. If a decision is in excess of statutory authority or jurisdiction, the decision should be set aside. If a decision is rendered in a manner that contravenes procedural fairness, it should be set aside. If it is unwarranted by the facts, the decision should be set aside by the courts.

Chevron Deference Continued

Back to Chevron deference and the role of courts. When a court is reviewing an interpretation of a statute or regulation made by an agency, if congressional intent is clear and unambiguous regarding the meaning of the statute, no deference is due since the agency action is not a matter of reasonability or interpretation but rather a question of the plain meaning of the statute. While this prong of Chevron, referred to as Part I of the Chevron, was thought to be quite limited, (the premise being that Congress was rarely unambiguous) recently a number of decisions have used this approach as a means of rejecting agency (executive) action. (U. S. v. Mead Corp., 533 U.S. 218 (2001), Christensen v. Harris County, 529 U.S. 576 (2000)) Chevron, Part II refers to the more common situations where a statute is general or ambiguous thus permitting a court to engage in more comprehensive review of the agency's action, looking to the reasonability of the decision, the support in the record for the decision, and the consistency with congressional intention. The Supreme Court has said that this type of broad review is bounded by common sense (Food and Drug Administration v. Brown & Williamson Tobacco Corp. 529 U.S. 120 (2000), but one person's common sense is another person's nonsense.

While the idea underlying Chevron idea is simple– outside of unambiguous legislative pronouncements, courts are not to "probe the mind of the administrator," (Grant v. Shalala, 989 F.2d 1332, 1345 (3rd Cir. 1993) or substitute their judgement

for that of the agency, so long as the agency has put forward a reasoned basis for its determination– implementing that idea is fraught with portent. Where the judgement of the agency is at odds with general congressional intention, fails to address criteria set out in legislation, or is unsupported by reasoned explanation (Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983), courts must intervene. In that event, the risk of a judge interjecting personal perspective is quite real.

One area where deference, the linguistic symbol of judicial restraint, is often withheld is where the agency's interpretation of law or policy boils down to little more than an expansion of agency jurisdictional or authority. Concern about expansion of agency authority is evident in the Food and Drug Administration v. Brown & Williamson. In that case, the Food and Drug Administration (FDA) decided that cigarettes were a drug delivery device and nicotine was a drug meaning that the FDA could now regulate cigarettes. This interpretation was arguably at odds with federal legislation and was not accorded deference, in part because the agency action would have greatly expanded FDA authority.

Tolerating Uncertainty

Part of the challenge presented by an independent judiciary is the necessity of tolerating the uncertainty of such a system. Not only is it hard to predict whether a court will grant deference, (See, *Cilaio v. Fineberg*, 262 f. Supp. 2d 273 (SDNY, 2003); *Intercontinental Marble Corp. v. United States*. 264 F. Supp. 2d 1306 (2003); *O'Shaunessy v. Commr. of Internal Revenue*, 332 F.3d 112 S (8th Cir. 2003), it is often impossible to state with clarity the very meaning of *Chevron* deference. In *Christensen (Christensen v. Harris County*, 529 U.S. 576 (2000), a case interpreting *Chevron* decided by the Supreme Court in May, 2000, the question arose whether an employer can force an employee to take comprehensive time– time off from work– as opposed to being paid for time that had accrued. The agency involved sent a letter (the agency

decision) to the employer (a local government) advising that a change in comp time rules could not be done without a new labor/management agreement. The municipality disagreed with the agency and contended that its regulations allowed it to make changes in comp time rules without a specific new agreement. It is a typical complex administrative law case. Here is what the Supreme Court did as it reviewed the agency letter.

First they said that policy statements, manuals, and guidelines are not entitled to *Chevron* deference because they are not promulgated in a way that involves public participation and that an opinion letter was not a policy statement. Then they said that internal guidelines are entitled to some deference, although not the same as *Chevron*, based on their power to persuade but that an opinion letter was not an internal guideline. Then they said interpretations contained in a regulation that are promulgated by the agency are entitled to *Chevron* deference but that an opinion letter was not an interpretation contained in a regulation. Then they said even a formal opinion letter is not an interpretation because it is not a regulation since opinion letters are produced without any public process. Such opinion letters are entitled to no deference. Then the court noted that an agency's interpretation of its own rules is entitled to deference, citing a case decided in 1997, (*Auer v. Robbins,* (519 U.S. 452 (1997)) but that this was not really an interpretation of an agency's own rules. Finally, the court said that deference is not due here because the agency regulation being interpreted in this instance is clear, not ambiguous. Such convoluted holdings are typical in this area and do little to clarify the field.

Select Topic and U.S. Judicial Review

1. Review of Policy Statements

Agency policy statements, standing alone, are unreviewable. The Administrative Procedure Act (APA) makes clear that if all an agency does is an interpretation of an existing rule or regulation outside of a case disposition or a new substantive rule, then

the action of the agency is vested to the discretion of the agency and is non-reviewable. Part of the reasoning underlying the preclusion of judicial review for interpretations and policy statements is that Article III of the Constitution requires a case and controversy for any proceeding in any court. Courts are not permitted to render, outside of the declaratory judgement field, advisory opinions. Therefore, if a court is commenting on an agency policy statement outside of an existing case or controversy, it is violating the basic separation of powers notions.

2. Process vs. Substance

Looking broadly at judicial review, there are two schools of thoughtone is that the review should be limited in large part to making sure that the process is adequate to produce the fact-finding. Under that theory, if the process is fair and the parties have a full opportunity to make their presentations, a court should not interfere with the essence agency action.

A contrary view is that the courts should look at the substance of what the agencies do. Courts can and do review technically difficult data and an aggrieved party is denied due process if the agency does not carefully check the action of the agency, particularly if fundamental rights are involved. (For a good discussion of these two approaches, see Matthew Warren, Active JudgingJudicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit, 90 Geo. L. J. 2599 (2002).

3. Agency Publication of Articulated Standards

One overt limit on agencies derives from *Morton v. Ruiz*, 462 U.S. 818 (1972), where the court held that if there is a congressional directive to establish guidelines in a particular field prior to prosecution, and the agency fails to do so, it cannot make enforcement actions the form for producing guidelines and such actions would not be entitled to deference.

4. Can Judicial Review Boil Down to Grading?

Next, there is the question of how review takes place– is judicial review an opportunity for courts to stand in judgement of the quality of an agency"s decision, much like a professor grades a student paper? Justice Antonin Scalia, dissenting in *Mead*, argued that there is grave risk in judicial review if the court's review is based on the "quality" of the agency decision.

Mead holds, in part, that if an agency action is not entitled to deference on its face, i.e. a properly conducted notice and comment rulemaking or a formal adjudication that followed appropriate process, a court might assess the validity of the agency decision based on the persuasiveness and thoroughness of the action of the agency. Justice Scalia warned that using this standard, the action of the executive branch including the head of a major department or cabinet secretary, could be overturned by the courts if they are not accompanied by extensive record and are well-written and fully documented– in effect, a process in which a reviewing court "grades" the decision and affirms it only if it is "A" quality work. If this turns out to be the practice of post-*Mead* courts, agencies will be forced to use the more formalized and time consuming notice and comment rulemaking or formal adjudication to prevent courts from undoing the work of the agency. This is excessive procedure, Scalia contends, and would ossify the agency process and elevate the courts, making them like super legislatures. (For a comprehensive overview and interesting view on the scope of judicial review of agency decisions, se Paul R. Verkuil, An Outcomes Analysis of Scope of Review Standards, 44 Wm. & Mary L. Rev. 679 (2002).

5. Review and Trial De Novo

There are situations where the review of the action of an agency is, in fact, a complete rejection not only of the agency decision but of the record the agency produced, thus necessitating a trial *de novo* in court. There are several instances where this can occur

1) When a substantive statute mandates that review of agency action shall be a suit in any jurisdiction where the aggrieved party resides, then Congress has resolved the question and obligated *de novo* review.
2) Where there is grossly unwarranted fact-finding by an agency or if the procedures are so fundamentally inadequate that you cannot say the decision is fair. (5 U.S.C. 706(f)
3) A *de novo* trial can also take place if the action the agency seeks is judicial enforcement of an agency order where there was no prior underlying adjudication.
4) *De novo* trials can also occur for decisions that include constitutional facts_— for example the question of whether a particular island is within interstate or is the subject of the jurisdictional reach of an individual state.

6. Fact/Law Conflict

Questions regarding the scope of review question are often determined by characterization of the problems as fact or law questions. In *Connecticut State Medical Society v. The Board of Examiners*, (546 A.2d 830 (Conn. 1988), a case decided by the Connecticut Supreme Court, the question of deference and scope of review came up regarding, of all things, the definition of an ankle as part of a foot.

Podiatrists are allowed to provide health care services on people's feet. A state board decided that the term "foot" would also include ankle and that would allow podiatrists to provide more comprehensive medical services. The court decided that the decision of the agency to expand the jurisdiction of the podiatrists they regulated was not entitled to deference because it was a matter of statutory construction. Courts, the Connecticut Supreme Court reasoned, are in a position superior to agencies when it comes to the business of interpreting the meaning of the statute. The court then looked independently at the state statute, observed that the word "foot" appeared not to pertain to ankles, and decided that the agency action was not entitled to deference.

7. Finality

The judicial review also involves the question of finality of agency action. Unless an agency action is final in all respects, it is not ripe for judicial review. In *Heckler v. Chaney (*470 U.S. 821 (1985), the Supreme Court held that if the agency has chosen not to act at all, then the decision is non-reviewable. *Heckler* is a lethal injection case where condemned prisoners challenged the FDA's failure to act regarding the use of various pharmaceutical products that were being used to implement death penalty sentences. The court accepted the argument that the decision to take no action on the prisoners claim meant that there was nothing to review.

Conclusion

The process of judicial review does not promise certainty. Varying standards and varying opinions on the proper role of courts are the rule, not the exception. Further, the system of review is bounded by *Chevron*, and constitutes a directive to courts, ordering them to defer to agencies under many circumstances. Nevertheless, the right of independent review insures that a court, free from political influence, can take a hard look at the action of the agency, even if in the end, the court affirms the agency's decision.

. Podiatrists are allowed to provide health care services on people's feet. A state board decided that the term "foot" would also include ankle and that would allow podiatrists to provide more comprehensive medical services. The court decided that the decision of the agency to expand the jurisdiction of the podiatrists they regulated was not entitled to deference because it was a matter of statutory construction. Courts, the Connecticut Supreme Court reasoned, are in a position superior to agencies when it comes to the business of interpreting the meaning of the statute. The court then looked independently at the state statute, observed that the word "foot" appeared not to pertain to ankles, and decided that the agency action was not entitled to deference.

7. Finality

The judicial review also involves the question of finality of agency action. Unless an agency action is final in all respects, it is not ripe for judicial review. In *Heckler v. Chaney (*470 U.S. 821 (1985), the Supreme Court held that if the agency has chosen not to act at all, then the decision is non-reviewable. *Heckler* is a lethal injection case where condemned prisoners challenged the FDA's failure to act regarding the use of various pharmaceutical products that were being used to implement death penalty sentences. The court accepted the argument that the decision to take no action on the prisoners claim meant that there was nothing to review.

Conclusion

The process of judicial review does not promise certainty. Varying standards and varying opinions on the proper role of courts are the rule, not the exception. Further, the system of review is bounded by *Chevron*, and constitutes a directive to courts, ordering them to defer to agencies under many circumstances. Nevertheless, the right of independent review insures that a court, free from political influence, can take a hard look at the action of the agency, even if in the end, the court affirms the agency's decision.

.