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Deconstructing the Bill of Rights in Administrative Adjudication--Enfranchising Constitutional Principles in the Process

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DECONSTRUCTING THE BILL OF RIGHTS IN ADMINISTRATIVE ADJUDICATION— ENFRANCHISING CONSTITUTIONAL PRINCIPLES IN THE PROCESS

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I. INTRODUCTION

The constitutional Framers anticipated many of the problems that our society might encounter with a powerful government, but the expansion of the administrative state seemed to have eluded them.[1]

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1. Agencies can be traced to the pre-civil war era, with the Treasury Department's regulation in 1864 establishing the "freedmen's home colonies" (also called the Freedmen's Bureau) to provide employment, food, clothing, and welfare assistance to freed slaves. President Roosevelt later used the notion of administrative agencies in his New Deal programs in order to counteract the Great Depression. Even though many of these agencies were later abolished, the concept of utilizing agency authority was thereafter given serious consideration. *See* The National Archives, Records of Civil War Special Agencies of the Treasury Department of 1864, 366.1-366.6, http://www.archives.gov/research/guide-fed-records/groups/366.html (last visited Feb. 18,

With the increased tendency toward governmental oversight in modern society, Congress deemed it fit to delegate some of its lawmaking authority to the other branches of government.[2] While this action has effectuated the promulgation of regulations and resolution of disputes through adjudicatory proceedings, the area of administrative law continues to be challenging, especially where it poses concerns regarding an individual's basic rights.[3] To avoid the slow erosion of our fundamental constitutional rights as they pertain to our system of administration, it is crucial to develop an understanding of the dynamics of administrative law.[4]

The purpose of an agency's regulation is derived from its underlying authority as it relates to a public policy concern, which is designated by the legislature.[5] Most often, however, individual rights become interpreted in an attenuated manner in favor of legislative

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2010); *see generally* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

2. *See* Hampton v. United States, 276 U.S. 394, 408–09 (1928).

3. *See* Save Our Valley v. Sound Transit, 335 F.3d 932, 953–54 (9th Cir. 2003) (Berzon, J., dissenting).

> Aside from the supposed identity of rights and private causes of action, the majority rests its contrary categorical assertion that "agency regulations cannot independently create rights," . . . on its view of the role of administrative agencies. That view flies in the face of seventy years of administrative law jurisprudence. Applying contemporary administrative law principles rather than antiquated ones, I can see no reason why valid agency regulations cannot create individual rights and do so independently of specific Congressional intent regarding the rights created.

Id. at 954 (quoting *id.* at 939)

4. Individuals should understand their due process rights in order to protect these rights. For example,

> [m]inimum due process requires that before an individual may be deprived of property he be given notice and an opportunity for a hearing. The notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The question is not whether a particular individual failed to understand the notice but whether the notice is reasonably calculated to apprise intended recipients, as a whole, of their rights.

Jordan v. U.S. Dep't of Labor, 876 F.2d 1455, 1459 (11th Cir. 1989) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)) (citations omitted).

5. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

> [A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."

Id. (quoting 62 Cases of Jam v. United States, 340 U.S. 593, 600 (1951)).

regulatory policy concerns.[6] For example, in the pursuit of a regulatory infraction, an individual's right to remain silent may be subverted,[7] or criminal actions may be scrutinized without concerns regarding double jeopardy.[8] Arguably, the explanations for this may simply be a matter of perspective, that the agency is bringing an action against licensure and not the individual,[9] or that it is regulating a pervasive industry practice which requires balancing the individual's rights with the agency's action.[10] The interpretation of certain constitutional liberties has, however, unbalanced the interest of the individual with that of government.[11]

Currently, as the government seeks to provide financial assistance to the marketplace, its action will likely result in increases to regulation and oversight in an attempt to avoid a recurrence of the 2008 recession. Arguably, as it continues to exercise its authority under the umbrella of an administrative state, the government could potentially limit some fundamental rights to the extent that rectification becomes too complex or difficult.

This Article will focus discussion on some fundamental issues relating to the administrative process and explore the ramifications on the individual. The importance for such analytical discourse finds support in the historical increase of regulations and the individual citizen's lack of awareness of the potential regulatory consequences. Hence, an exploration of administrative issues should begin with an understanding of this delegated authority and the unique entity it empowers.

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6. Garner v. Teamsters Local 776, 346 U.S. 485, 496 (1953).

> Federal law has largely developed and expanded as public law in this latter sense. It consists of substituting federal statute law applied by administrative procedures in the public interest in the place of individual suits in courts to enforce common-law doctrines of private right. This evolution, sharply contested, and presenting many problems, has taken place in many other fields as well . . . .

Id.

7. *See* Williams v. U.S. Dep't of Transp., 781 F.2d 1573, 1578 & n.6 (11th Cir. 1986).

8. *See* Hudson v. United States, 522 U.S. 93, 95–96, 105 (1997).

9. *See* Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 419 (1942).

10. *See* New York v. Burger, 482 U.S. 691, 700–02 (1987).

11. Quaker Action Group v. Morton, 516 F.2d 717, 723 (D.C. Cir. 1975) ("When the executive or the administrative process abridges constitutional rights, it is subject to closer scrutiny than otherwise, and ultimately it is the court rather than the agency that must balance the competing interests.").

II. ADMINISTRATIVE AGENCIES: DELEGATED POWER FOR THE BENEFIT OF THE PUBLIC

The administrative agency[12] is a unique entity due to its inherent powers and the somewhat ambiguous nature that its powers engender for the benefit of the public.[13] While this is not always the case, the assumption is that policy makers contemplated a favorable balance between the potential social benefit and individual rights.[14] Normally, an agency must act according to its governing authority[15] and should not override an individual's constitutional rights.[16] Yet administrative enforcement or agency action,[17] while distinct from a criminal or civil matter, sometimes affects the non-proprietary privilege of a party.[18] For example, a consumer may believe that an agency's regulation should protect his or her individual interest, when in fact the underlying purpose of the regulation is to protect the public as a whole.[19] However, it is not uncommon for people to lack awareness of the extent of an agency's authority or the reason for its regulation until they are adversely affected by agency action.[20] Once faced with

12. The term "agency" refers to an entity subject to the Administrative Procedure Act (APA) as well as similar acts at the state level. *See* 5 U.S.C. § 551 (2006).

13. NLRB v. Millwrights Local 1102, United Bhd. of Carpenters & Joiners, 779 F.2d 349, 350 (6th Cir. 1985) ("[A]dministrative agencies are frequently given rather loosely defined powers to cope with [difficult] problems . . . .").

14. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.").

15. Pirlott v. NLRB, 522 F.3d 423, 433 (D.C. Cir. 2008).

> [I]t is the role of the agency charged with administrating a statute to make the initial interpretation of that law—one that will be overturned only when the agency acts without delegated authority, or its action is at odds with the plain meaning of the authorizing statute, unreasonable, or arbitrary and capricious.

Id.

16. United States v. Spano, 476 F.3d 476, 479 (7th Cir. 2007) ("As exercises of lawfully delegated legislative authority, particular guidelines [of an agency that exercises policy-making authority delegated to it by Congress] can be invalidated by a court only if they violate the defendant's constitutional rights." (citations omitted)).

17. *See* 5 U.S.C. § 551(13) (2006).

18. *See* U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Co., 390 F. Supp. 2d 27, 33 (D.D.C. 2005).

19. *See generally* United States v. New Mexico, 438 U.S. 696 (1978); Nutritional Health Alliance v. FDA, 318 F.3d 92 (2d Cir. 2003); Simpson v. Office of Thrift Supervision, 29 F.3d 1418 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

20. *See generally* Tracy v. Beaufort County Bd. of Educ., 335 F. Supp. 2d 675 (D. S.C. 2004); Powe v. U.S. Postal Serv., 282 F. App'x 808 (Fed. Cir. 2008).

administrative adjudication,[21] the agency has an obligation to ensure that the affected party[22] is given notice of certain rights.[23] A discussion on how due process affects an individual's right or privilege will serve to elucidate the relationship between the Fifth Amendment and agency action.[24]

Congress confers statutory authority upon an agency to regulate a particular area and further grants it the power to promulgate rules in accordance with that specific authority.[25] This delegation of authority from the legislative to the executive branch must be accomplished with careful consideration to the separation of powers.[26]

> [A] delegation is predicated upon a . . . judgment on the part of the legislature, for the legislature . . . has chosen to entrust a

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21. *See* 5 U.S.C. § 551(7) (2006).

22. *See id.* § 551(3).

23. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994).

> It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.

Id.

24. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–72 (1972).

> "Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience. . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." For that reason, the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.

Id. (quoting Nat'l Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)) (alterations in original) (citation omitted) (footnotes omitted).

25. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

26. I.N.S. v. Chadha, 462 U.S. 919, 951 (1983) ("Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." (citation omitted)). However, "[t]he Constitution does not contemplate total separation of the three branches of Government. '[A] hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.'" *Id.* at 999 (White, J., dissenting) (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976)) (alterations in original) (citation omitted).

> private body with law making functions in order to take advantage of a body with expertise and experience in a particular area requiring the exercise of professional judgment and specialized skills.[27]

Once the legislature clearly defines these standards, the delegation may be used to benefit the public interest, convenience, or necessity under regulations promulgated by the agency.[28] "'The rise of administrative bodies probably has been the most significant legal trend of the last century . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories . . . .'"[29]

> Theoretically, agencies and officials [are] asked only to fill up the details, [under the notion] that Congress cannot delegate any part of its legislative power except under a limitation of a prescribed standard. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [practice or perform some regulated act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.[30]

Agencies are responsible for enforcing the authority granted by the legislature and are also afforded great deference for its interpretation of that delegated authority.[31] Stated another way, although an administrative agency may be delegated specific statutory authority to regulate a particular profession, it is up to the agency to specify the details of enforcing that authority through its rules and policies.[32] Each agency further has a responsibility of investigating and enforcing the provisions under its authority.[33] This entails balancing

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27. Simon v. Cameron, 337 F. Supp. 1380, 1383 (C.D. Cal. 1970).

28. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

29. *Chadha*, 462 U.S. at 984 (White, J., dissenting) (quoting FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)) (alteration in original).

30. *Id.* at 985 (citations omitted) (internal quotation marks omitted).

31. *See* Chevron, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984).

32. Hodge v. West, 155 F.3d 1356, 1360 (Fed. Cir. 1998).

> In *Chevron v. Natural Resource Defense Council*, the United States Supreme Court recognized that Congress frequently leaves certain details unspecified in a statutory scheme[] and delegates rulemaking authority to an agency to fill in the details necessary to administer the statute. Thus, where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."

Id. (quoting *Chevron*, 467 U.S. at 843–44)) (citations omitted).

33. Morton v. Ruiz, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."); *see also*

the need for regulation against the due process rights of the affected party.[34] To accomplish this balance, the agency's mechanism must look at several factors: (1) the private interest affected by the action; (2) the risk of an erroneous deprivation of such interest through the procedures used; (3) the probable value of additional or substitute procedural safeguards; and (4) the government's interest, which includes analyzing the function involved, as well as the related fiscal and administrative burdens, all in efforts toward fairness.[35]

III. THE FIFTH AMENDMENT: DUE PROCESS, SELF-INCRIMINATION & DOUBLE JEOPARDY

A. *Due Process*

> General due process considerations of fairness directly limit the manner in which an agency may exercise its designated responsibilities. A practice which violates due process cannot be excused because of mere administrative inconvenience. *However, the full rights of due process present in a court of law do not automatically attach.* An administrative agency's actions may be only investigatory, only adjudicatory, or a combination of both, and the due process that must be accorded in an administrative proceeding depends upon the nature of the administrative agency's actions. The level of due process required in an administrative setting must be decided under the facts and circumstances of each case. In addition, any administrative agency in determining how best to effectuate public policy is limited by principles of fundamental fairness.[36]

Despite due process guarantees, an individual who faces agency action may be subjected to the possible loss of a proprietary interest or the ability to obtain a privilege, such as a license or permit.[37] He or

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Hampton v. United States, 276 U.S. 394, 408 (1928).

34. At the same time, the agency is also governed by the limitations of its authority. *See generally* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

35. *See* Matthews v. Eldridge, 424 U.S. 319, 334–35 (1976).

36. 2 AM. JUR. 2D *Administrative Law* § 56 (2004) (footnotes omitted) (emphasis added).

37. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing

she may also be the subject of an agency's declaratory ruling or opinion.[38] However, under an application of the Fifth Amendment, the individual is entitled to procedural due process, affording him or her notice and potential entry into the administrative process.[39] Before the privilege or interest is taken away by the government, an individual is entitled to notice and a hearing, prior to the sanctioning of a license.[40] An applicant for licensure is also entitled to notice and a hearing in the event the agency decides to deny the issuance of a license to practice or application to engage in a particular activity.[41]

At times, an agency may not have adequate information on which to make a decision. Under such circumstances, implicit authority allows the agency to request additional information, possibly in the form of an investigative inquiry proceeding.[42] "[The Fifth Amendment] can [also] be asserted in [an administrative] proceeding . . . and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[43] During the inquiry or a written request for additional information, the agency may acquire disclosures that subject the applicant to criminal or civil liability.[44] While the applicant attempts to provide the presiding body with evidence of his or her good character—honesty or fitness to obtain licensure, for instance—he or she may inadvertently provide incriminating information regarding prior conduct.[45]

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to provide an opportunity for a person to vindicate those claims.

Id.

38. *See* ACLU v. NSA, 493 F.3d 644, 678 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008).

39. *See* W. Power Sports, Inc. v. United States, 577 F. Supp. 2d 1314, 1317 (Ct. Int'l Trade 2008) ("To satisfy the requirements of Fifth Amendment procedural due process, agency notice is only required to: (1) alert interested parties of the issue at hand; and (2) provide a reasonable opportunity for the recipient to object to the issues raised."); *see also* Vail v. Brown, 841 F. Supp. 909, 912–13 (D. Minn. 1994) ("The Fifth Amendment requires that, before a federal agency may take an action which affects a constitutionally-protected interest in life, liberty, or property, '[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" (quoting Fuentes v. Shevin, 407 U.S. 67, 80 (1972))); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

40. *See* 5 U.S.C. § 554(b) (2006).

41. *See* Save Our Dunes v. Ala. Dep't of Envtl. Mgmt., 834 F.2d 984, 989–90 (11th Cir. 1987).

42. *See* Morgan v. U.S. Dep't of Justice, 473 F. Supp. 2d 756, 767 (E.D. Mich. 2007), *aff'd*, Morgan v. Bureau of Alchohol, Tobacco, & Firearms, 509 F.3d 273 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2438 (2008).

43. Kastigar v. United States, 406 U.S. 441, 444–45 (1972) (footnote omitted).

44. *See* Trs. for Alaska v. EPA, 749 F.2d 549, 560 (9th Cir. 1984).

45. *See id.*

B. *Self-Incrimination*

In the face of past indiscretions, a second important application of the Fifth Amendment—the right against self-incrimination—must be affirmatively invoked.[46] The agency, however, does not have an obligation to inform an adverse party of his or her ability to invoke the Fifth Amendment.[47] Conversely, the agency may argue that without access to such information it may not have adequate information on which to base a decision, thereby forcing the applicant to prove entitlement to licensure.[48] The choice whether to apply for licensure resides with the applicant, and it is also up to the applicant whether or not to provide relevant information, which could infringe on the right against self-incrimination.[49]

> The Fifth Amendment privilege protects a person who invokes it from self-accusation; but when he seeks a license at the hands of an agency acting under the standard of the public interest[] and information substantially relevant to that standard is withheld under the privilege, as may be done, the need for the information and the cooperation of the applicant with respect to it remains. *The agency cannot be required to act without the information.* To hold otherwise would carry the privilege beyond its purpose. While its invocation may not be considered ground for disqualification, for the privilege is available to the innocent as well as to the non-innocent, the lack of relevant information [that] follows in the wake of its assertion leaves a gap in data[,] which the applicant can supply.[50]

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46. *See id.*

47. *See id.* at 560–61.

48. Chi. Grain Prod. Co. v. Mellon, 14 F.2d 362, 364 (7th Cir. 1926).

> The burden is not upon the government to show that an applicant is not entitled to a permit, but is upon the applicant to show that he is entitled to one. The character and fitness of the men who are to control the business of the permittee is of very large importance.

Id.; *see also* Trade Waste Mgmt. Ass'n v. Hughey, 780 F.2d 221, 233–34 (3d Cir. 1985).

49. Blumenthal v. FCC, 318 F.2d 276, 279 (D.C. Cir. 1963), *cert. denied*, 373 U.S. 951 (1963).

> Dismissal of an application for refusal of the applicant to fill the informational gap leads to an unhappy result. For it attaches significance to exercise of the privilege[] and exerts pressure upon the applicant to waive it. Yet, on the other hand, there remains the inability of the Commission to obtain his help in supplying relevant information available to him. He applies for the license. The Commission cannot be required to act on his application without the relevant light he can supply and which the Commission is authorized to seek. . . . The choice is that of the applicant.

Id.

50. *Id.* (emphasis added) (footnote omitted).

When providing background information, the applicant has an incentive to disclose that his or her character warrants the receipt of licensure.[51] Meanwhile, it is the agency's responsibility to strictly protect the public by preventing unscrupulous individuals or entities from engaging in a particular practice detrimental to the public.[52] In the event an applicant discloses a prior criminal offense on an application, the agency must decide whether the individual may pose a danger or threat to society.[53] To this end, some agencies follow a statutory or rule scheme in assessing the severity of the offense in enforcing a waiting period before granting licensure.[54]

In lieu of such a specific scheme, an inquiry hearing may serve to allow the applicant to explain or mitigate the circumstances of the criminal behavior, assuring the presiding body that the prior misconduct will not affect the applicant's professional practice. Although this may result in a final determination for or against based on the weight afforded to the credibility of the applicant's evidence by the presiding body, there may be a strong propensity to interrogate the applicant as to the details of his or her background.[55] For example, an applicant who may have pled no contest to a criminal offense may be placed in the difficult situation of having to disclose this information prior to licensure in order to dispel doubts regarding his or her character.[56] The resulting problem is that an applicant faces a conscious decision whether or not an admission of prior misconduct is necessary in order to obtain the license, without being afforded a full explanation of the consequences to his or her rights.[57]

There is no affirmative requirement that the agency inform affected parties of their constitutional rights and how these rights

51. *See* De Lara Bellajaro v. Schiltgen, 378 F.3d 1042, 1046 (9th Cir. 2004); *see also* Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 194 (1961) (Brennan, J., dissenting).

52. *See* Sierra Club v. EPA, 292 F.3d 895, 897 (D.C. Cir. 2002); Ramirez v. Ahn, 843 F.2d 864, 869 (5th Cir. 1988); *see also* Retail Credit Co. v. Dade County, 393 F. Supp. 577, 589 (S.D. Fla. 1975).

53. *See* Trade Waste Mgmt. Ass'n v. Hughey, 780 F.2d 221, 236–39 (3d Cir. 1985).

54. *See* Paris Adult Bookstore II v. City of Dallas, 493 U.S. 215, 234 (1990); Spicer v. D.C. Real Estate Comm'n, 636 A.2d 415, 418 (1993); City of Elko v. Abed, 677 N.W.2d 455, 465 (Minn. Ct. App. 2004); Pittenger v. Dep't of State, 596 A.2d 1227, 1229 (Pa. Commw. Ct. 1991).

55. *See* Am. Fed'n of Gov't Employees v. U.S. R.R. Ret. Bd., 742 F. Supp. 450, 452 (N.D. Ill. 1990).

56. *See id.* at 451, 453 (noting that a government agency required applicants to disclose drug and alcohol use).

57. *See id.* at 453.

apply in adjudicatory or rulemaking proceedings.[58] While any agency must afford procedural due process, there is no administrative equivalent to the *Miranda* warning.[59] Requisitely, the agency must notify the parties of an impending action and that this action may be detrimental to their interests. However, the agency is not required to properly notify them that any information collected could be used against them either in the current or subsequent proceedings.[60] "[T]he Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information.'"[61] Once individuals have gained access to the adjudicatory remedies or rulemaking procedures afforded in the Administrative Procedure Act (APA), they are presumed to be acquainted with the multitude of civil and criminal concepts embedded in the process, as well as how they correlate with the agency's action.[62]

The Court has already stated that there is no Fifth Amendment violation where an agency requires certain records from licensed individuals or entities—known as the "required records doctrine"—after they have engaged in a pervasively regulated practice.[63] This interpretation permits the compelled production of private records where an agency requires that a particular record be regularly kept and maintained under a regulatory scheme.[64] The reason for such may be that the applicant voluntarily entered into a regulated industry, which may justify requiring the applicant to maintain records according to the regulatory standards as a way to safeguard the

58. The APA requires that "[p]ersons entitled to notice of an agency hearing shall be timely informed of—(1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted." 5 U.S.C. § 554(b) (2006). The APA further requires an agency to afford notice of a proposed rule and an opportunity for the public to comment. *See* 5 U.S.C. § 553(b) (2006). In light of this, the Supreme Court held that "courts could only in 'extraordinary circumstances' impose procedural requirements on an agency beyond those specified in the APA. It is within an agency's discretion to afford parties more procedure, but it is not the province of the courts to do so." Chrysler Corp. v. Brown, 441 U.S. 281, 312–13 (1979).

59. *Compare* § 554(b) (describing various due process provisions provided by agencies) *with* Miranda v. Arizona, 384 U.S. 436 (1966) (describing the due process requirements for criminal defendants).

60. *See Chrysler*, 441 U.S. at 312–13; Kastigar v. United States, 406 U.S. 441, 444–45 (1972).

61. Fisher v. United States, 425 U.S. 391, 401 (1976) (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)).

62. *See* Aeronautical Repair Station Ass'n v. FAA, 494 F.3d 161, 170 (D.C. Cir. 2007).

63. *See* Smith v. Richert, 35 F.3d 300, 301–02 (7th Cir. 1994).

64. *See* Grosso v. United States, 390 U.S. 62, 67–69 (1968).

public.[65] Essentially, such records take on characteristics of public documents.[66]

> Where [the Government seeks] to inspect *public* documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where *private* papers are sought. The demand is one of right. When the custodian is persuaded by argument that it is his duty to surrender them and he hands them over, duress and coercion will not be so readily implied as where private papers are involved. The custodian in this situation is not protected against the production of incriminating documents. The strict test of consent, designed to protect an accused against production of incriminating evidence, has no place here. The right of privacy, of course, remains.[67]

From the agency's perspective, the purpose of eliciting information about an applicant's character and the purpose of the required records doctrine is the same—the protection of the public good.[68] An agency's authority in promulgating regulations requiring certain records has a public interest aspect for which the agency must ensure compliance.[69] At the application stage, the individual is not yet bound by the full purview of the agency's regulatory authority.[70] And as previously stated, the individual may affirmatively refuse to answer to prior misconduct, even though the agency is not required to inform an applicant of this right.[71] After the applicant obtains a license, he or she may be subject to the required records doctrine.[72] A licensee may also affirmatively assert the Fifth Amendment the same as an applicant.[73] After asserting that right, however, both the applicant and licensee may further have to show entitlement to the licensure

65. *See Richert*, 35 F.3d at 301–02.

66. *See id.* at 301.

67. Davis v. United States, 328 U.S. 582, 593 (1946) (citation omitted) (emphasis in original).

68. *See* Shapiro v. United States, 335 U.S. 1, 17–18 (1948).

69. Donovan v. Mehlenbacher, 652 F.2d 228, 231 (2d Cir. 1981) ("Under th[e] doctrine, records required to be kept pursuant to valid regulatory programs have a 'public aspect' for purposes of constitutional analysis, and thus are not private papers entitled to the protection of the [F]ourth or [F]ifth [A]mendments.").

70. *See* Hous. Auth. of Seattle v. Wash. Dep't of Revenue, 629 F.2d 1307, 1309 (9th Cir. 1980).

71. *See supra* text accompanying note 58; *see also* Trs. for Alaska v. EPA, 749 F.2d 549, 560–61 (9th Cir. 1984).

72. *See* Hartford Accident & Indem. Co. v. Illinois, 298 U.S. 155, 157 (1936).

73. *See generally* United States v. Kordel, 397 U.S. 1 (1970); Avila v. Colo. Supreme Court Grievance Comm., 704 F. Supp. 195 (D. Colo. 1989).

privilege.[74] Here again, the agency is not obligated to ensure prevention of any self-incriminating material from being used in a proceeding.[75]

Moreover, protection from self-incrimination becomes problematic for a licensee during an agency investigation, especially when trying to distinguish between the public aspects of the required material from what may strictly be private material.[76] In other words, a licensee may end up inadvertently commingling personal material with other required records.[77] Generally, the agency is not required to disclose the extent of an ongoing investigation against a licensee or the extent to which subpoena power may be used to gather incriminating evidence.[78] Thus, the personal material made part of the business record may summarily be subject to an investigation.[79] The records collected pursuant to an investigation may subsequently be used in an agency action and, absent a specific exemption, may further be the subject of a request under the Freedom of Information Act (FOIA).[80] Under such a scenario, the agency is also not responsible for preventing incriminating information from being disclosed to third parties, unless the individual specifically asserts and shows entitlement to the privilege against self-incrimination.[81] This doctrine also creates

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74. *See* Herman v. Galvin, 40 F. Supp. 2d 27, 28–29 (D. Mass. 1999).

75. *See id.* at 28.

76. Balt. Dept. of Soc. Servs. v. Bouknight, 493 U.S. 549, 556 (1990) ("[N]o Fifth Amendment protection attache[s] to production of the 'required records,' which the 'defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection.'" (quoting Shapiro v. United States, 335 U.S. 1, 17–18 (1948))).

77. *See* SEC v. O'Brien, 467 U.S. 735, 737–39 (1984).

78. *See id.* at 745.

79. *See id.* at 743.

80. U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136, 142, 144 (1989).

> In enacting the FOIA 23 years ago, Congress sought to open agency action to the light of public scrutiny. Congress did so by requiring agencies to adhere to a general philosophy of full agency disclosure.
>
> . . . .
>
> . . . First, an agency must either create or obtain the requested materials as a prerequisite to its becoming an "agency record" within the meaning of the FOIA. In performing their official duties, agencies routinely avail themselves of studies, trade journal reports, and other materials produced outside the agencies both by private and governmental organizations. To restrict the term "agency records" to materials generated internally would frustrate Congress's desire to put within public reach the information available to an agency in its decision-making processes.

Id. (internal quotation marks omitted) (citations omitted).

81. Hollinger Int't Inc. v. Hollinger Inc., No. 04 C 698, 2005 WL 3177880, at *9 (N.D. Ill. Jan. 19, 2005) ("Parties that provide documents to the government may request confidential treatment to prevent public disclosure in response to a FOIA request. FOIA precludes the government from disclosing Defendants' 'commercial or financial

confusion about the individual's intention to disclose personal information when filing or keeping records dealing with an agency, similar to the problem applicants have when requesting licensure.[82]

The procedural consequences to affected parties are that the negligence or disregard by which the non-required information was inadvertently included in their records may determine the parties' ability to assert the privilege.[83] The agency may then conduct an evidentiary hearing under a reasonableness standard to determine a party's entitlement.[84] While the agency may argue that the information was voluntarily included in a required record, the party must be given an opportunity to present a reason for the refusal of disclosure once the privilege is asserted.[85] Fundamentally, this means that the agency may not circumvent the right against self-incrimination under the guise of the required records doctrine.[86] However, the application of this limitation on the privilege and the determination of whether an individual has the right to invoke a personal privilege is determined strictly on a case-by-case basis.[87] Affected parties, therefore, must be extremely careful when dealing with required records. For instance,

> [i]f a subpoena demanded all the documents possessed by the subpoenaed person concerning some subject, by producing them the person would be acknowledging that he possessed them and that they concerned the subject in question, and if this acknowledgment was self-incriminating he could not be forced to produce them. But if the documents were required records

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information obtained from a person and privileged or confidential.'" (quoting 5 U.S.C. § 552(b)(4) (2006))); Canadian Commercial Corp. v. Dep't of Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008).

> Commercial or financial information obtained from a person involuntarily "is 'confidential' for purposes of the exemption if disclosure [would either] . . . impair the Government's ability to obtain necessary information in the future; or . . . cause substantial harm to the competitive position of the person from whom the information was obtained." . . . A person whose information is about to be disclosed pursuant to a FOIA request may file a "reverse-FOIA action" and seek to enjoin the Government from disclosing it.

Id. (quoting Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2 765, 770 (D.C. Cir. 1974)) (alteration in original).

82. *See* United States v. Doe, 465 U.S. 605, 607–08 n.3 (1984).

83. *See* Vanguard Sav. & Loan Ass'n v. Banks, No. 93-CV-4627, 1995 WL 555871, at *4–5 (E.D. Pa. Sept. 18, 1995).

84. *See* Seaboard Sys. R.R. v. Interstate Commerce Comm'n, 827 F.2d 699, 701–02 (11th Cir. 1987).

85. *See* Smith v. Richert, 35 F.3d 300, 305 (7th Cir. 1994).

86. *See id.*

87. *See id.*

the person could not resist the subpoena on this ground.[88]

The underlying policy behind the required records doctrine is in line with how agencies have dealt with adjudicatory proceedings—by distinguishing the individual's interest from the need for regulation.[89] The individual engages in a practice, is in contact with consumers, and then ultimately is held accountable by the government after the administrative process.[90] When an agency suspends the ability to practice or issues a fine, the individual may no longer have the authority to conduct a transaction for the consumer or must comply with certain obligations to continue practicing.[91] Since the "ability to practice" is at stake rather than an individual's freedom, the constitutional burden for the agency to take away the privilege is less demanding.[92]

It appears that when the government directly intrudes on individual liberties, the application of the Fifth Amendment is subject to stricter scrutiny.[93] For example, a government employment application may require information regarding the applicant's prior use of drugs and alcohol,[94] and the government may seek to reserve

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88. *Id.* at 302 (citations omitted).

89. BNSF Ry. Co. v. U.S. Dep't of Transp., 566 F.3d 200, 207 (D.C. Cir. 2009) ("[O]ne's privacy interests can only be diminished by a valid regulation."); *see also Seaboard Sys. R.R.*, 827 F.2d at 701–02.

90. *In re* Stoltz, 315 F.3d 80, 95 (2d Cir. 2002) (Walker, C.J., dissenting).

> [A license] allows the grant-holder to engage in certain regulated conduct. The government grants real estate, drivers, liquor, or medical licenses; building or emissions permits; bank or corporate charters; and cable television or electricity distribution franchises. . . . [T]he common thread is the government's role as a gatekeeper in determining who may pursue certain livelihoods.

Id. (internal quotation marks omitted).

91. *See* Olsen v. Idaho Bd. of Med., 363 F.3d 916, 919–20 (9th Cir. 2004).

92. Green v. Brantley, 719 F. Supp. 1570, 1579–80 (N.D. Ga. 1989), *vacated*, 981 F.2d 514 (11th Cir. 1993) ("The due process standards under [the APA are] not as stringent as the maximum procedural due process required by the Fifth Amendment." (citations omitted)).

> It has [also] long been established that the more stringent requirements of due process [that] attach in an adjudicatory proceeding are generally not compelled when agency action of a more legislative nature is pursued:
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> > Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. . . . There must be a limit to individual argument in such matters if government is to go on.

Love v. U.S. Dep't of Hous. and Urban Dev., 704 F.2d 100, 105 (3d Cir. 1983) (quoting Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915)).

93. *See* Quaker Action Group v. Morton, 516 F.2d 717, 723 (D.C. Cir. 1975).

94. *See* Am. Fed'n of Gov't Employees v. U.S. R.R. Ret. Bd., 742 F. Supp. 450, 453

the right to submit this information to federal, state, and local authorities.[95] Given such a situation, the applicant may wish to claim Fifth Amendment protection. The government could then assert that it intends to use the information "only as a basis for an investigation into the applicant's suitability for Federal employment and eligibility for any required security clearance."[96] This explanation, however, fails to adequately disclose how the information "would be sufficiently protected from release to law enforcement agencies."[97] The government's assurances could not offer adequate protection, and the request would be in violation of a right to privacy, absent a strong governmental interest in obtaining the information, and potentially also in violation of the applicant's Fifth Amendment right against self-incrimination.[98] The applicant should not be forced to balance the employment or authorization being sought with the possibility that the information could be used by another agency in an incriminating manner.[99]

> Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails.
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> . . . .
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> . . . [Licensees, for instance,] are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts. Failure to comply with the

(N.D. Ill. 1990).

95. *See id.* at 455–56 (declaring, however, that the information must be sufficiently protected from release to law enforcement agencies).

96. *Id.* at 455 (internal quotation marks omitted).

97. *See id.* at 455–56.

98. *See id.*

99. *See* United States v. Stringer, 535 F.3d 929, 937–38 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 662 (2008) (finding no Fifth Amendment violation when an agency advised certain defendants of their rights during an administrative deposition but failed to inform them that a parallel criminal investigation had been opened by a separate agency and that they were using the incriminating information elicited during the deposition).

regulations entails . . . loss of [licensure].[100]

C. *Double Jeopardy*

The third important aspect of the Fifth Amendment in administrative proceedings is the application of double jeopardy.[101] In short, an affected party may not necessarily enjoy the prohibition of double jeopardy for agency action similarly situated to a criminal action.[102] For example, "an administrative license revocation [is] 'remedial' in nature, and therefore subsequent criminal prosecution on the same grounds [is] not barred by the Double Jeopardy Clause."[103] This is generally considered the case in administrative law, even though the agency's prosecution of a regulatory requirement may actually contain criminal elements.[104] "While there is some case law that indicates disciplinary proceedings may be 'quasi-criminal' in nature, it is clear that administrative proceedings are not subject to the Double Jeopardy Clause."[105]

The issue of jeopardy begins with a determination of whether agency action is criminal or civil in nature. In order to avoid the ramifications of jeopardy, the judiciary has generally viewed agency action as civil in light of the remedial purpose of regulatory

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100. Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 418–19 (1942).

101. *See* United States v. Walker, 940 F.2d 442, 443 (9th Cir. 1991).

102. *See id.*; *see also* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991) ("[The courts have] long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality.").

103. Rivera v. Pugh, 194 F.3d 1064, 1066 (9th Cir. 1999) (citing State v. Zerkel, 900 P.2d 744, 754 (Alaska Ct. App. 1995)).

104. For example, a licensee may be required to perform certain tasks or manage a business practice in a certain manner in order to maintain his or her licensure. The licensee may have been required to maintain or deliver escrow funds in a certain manner or time frame, or he or she may have been required to maintain proper registration with the agency at the time the violation occurred in order to practice. These are requirements which would subject the licensee to administrative discipline. In the event that the licensee absconds with funds from a client, there may also be civil conversion or criminal theft issues. Stated another way, an agency complaint against a licensee that alleges fraud is treated differently that an administrative obligation without a criminal element, such as failure to properly maintain an escrow account. Since the charge of fraud has an implication of criminal behavior, the agency must seek to prove allegations of personal conduct by the individual. The escrow account charge, however, may merely require that the agency collect the books under the required records doctrine during an investigation and purport that it does not comply with the regulatory requirements. While this may result in an administrative penalty, it may be significantly less severe than a charge of fraud. *See generally* Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976); Ward v. U.S. Postal Serv., 833 F.2d 1022 (Fed. Cir. 1987) (unpublished opinion).

105. Marinangeli v. Lehman, 32 F. Supp. 2d 1, 8 (D.D.C. 1998) (citations omitted).

authority.[106] Initially, before an agency can even adjudicate certain actions involving prior criminal activity or allow criminal authorities to pursue subsequent criminal action, the agency requires a specific delegation of authority.[107] This authority can then be used to determine the intent of the legislature with regard to double jeopardy.[108] Irrespective of agency authority, it is fundamentally important that a controversy is resolved only once, whether in a criminal court or before an administrative body.[109] However, even when a defendant is acquitted of criminal charges, the agency may still initiate administrative action based on a concern over the licensee's character and fitness.[110] The argument in favor of the agency is that the government would be unable to effectively regulate an individual's dealings with the public if administrative action was not allowed.[111]

The licensee, on the other hand, also has a valid interest in complying with additional administrative action. In order to show his or her good character, he or she may be urged to re-litigate the offense as evidence of mitigation.[112] The final outcome, however, is

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106. United States v. Mayes, 158 F.3d 1215, 1222–23 (11th Cir. 1998).

> [The] first task is to determine whether the government intended the proceedings under these regulatory provisions to be "criminal" or "civil."
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> . . . .
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> The second prong of [the] inquiry is whether the "clearest proof" exists to show that the sanctions authorized in these regulations are "so punitive in form and effect as to render them criminal despite [the government's] intent to the contrary."

Id. (quoting United States v. Ursery, 518 U.S. 267, 290 (1996)).

107. *See id.*

108. *See id.*

109. Univ. of Tenn. v. Elliott, 478 U.S. 788, 798 n.6 (1986) ("[A] controversy should be resolved once, not more than once. The principle is as much needed for administrative decisions as for judicial decisions. To the extent that administrative adjudications resemble courts' decisions—a very great extent—the law worked out for courts does and should apply to agencies.").

110. McKnight v. Sch. Dist. of Phila., 105 F. Supp. 2d 438, 444 (E.D. Pa. 2000) ("[The r]esolution of criminal charges in favor of a defendant does not bar subsequent civil or administrative proceedings concerning the very same underlying misconduct . . . .").

111. "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same set of facts on which the criminal proceeding was based has long been settled." Helvering v. Mitchell, 303 U.S. 391, 397 (1938).

112. *See* Zukas v. Hinson, 124 F.3d 1407, 1412 (11th Cir. 1997).

> Only when the civil sanction serves a retributive or deterrent purpose does the sanction constitute punishment and violate the Double Jeopardy Clause. [For example, r]evoking a pilot certificate by the FAA to ensure air safety by removing an unqualified pilot [convicted of conspiracy and intent to distribute cocaine] from the ranks of those who hold pilot certificates granted by the FAA serves a remedial purpose.

Id. (citations omitted).

still structured in favor of the agency preventing unscrupulous behavior in the profession, in light of the licensee's recent criminal activity.[113]

> A doctor might well go to prison for a misdeed in connection with his practice and yet not automatically lose his right to practice medicine.... [A hearing is required] since broader issues than those in the criminal case are involved, *e.g.*, whether the misdeed is of a character to make it unsafe and improvident for the State to entrust a medical license to that person.[114]

Moreover, an agency may summarily decide to wait until the completion of a criminal proceeding before initiating administrative action.[115] This would allow it the opportunity to obtain further investigatory material or to utilize a criminal judgment against the licensee during the administrative adjudication.[116]

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113. *See id.*

114. Rehman v. California, 85 S. Ct. 8, 9 (1964).

> The [F]ifth [A]mendment, as applicable to the states, prohibits [an affected party] from being twice subjected to *criminal* punishment. Imposition of both criminal and civil sanctions for the same acts or omissions does not violate the double jeopardy clause. Thus, the question is whether administrative suspension of [a] medical license constitutes a criminal, or essentially criminal, sanction.
>
> Medical license revocation proceedings are highly penal in the sense that valuable rights are at stake, but revocation of privileges voluntarily granted is characteristically free of the punitive criminal element. Despite the sanction's severity, its character is remedial.
>
> Consequently, [any affected party has] not twice received criminal punishment for the same offense.

Emory v. Tex. Bd. of Med. Exam'rs, 748 F.2d 1023, 1026 (5th Cir. 1984) (citations omitted) (internal quotation marks omitted).

115. *See* United States v. Alexander, 743 F.2d 472, 477 (7th Cir. 1984).

> [C]ollateral estoppel . . . [could affect] executive branch decisions to enforce regulatory schemes. If an administrative decision against the Government precluded subsequent prosecutions, the Government might hesitate to bring enforcement proceedings at all. The clear intent of Congress in the establishment of these regulatory schemes was to provide an informal and expeditious adjudicatory setting for the determination of regulatory violations, subject, of course, to various mechanisms of review. If we were to endow initial administrative decisions with preclusive effects on criminal actions, the Government would either have to postpone the administrative action until it obtained a favorable result in the corresponding criminal case or have to allocate substantially greater resources to the enforcement of regulations to increase the likelihood of a favorable outcome at the administrative level.

Id.

116. *See id.*

D. *A Potential Remedy*

The aforementioned Fifth Amendment issues may be resolved in the APA by requiring an administrative warning or explanation of rights similar to those stipulated under *Miranda*.[117] In a criminal proceeding, the *Miranda* warning is required before a custodial interrogation.[118] However, there is no equivalent broad-based administrative requirement imposed on an agency investigator.[119] While procedural due process provides notice to the affected party, a similarly written notice could be provided when the agency sends an affected party notification of an administrative investigation or provides entry into the administrative process.[120]

A *Miranda* equivalent administrative warning, codified in the APA, could streamline these interpretations for every agency.[121] A basic requirement of such a warning could include information on the agency's right of access to business records, clarification of the affected party's right against self-incrimination, and, finally, a requirement that any investigation be conducted by an agency investigator.[122] A waiver of such rights, operating in similar fashion as a waiver of the *Miranda* rights, could then fully apprise an individual of third party access to the information collected for possible criminal prosecution.[123] In addition to an explanation of the hearing rights under the APA,[124] an administrative warning could benefit the

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117. *See* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

118. *See* Dickerson v. United States, 530 U.S. 428, 434–35 (2000).

119. *See* Stickler v. Dep't of Def., 264 F. App'x 886, 887–88 (Fed. Cir. 2007).

120. *Id.* at 888. ("[E]ven if *Miranda* applie[d in administrative] proceedings, [it would only be] necessary in custodial interrogations.").

121. "As a general matter, the APA applies to all federal agencies . . . ." Howard v. Ashcroft, 248 F. Supp. 2d 518, 536 (M.D. La. 2003).

122. *See* United States v. Keller, 730 F. Supp. 151, 164–65 (N.D. Ill. 1990). In *Keller*, IRS agents, acting under direction of the United States Attorney and not pursuant to an administrative investigation,

> identified themselves and [informed a criminal defendant that] they wanted to ask questions about [certain business] transactions . . . . [The defendant] was not given *Miranda* or administrative warnings.
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> . . . .
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> Since none of the defendants were in custody, the IRS agents were not obliged to give *Miranda* warnings.
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> . . . [The court refused to suppress the statements, holding that the defendant's will was not overborne and that f]ailure to reveal that the person being interviewed [was] the subject of [an] investigation [was] not, by itself, a ground for suppressing the statements obtained.

Id.

123. *See id.*

124. *See* 5 U.S.C. § 554 (2006).

individual by focusing on the specific rights of affected parties during administrative investigations.[125]

As it stands, an individual dealing with an agency representative may not fully understand the nuances of administrative law and unwittingly subject him or herself to future criminal or civil liability.[126] As adjudication under the APA is important enough to invoke procedural due process, the notion of fundamental fairness should extend to all aspects of the proceeding, focusing on what the individual reasonably believes is the use of evidence collected during an agency investigation and his or her understanding of the right to remain silent.[127] To curtail these issues, policy makers can consider enacting language—as part of the APA—to apprise an affected party of how the Fifth Amendment is applied in administrative adjudication. Agencies can then include a summary of rights that merely cites to the Act in a charging document, which would not impose an overly burdensome administrative cost.

IV. THE SIXTH AMENDMENT: COUNSEL AND CONFRONTATION

In seeking to provide defendants with fair access, the right to counsel and the Confrontation Clause are embedded within our system of criminal justice.[128] Formal and, more so, informal administrative proceedings could embrace the spirit of these concepts while still balancing the government's regulatory enforcement scheme against an affected party's opportunity for redress.[129] The current process, however, operates according to its own procedural applications rather than strictly being defined by the civil rules of

125. "[Currently, t]he standards that apply to administrative inspections are not, by their very nature, the same that apply to criminal searches and seizures." United States v. Anile, 352 F. Supp. 14, 17 (N.D. W. Va. 1973).

126. *See id.*

127. *See* Kastigar v. United States, 406 U.S. 441, 444–45 (1972).

128. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006).

> [T]he purpose of the Confrontation Clause was to ensure the reliability of evidence . . . . [It] "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."
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> So also with the Sixth Amendment right to counsel of choice. It commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best.

Id. (quoting Crawford v. Washington, 541 U.S. 36, 61 (2004)) (citations omitted).

129. "[Under the federal APA, w]here the remedy for an evil is clear, the remedial provisions of the [Act] should be given full effect." Pan-Atlantic S.S. Corp. v. Atl. Coast Line R.R. Co., 353 U.S. 436, 440 (1957).

procedure or evidentiary rules.[130] "[A] hearing granted does not cease to be fair[] merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received."[131] In the event that there is a disparity between the remedies afforded under the civil rules and that of the agency, the courts have attributed the administrative authority to the agency, rather than merely applying the civil rules.[132]

A. The Right to Counsel

The APA specifically provides a right to counsel where an individual is compelled to appear before an agency.[133] An accountant, for instance, may be subpoenaed by the IRS to answer questions dealing with a tax return prepared for a client.[134] "This right to have counsel in such cases is founded, not upon any constitutional right, but upon the [APA] . . . ."[135] It has also been extended to a formal or informal proceeding requested by an affected party due to agency action.[136] Essentially, the right to counsel is tantamount to an opportunity to obtain counsel, and is therefore limited in an

130. *See* 2 AM. JUR. 2D *Administrative Law* § 327 (2004) ("[T]he rules of civil procedure do not apply to discovery in administrative proceedings unless specifically provided by statute."). Further, "the technical rules of evidence that govern procedures in the courts are not necessarily applicable to administrative proceedings." Nadiak v. Civil Aeronautics Bd., 305 F.2d 588, 593 (5th Cir. 1962).

131. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 157 (1923).

132. *See* Fuji Photo Film Co. v. Int'l Trade Comm'n, 474 F.3d 1281, 1291–92 (Fed. Cir. 2007) (noting that an injunctive remedy against a corporation under the civil rules was equivalent to agency authority to issue a cease and desist order against the corporation); *see also* Van Houten v. Hixon, No. 06-3102-CM, 2006 WL 2920575, at *1–2 (D. Kan. Oct. 11, 2006) (noting that a motion to dismiss for failure to exhaust administrative remedies is equivalent to a civil motion to dismiss for failure to state a claim upon which relief can be granted).

133. 5 U.S.C. § 555(b) (2006) ("A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.").

134. *See* Backer v. Comm'r of Internal Revenue, 275 F.2d 141, 143 (5th Cir. 1960).

> It is clear that the right to counsel guaranteed under the Administrative Procedure Act is much broader than the right to have an attorney to advise him relative to his rights under the Fifth Amendment. The Act says such counsel may accompany, represent and advise the witness, without any limitation.

Id.

135. United States v. McPhaul, 617 F. Supp. 58, 59 (W.D.N.C. 1985).

136. § 555(b) ("A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.").

administrative proceeding.[137] It is further only afforded to the affected party, precluding any other party in an industry that may be affected by the agency's final decision.[138]

In an administrative hearing, the affected party may appear in person or with counsel, but if he or she appears in person, there is no entitlement to thereafter obtain counsel.[139] Conversely, if the agency was previously aware that the affected party retained counsel after the action was initiated but before the proceeding, it is required to afford proper notice to the party's counsel.[140] A party may decide, for instance, to personally appear before the agency to simply explain the reasons for his or her actions without understanding the nuances of a formal or informal proceeding. Essentially, however, in the event the party appears pro se at a proceeding, he or she may not thereafter be

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137. United States v. Paternostro, 966 F.2d 907, 912 (5th Cir. 1992) ("The Sixth Amendment requires only that a defendant be given a fair or reasonable opportunity to obtain particular counsel; it does not guarantee an absolute right to the counsel of one's choice.").

138. *See* Hannah v. Larche, 363 U.S. 420, 443–44 (1960).

> [T]he investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of his own selection. This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.

Id. (footnote omitted).

> In today's complex social and governmental structure in which Congressional policies are effectuated through agencies having investigatory functions the results of which most often lead to quasi civil sanctions but which not infrequently lead to criminal prosecutions, this essential role would be frustrated by requiring those persons not parties who *might* be later affected to be allowed to take an active part through private counsel in such proceedings. Often such proceedings involve a nationwide industry or industry practice and can start out with no fixed goal since many such agencies can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

United States v. Newman, 441 F.2d 165, 174 (5th Cir. 1971) (internal quotation marks omitted).

139. *See* 900 G.C. Affiliates, Inc. v. City of N.Y., 367 F. Supp. 1, 4–5 (S.D.N.Y. 1973).

140. *See* Garcia-Guzman v. Reno, 65 F. Supp. 2d 1077, 1090 (N.D. Cal. 1999) ("We disaprove of an administrative agency scheduling a hearing for a person who it knows is represented by counsel without giving reasonable notice to the lawyer. . . . [It] is more than simply discourteous; it is unfair.").

entitled to a continuance in order to seek the services of an attorney.[141] As such, this inability to later obtain counsel leads to a wide range of adverse consequences if the party is not provided with adequate information pertaining to his or her rights.[142]

> The Supreme Court has not recognized a constitutional right to counsel in a civil case or in a civil matter before an administrative agency. The statutory right to counsel under the Administrative Procedure Act has been construed to mean the right to counsel of one's choice. In addition, where the right to counsel exists, the [D]ue [P]rocess [C]lause of the [F]ifth [A]mendment does provide some protection for the decision to select a particular attorney. That protection, however, goes no further than preventing arbitrary dismissal of a chosen attorney[] and providing a fair opportunity to secure counsel of one's choice. Thus the right to counsel does not mean an absolute right to the lawyer of one's choice.[143]

The adjudicatory process is already daunting to the pro se litigant, who must attempt to understand the varying policies and procedures that differ among agencies[144] and the degree of civil and criminal influences on the process.[145] The unrepresented individual

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141. *See 900 G.C. Affiliates, Inc.*, 367 F. Supp. at 4–5.

> That [a] hearing examiner did not grant . . . a continuance . . . does not constitute evidence of a deprivation of due process. The matter of granting a continuance before an administrative agency rests in the sound discretion of the hearing examiner unless there is a clear showing of abuse of that discretion.

Id.

142. *See In re* Coleman, 560 F.3d 1000, 1006 (9th Cir. 2009).

143. Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n, 837 F.2d 600, 618 (3rd Cir. 1988) (citations omitted) (inernal quotations omitted).

144. *See* Fed. Exp. Corp. v. Holowecki, 128 S. Ct. 1147, 1158 (2008).

> [I]n the formal litigation context, *pro se* litigants are held to a lesser pleading standard than other parties. In the administrative context now before us it appears *pro se* filings may be the rule, not the exception. . . . The system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes. . . .
>
> Reasonable arguments can be made that the agency should adopt a standard giving more guidance to filers, making it clear that the request to act must be stated in quite explicit terms. A rule of that sort might yield more consistent results. This, however, is a matter for the agency to decide in light of its experience and expertise in protecting the rights of those who are covered by the [agency's authority]. For its decisions in this regard the agency is subject to the oversight of the political branches.

Id. (citation omitted).

145. *See* Cities Serv. Co. v. Dep't of Energy, 520 F. Supp. 1132, 1140 (D. Del. 1981).

> [T]he constitutional requirement that [an affected party] be faced with some immediate or certain future injury overlaps with the prudential prerequisite for preenforcement review that the controversy have a direct and immediate

may appear before an administrative body with the impression that the issues raised should be treated the same as a civil dispute, where recompensing the injured consumer can mitigate any harm to the public.[146] However, the broader policy implications of a regulatory scheme must be considered.[147] An agency may receive a complaint from a member of the public, delineating issues with a licensee or permit holder that may contain instances of possible criminal or private civil liability.[148] The agency's responsibility is to review the material, gather additional material if necessary, and make a determination of legal sufficiency or a reasonable basis to initiate a formal investigation.[149] Any agency action thereafter initiated is also not dependant on private civil or criminal liability.[150]

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impact on the [affected party's] business, such impact in the administrative agency context being in the form of facing the unhappy choice of complying with agency action believed to be invalid or risking criminal and substantial civil penalties. Similarly, the constitutional requirement that there be concrete adversity between the parties is related to the rule that there may be preenforcement review only of final agency action.

Id.

146. *See* Haleston Drug Stores, Inc. v. NLRB, 187 F.2d 418, 420 (9th Cir. 1951).

The courts have uniformly recognized that [certain federal regulations do] not confer private rights, but granted only rights in the interest of the public to be protected by a procedure looking solely to public ends. The proceeding authorized to be taken by [an agency is] not for the adjudication or vindication of private rights. The . . . function [of] an administrative agency is to give effect to the declared public policy of Congress. These propositions have been . . . firmly established . . . .

Id.

147. *See id.*

148. *See* Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962).

There is a clear-cut distinction between private interests in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. . . . The very fact that there is clear distinction between civil and criminal actions requires a government policy determination of priority: which case should be tried first. Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.

Id.

149. Penobscot Air Servs, Ltd. v. FAA, 164 F.3d 713, 720–21 (1st Cir. 1999) ("The plain meaning of [delegated authority requiring agency investigation] is that the agency first make[] a determination, based on the complaint, as to whether there is 'a reasonable ground' for investigating its merits, and if there is, then the agency is mandated to investigate.").

150. *See* Amalgamated Util. Workers v. Consol. Edison Co. of N.Y., 309 U.S. 261, 269–70 (1940) ("[An agency] seeks enforcement as a public agent, not to give effect to a 'private administrative remedy.'").

The public policy behind pursuing a criminal violation is not the same as the pursuit of an administrative sanction.[151] The government seeks to protect society by investigating a crime in order to identify and punish a specific offender, whereas an agency seeks to investigate a possible regulatory violation pursuant to a consumer complaint or through routine checks to ensure compliance.[152] An affected party may fail to understand the distinction between a regulatory violation that intends to protect the public and one that seeks to remedy the effects on victims.[153] After completion of agency action, a victimized consumer may have to pursue a separate civil action for private damages.[154] Occasionally, the policies of an administrative and criminal violation may overlap, where "[t]he public interest may not always call for criminal prosecution, particularly where effective civil and administrative remedies have been obtained."[155]

An agency, however, is normally not empowered to assist the consumer without separate, specific delegated authority, such as having a specific statute allowing the imposition of a restitution judgment.[156] Without this authority, a consumer whose funds have been absconded with by a licensee may not necessarily be awarded monetary damages by the agency.[157] Providing the affected party with information regarding the right to counsel can assist him or her with understanding these dynamics during the administrative process.[158]

B. The Confrontation Clause

The other important aspect of the Sixth Amendment is a particular application of the Confrontation Clause, even though it is also a constitutional guarantee applying specifically to criminal

151. *See* United States v. Pac. & Arctic Ry. & Navigation Co., 228 U.S. 87, 107–08 (1913); Sash v. Zenk, 428 F.3d 132, 134–35 (2d Cir. 2005); Moore v. Knowles, 482 F.2d 1069, 1074 (5th Cir. 1973); Rodriguez v. United States, 534 F. Supp. 370, 374 (D.P.R. 1982).

152. *See* Camara v. San Francisco, 387 U.S. 523, 535–36 (1967).

153. *See* Bulzan v. Atl. Richfield Co., 620 F.2d 278, 282 (Temp. Emer. Ct. App. 1980) (noting that the purpose of administrative remedies is to ensure the enforcement of administrative regulations).

154. Pel-Star Energy, Inc. v. U.S. Dep't of Energy, 890 F. Supp. 532, 537–38, 546 (W.D. La. 1995) (mem.).

155. United States v. Naftalin, 534 F.2d 770, 774 (8th Cir. 1976).

156. *See* Cook v. NASD Regulation, Inc., 31 F. Supp. 2d 1245, 1247–49 (D. Colo. 1998).

157. *See id.*

158. It is a "well-established principle that the [constitutional] right to counsel . . . does not extend to administrative license revocation proceedings." Plumer v. Maryland, 915 F.2d 927, 931–32 (4th Cir. 1990).

proceedings.[159] In a similar fashion as the principles behind the civil rules, the Confrontation Clause has been preserved in administrative proceedings as an implicit authority that exists in conjunction with the right to a hearing.[160] "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."[161] While the statutory right to counsel under the APA is a limited right, an affected party has an inherent right to confront the evidence being used by an agency.[162]

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment[,] which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny.[163]

The evidence which is used by an agency to prove an action must be disclosed to the adverse party who is given the opportunity to challenge it at a hearing.[164] In fact, until the affected party can show that he or she has been injured by agency action, the party may not

159. *See* Bennett v. NTSB, 66 F.3d 1130, 1136 (10th Cir. 1995) ("[T]he Confrontation Clause speaks only of 'all criminal prosecutions.' That constitutional right does not [generally] apply to civil administrative matters . . . ."); *see also* Elliott v. SEC, 36 F.3d 86, 88 (11th Cir. 1994); Camp v. United States, 413 F.2d 419, 421–22 (5th Cir. 1969).

160. *See* Greene v. McElroy, 360 U.S. 474, 496–97 (1959).

161. Morgan v. United States, 304 U.S. 1, 18 (1938).

162. Goldberg v. Kelly, 397 U.S. 254, 269–70 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

163. *Greene*, 360 U.S. at 496–97 (citations omitted) (footnote omitted).

164. *See* Robbins v. U.S. R.R. Retirement Bd., 594 F.2d 448, 451 (5th Cir. 1979).

attempt to confront the evidence.[165] "A[n affected] party is [also] entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."[166] Absent these rights, the public may otherwise be apprehensive about an agency's decision-making process or conclude that final agency action is disingenuous.[167] However, these inherent rights do not extend to the agency's investigation; the courts have found that neither the Sixth nor the Fifth Amendments are undermined when an agency utilizes its subpoena power during an investigation.[168]

Some agencies may conduct an administrative investigation in secrecy as though it were a criminal matter.[169] The purpose of the administrative investigation is not adjudicatory, and the resulting prosecution is tantamount to a civil matter.[170] In these situations, a party may not seek to confront the agency's investigative findings until the agency initiates action.[171] It is possible, however, for agencies

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165. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

> [As a standing requirement f]irst, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant[] and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. (citations omitted).

166. 5 U.S.C. § 556(d) (2006).

167. *See* Doty v. United States, 53 F.3d 1244, 1251 (Fed. Cir. 1995).

168. *See* EEOC v. Univ. of N.M., 504 F.2d 1296, 1303 (10th Cir. 1974).

> [T]he enforcement of administrative subpoenas rests upon showing[] that the investigation: (a) will be conducted pursuant to a legitimate purpose; (b) that the inquiry is relevant to the purpose; (c) that the information sought is not already in the possession of the administrative body; and (d) that the administrative steps required by Code have been followed.

Id. (citing United States v. Morton Salt Co., 338 U.S. 632, 652 (1950)).

169. *See* SEC. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984).

> [T]he Due Process Clause of the Fifth Amendment nor the Confrontation Clause of the Sixth Amendment is offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him. The Due Process Clause is not implicated under such circumstances because an administrative investigation adjudicates no legal rights, and the Confrontation Clause does not come into play until the initiation of criminal proceedings.

Id. (citations omitted).

170. *See id.*; *see also* United States v. England, 347 F.2d 425, 442 (7th Cir. 1965).

171. *See* Hannah v. Larche, 363 U.S. 420, 446–48 (1960).

to allow the right of confrontation during an agency investigation[172] or for an agency to concretely show how disclosure would interfere with enforcement proceedings.[173]

> The history of investigations conducted by the executive branch of the Government is . . . marked by a decided absence of . . . procedures [such as detailed notice or an opportunity to confront, cross-examine, and call other witnesses]. The best example is provided by the administrative regulatory agencies. Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely fact-finding investigations. When doing the former, they are governed by the Administrative Procedure Act and the parties to the adjudication are accorded the traditional safeguards of a trial. However, when these agencies are conducting nonadjudicative, fact-finding investigations, rights such as apprisal, confrontation, and cross-examination generally do not obtain.
>
> A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. Although the latter are frequently initiated by complaints from undisclosed informants and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of "the purpose and scope of the investigation," and while they may have the advice of counsel, "counsel may not, as a matter of right, otherwise participate in the investigation." The reason for these rules is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated

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> Another regulatory agency which distinguishes between adjudicative and investigative proceedings is the Securities and Exchange Commission. This Commission conducts numerous investigations, many of which are initiated by complaints from private parties. Although the Commission's Rules provide that parties to adjudicative proceedings shall be given detailed notice of the matters to be determined, and a right to cross-examine witnesses appearing at the hearing, those provisions of the Rules are made specifically inapplicable to investigations, even though the Commission is required to initiate civil or criminal proceedings if an investigation discloses violations of law. Undoubtedly, the reason for this distinction is to prevent the sterilization of investigations by burdening them with trial-like procedures.

Id. (citations omitted) (footnote omitted).

172. *See* Associated Dry Goods Corp. v. EEOC, 720 F.2d 804, 811–12, (4th Cir. 1983).

173. *See* Campbell v. Dep't of Health & Human Servs., 682 F.2d 256, 261–62 (D.C. Cir. 1982).

were permitted to convert the investigation into a trial.[174]

The policy implication of disallowing a right of confrontation during the investigation primarily involves maintaining the efficacy of the process.[175] While a criminal violation involves a clear delineation of certain elements that the government must establish beyond a reasonable doubt, an administrative violation is based on enforcement guidelines and the expertise of a governing commission or agency designee.[176] This system of enforcement allows the agency to develop coherent policies and promulgate rules that have the force of law.[177] After an action is initiated, the agency is further granted deference in interpreting its prosecuting authority.[178] Given this deference and the

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174. *Hannah*, 363 U.S. at 445–46 (quoting 16 C.F.R. §§ 1.33, 1.40 (1958)) (citations omitted).

175. The Supreme Court has

> explained that an administrative agency need not demonstrate "[p]robable cause in the criminal law sense" to obtain a warrant to inspect property for compliance with a regulatory scheme. Rather, an administrative warrant may issue "not only on specific evidence of an existing violation but also on a showing that reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."

Dow Chem. Co. v. United States, 476 U.S. 227, 252 n.14 (1986) (Powell, J., concurring in part and dissenting in part) (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978)) (alteration in original) (citations omitted).

176. *See* Ash Grove Cement Co. v. FTC, 577 F.2d 1368, 1375 (9th Cir. 1978).

> Information gathered by the Commission under its broad investigatory powers can be used for a variety of purposes, including promulgation of new rules, reporting to Congress, disseminating economic knowledge to the public, or, as here, to prepare an economic survey or report to enable the Commission to better administer the statutes over which it has jurisdiction.

Id.

177. Dyer v. Sec'y of Health & Human Servs., 889 F.2d 682, 685 (6th Cir. 1989).

> Statements made by federal agencies may constitute substantive rules or merely be general policy statements. Agencies are bound by duly promulgated substantive rules, which have the force of law, while interpretive rules or policy statements do not have binding effect. In order to determine whether a particular statement is a binding rule or a general, non-binding policy statement, courts must examine both the language of the statement and the purpose it serves. If a pronouncement implements a statute by enacting a legislative-type rule affecting individual rights and obligations, it is likely to be a substantive rule. A statement is also likely to be considered binding if it narrowly circumscribes administrative discretion in all future cases, and if it finally and conclusively determines the issues to which it relates. A policy statement is a pronouncement that simply advises the public what the agency's prospective position on an issue is likely to be.

Id. (citations omitted).

178. *See* Chevron, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984); *see also* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 668, 672 (2007).

fact that the proceeding is not treated as a criminal offense in which an individual can invoke his or her constitutional rights, the affected party is left at a disadvantage by the conflicting principles of civil and criminal elements in administrative law as to when they are applied and to what extent.

In the event a violation merely requires that the agency purport for the record that the affected party failed to accomplish an administrative task, a complete right of confrontation hardly creates a burden on the system. For example, in the case of an applicant for licensure who fails to disclose a prior criminal offense, the agency may simply need to produce a certified copy of the judgment and sentence at a hearing.[179] If, however, the violation contains a criminal element such as fraud, the agency may require additional evidence or require the witnesses to prove intent.[180] The administrative process may benefit by allowing the licensee access to materials during a pending investigation if disclosure would not compromise a parallel criminal investigation.[181]

Allowing access to evidence after initiating an administrative proceeding under a statute that contains criminal elements actually appears stronger than proceedings that are civil in nature.[182] Ironically, although the Confrontation Clause specifically applies to criminal

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179. *See* Sokoloff v. Saxbe, 501 F.2d 571, 574 (2d Cir. 1974).

180. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976).

> [T]he elements of [making an] intentional false statement [under a statute that an agency administers] are the first three elements of fraud: falsity, materiality and knowledge. Thus, intentional false statement is a lesser included offense within fraud. . . . [F]raud requires at least one additional element, *i.e.*, an intent to deceive.

Id.

181. *See generally* United States v. Stringer, 535 F.3d 929 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 662 (2008).

182. *See* United States v. England, 347 F.2d 425, 443 (7th Cir. 1965).

> "If th[e] constitutional provision (the Sixth Amendment) means anything, one accused of a crime[,] which consists in the violation of an administrative order[,] is entitled to a full trial on his defense that he committed no crime because the order in question was invalid. The concepts of statutory provisions for judicial review as exclusive and of a narrow scope of review may be valid and valuable ones in administrative-law cases. That is true because such cases are exclusively civil in character. They are wholly out of place in criminal proceedings. When the criminal law is used as an auxiliary of the administrative process, the ordinary concepts applicable in administrative law proceeding must give way in favor of the constitutional right of the accused to a full and fair trial. Only thus can our administrative law be reconciled with the demands of the Sixth Amendment."

Id. (quoting Bernard Schwartz, *Administrative Law and the Sixth Amendment: "Malaise in the Administrative Scheme"*, 40 A.B.A. J. 107, 166 (1954)).

proceedings, the Supreme Court has in fact equated the non-adjudicatory administrative investigation and determination of a violation to a grand jury proceeding.[183] An affected party, however, may in fact benefit by being allowed to present mitigating evidence to the body or panel charged with determining reasonable sufficiency or probable cause. Prior to the agency making a determination whether there is a violation, such as the determination of probable cause by an agency officer or panel, the affected party should have the opportunity to supplement the investigation.[184] In such an event, the investigating agency would be in a better position to utilize its expertise prior to making a decision whether to prosecute or initiate action, settle the action prior to adjudication, or dismiss the matter.[185]

The APA provides that agency action may be considered unlawful if it is contrary to a constitutional right.[186] From the agency's perspective, as these proceedings are not characteristically criminal in nature nor considered a "criminal prosecution," the Sixth Amendment does not readily apply.[187] Courts have essentially

183. Hannah v. Larche, 363 U.S. 420, 448–49 (1960).

> [Considering] the procedures traditionally followed by executive and legislative investigating agencies, we think it would be profitable at this point to discuss the oldest and, perhaps, the best known of all investigative bodies, the grand jury. It has never been considered necessary to grant a witness summoned before the grand jury the right to refuse to testify merely because he did not have access to the identity and testimony of prior witnesses. Nor has it ever been considered essential that a person being investigated by the grand jury be permitted to come before that body and cross-examine witnesses who may have accused him of wrongdoing. Undoubtedly, . . . procedural rights . . . have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try.
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> We think it is fairly clear from this survey of various phases of governmental investigation that witnesses appearing before investigating agencies, whether legislative, executive, or judicial, have generally not been accorded the rights of apprisal, confrontation, or cross-examination. Although we do not suggest that the grand jury and the congressional investigating committee are identical in all respects to the . . . executive agencies and commissions created by Congress, [we mention them] to show that the rules of this Commission are not alien to those which have historically governed the procedure of investigations conducted by agencies in the three major branches of our Government.

Id.

184. *See* Fore Way Express, Inc. v. State of Wis. Dep't of Indus., Labor & Human Relations, 660 F. Supp. 310, 312 (E.D. Wis. 1987).

185. *See* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 646 (2003).

186. 5 U.S.C. § 706(2)(b) (2006).

187. Agee v. Baker, 753 F. Supp. 373, 385 n.13 (D.D.C. 1990) ("The Sixth Amendment claim can be easily dismissed, as the amendment on its face applies only in 'criminal

interpreted the application of an individual's Sixth Amendment rights, like the Fifth, in a specific fashion during the proceeding.[188] Affected parties, such as licensees and permit holders, may be unaware of these distinctions during a challenge to agency action, irrespective of whether the proceeding is considered quasi-criminal or civil in nature.[189] These rights should be re-examined to provide the parties with full notice, not just notice of the impending action, and to allow absolute access to the process, not simply access to a hearing.

V. AN ADMINISTRATIVE BILL OF RIGHTS: INVESTIGATION, TRIAL & SENTENCE

The Bill of Rights was written to ensure the protection of civil liberties against fundamental aspects of government intrusion at a time when administrative agencies were not prolific.[190] The administrative process is a quagmire of legal concepts bridged together by a common theme—to regulate and adjudicate for the benefit of the public.[191] The uniqueness of this system has allowed for

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prosecutions' . . . .").

188. *See* Bennett v. NTSB, 66 F.3d 1130, 1136 (10th Cir. 1995); Roach v. NTSB, 804 F.2d 1147, 1154–55 (10th Cir. 1986).

189. *See* Helvering v. Mitchell, 303 U.S. 391, 399–400 (1938).

> Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted.
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> . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

Id. (footnote omitted); *see also Roach*, 804 F.2d at 1154.

190. *See* Furman v. Georgia, 408 U.S. 238, 266–67 (1972) (Brennan, J., concurring). Although opponents of the Bill of Rights "felt sure that the spirit of liberty could be trusted[] and that its ideals would be represented, not debased, by legislation," the Framers disagreed:

> . . . Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. . . . With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause . . . .
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> . . . [T]his "restraint upon legislatures" possesses an "expansive and vital character" that is "'essential . . . to the rule of law and the maintenance of individual freedom.'"

Id. (quoting Weems v. United States, 217 U.S. 349, 372–73, 376–77 (1910)) (citations omitted).

191. *See, e.g.*, Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 588–89 (1985) ("In essence, the public rights doctrine reflects simply a pragmatic understanding that

a limited interpretation of certain constitutional rights at the complete alienation of others.

An example of a constitutional right that has not been limited is the First Amendment. For instance, the right to petition an agency to take official action has been fully preserved in a proceeding.[192] To a licensee, this means that "the First Amendment[] require[s] . . . a licensing scheme [to] assure prompt judicial review of an administrative decision denying a license."[193] The Supreme Court has further declared that a First Amendment violation may occur "where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad[,] . . . [or] where a scheme creates a risk of delay, such that every application of the statute create[s] an impermissible risk of suppression of ideas . . . ."[194] As such, the First Amendment came to be given serious consideration with regard to delegated authority.[195]

On the opposite end of the spectrum, the rights embodied in the Seventh Amendment are generally excluded from administrative

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when Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers is reduced." (internal quotation marks omitted)); *see also* Beard v. Braunstein, 914 F.2d 434, 440 (3d Cir. 1990).

192. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

> The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.

Id.; *see also* Franchise Realty Interstate Corp. v. S.F. Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1082 (9th Cir. 1976).

193. City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 776 (2004).

194. Paris Adult Bookstore II v. City of Dallas, 493 U.S. 215, 223–24 (1990) (citations omitted) (internal quotation marks omitted).

195. Tucker v. Texas, 326 U.S. 517, 520 (1946) ("Certainly[, absent any security reasons,] neither Congress nor [f]ederal agencies acting pursuant to [c]ongressional authorization may abridge the freedom of press and religion safeguarded by the First Amendment."); *but see* Worrell v. Henry, 219 F.3d 1197, 1205 (10th Cir. 2000) (finding a more limited application of the First Amendment in relation to public employees). The

> First Amendment protection of public employees' testimony is not absolute. There are instances in which government entities' interests as employers outweigh employees' interests in free expression and the policy of encouraging truthful and uninhibited testimony. . . . A public employee's testimony may impair discipline by supervisors or harmony among coworkers; it may undermine close working relationships based on loyalty and confidence; it may impede the performance of an employee's duties or the regular operations of the enterprise.

Id. (citations omitted).

procedure.[196] This is simply because jury trials were not integrated into the statutorily created adjudicatory process of the APA.[197] In a system dominated by administrative law judges and hearing officials, the process simply does not seem, on its face, to require an application of the Seventh Amendment because administrative cases do not arise under the common law.[198] "[T]he Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme."[199]

To understand the basis for this exclusion, it is important to look at the reasoning of the Supreme Court. In *Granfinanciera, S.A. v. Nordberg*, the Court stated that a jury trial should be utilized when the cause of action is legal in nature and involves a matter of "private" rather than "public" right.[200] In the event Congress delegates its authority to an agency for a public purpose, the Seventh Amendment does not entitle the parties to a jury trial.[201] A public right is one in which "the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights."[202] Private rights, on the other hand, are generally "private tort, contract, and property cases."[203] For the Court, the interpretation of the Seventh Amendment with respect to the APA was strictly a legal analysis regarding the forum through which a dispute is resolved.[204] This did not, however, impair Congress from creating and vesting new rights in administrative agencies similar to those preserved under the Seventh Amendment.[205]

> The Seventh Amendment was declaratory of the existing law, for it required only that jury trial in suits at common law was to

196. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51–52 (1989) (discussing that Congress cannot subvert citizens' Seventh Amendment right to a jury trial by merely assigning the adjudication of disputes through administrative agencies).

197. However, "the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity." *Id.* at 42 n.4.

198. *See* U.S. CONST. amend. VII; *see also* 5 U.S.C. § 3105 (2006) (discussing the appointment of administrative law judges).

199. Curtis v. Loether, 415 U.S. 189, 194 (1974) (footnote omitted).

200. *See Granfinanciera*, 492 U.S. at 51.

201. *See id.*

202. *Id.*

203. *Id.*

204. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 460–61 (1977).

205. *See id.*

> be "preserved." It thus did not purport to require a jury trial where none was required before. . . .
>
> The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases. It took the existing legal order as it found it, and there is little or no basis for concluding that the Amendment should now be interpreted to provide an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statutes. [The Court could not] conclude that the Amendment rendered Congress powerless—when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate—to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries.[206]

Fundamentally, as long as the agency is clear in its enforcement regulations and its adjudicatory process meets due process requirements, it can preserve the spirit of the Seventh Amendment.[207] As previously noted, an agency utilizes its expertise in determining whether an affected party's actions violated a particular regulation, and its interpretation of the regulation is afforded deference.[208] For instance, by utilizing this expertise, it can define and regulate unlicensed activity for a particular profession without serious concern whether the agency action violates constitutional principles, as long as it is acting under its specific delegated authority.[209] The more the

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206. *Id.* at 459–60.

207. *See* Galloway v. United States, 319 U.S. 372, 407 (1943) (Black, J., dissenting).

> The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or the jury must decide facts and, to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power [that] we must restrain. We should not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of right."

Id.

208. *See* Tenants and Owners in Opposition to Redevelopment v. U.S. Dep't of Housing, 406 F. Supp. 1024, 1057 (N.D. Cal. 1973) (mem.).

209. *See* Wang v. Pataki, 396 F. Supp. 2d 446, 454–55 (S.D.N.Y. 2005).

> "[G]overnmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated." [In a case where a state has revoked a real estate broker's

agency clearly defines unlicensed activity, the more likely its actions may fall under its defined authority.[210] In the event an agency files an unlicensed cease and desist order against a licensee for action that could otherwise be constitutionally protected, the agency may arguably be acting beyond its delegated authority.[211]

Avoiding such situations could preserve the spirit of the Seventh Amendment in the following ways. First, like the Sixth Amendment, an affected party should have an opportunity to supplement the investigative file to provide evidence to the presiding panel with policy and business practice changes from the regulated industry. As an expert entity, an agency can be both the guardian of the regulated public and a rights-protector of the affected party in order to ensure an independent decision. For agencies that may have imbued policy considerations into the development of its rules or interpretation of delegated authority, it is arguable whether a fact-finder may be in a position to fully understand these concepts without clearly defined instructions.[212]

Second, during the proceeding, an agency should provide

> license, it] has not suppressed speech before it is communicated but rather revoked [the licensure due to] unlicensed operation[, which] demonstrate[s] untrustworthiness.
>
> The State of New York may, consistent with the United States Constitution, require licensure to engage in numerous professions, including acting as a real estate broker. Under [a contrary] theory, any adverse action taken based on a person's unlicensed practice of a profession would be transformed into a "prior restraint," and the State would have to overcome the "heavy presumption against . . . constitutional validity" that attaches to such restraints.

Id. at 455 (quoting N.Y. State Ass'n of Career Schools v. State Educ. Dep't, 823 F. Supp. 1096, 1101 (S.D.N.Y. 1993)) (citations omitted).

210. *See id.* at 451.

211. *See id.*

212. *See* United Parcel Serv., Inc. v. Chadwick's of Boston, Ltd., No. 93-11240-REK, 1995 WL 706126, at *2 (D. Mass. Oct. 25, 1995).

> Nineteenth and twentieth century developments in the United States have created new kinds of mixed-legal-factual issues that were unknown in the common law legal tradition. (a) The degree of intertwining of fact, law, and policy choices underlying lawmaking by legislatures and courts in the field of administrative law, including judicial review of agency decisions, has created issues unknown in the common law tradition before adoption of the Sixth and Seventh Amendments. (b) Among such issues are some that involve such extreme intermingling of factual, legal, and policy choices underlying lawmaking that disentanglement of factual issues so a jury could be clearly instructed on the applicable law and could function as the final decisionmakers by verdict would be extraordinarily difficult, if not impossible.

Id.

evidence of policy considerations to an administrative law judge, such that the decision rendered is not easily overturned by the agency. To this end, a major hurdle that needs to be resolved is the agency's authority over an administrative law judge's recommended order. Although an affected party may provide a judge with evidence contradicting an agency's policy consideration, some "administrative agenc[ies have] the ultimate authority to adopt, reject or modify an [administrative law judge's] recommended findings of fact and conclusions of law."[213] With such authority, an agency may pronounce a version of the facts which is different from the administrative law judge's decision, as long as it is based on an interpretation that is reasonably defensible and based on substantial evidence.[214] Even the appellate court may not be able to overturn such an agency decision unless it is found to be "arbitrary, capricious, an abuse of discretion" or one of the other standards of judicial review under the APA.[215]

In effect, an administrative law judge may solely determine a finding of fact based on the credibility of a witness or an assessment of the evidence.[216] The agency's decision, however, may otherwise contradict such findings, even when a judge does not find a regulatory violation.[217] Currently, an agency's final order is given deference as long as a reasonable mind might accept the conclusion reached by the agency.[218] Creating a mechanism to balance the interest of the affected party with that of the agency, such as a uniform review of standards and procedures,[219] may better serve the spirit of the Seventh

213. Latessa v. N.J. Racing Comm'n, 113 F.3d 1313, 1317 (3d Cir. 1997); *see, e.g.*, Cousin v. Office of Thrift Supervision, 73 F.3d 1242, 1249 (2d Cir. 1996).

214. *See* Multimax, Inc. v. FAA, 231 F.3d 882, 887 (D.C. Cir. 2000).

215. 5 U.S.C. § 706(2) (2006).

216. Brock v. Roadway Express, Inc., 481 U.S. 252, 266 (1987) (plurality opinion) ("Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge, before whom an opportunity for complete cross-examination of opposing witnesses is provided."); *see also* BE & K Constr. Co. v. NLRB, 536 U.S. 516, 526–27 (2002).

217. *See* Citizens State Bank v. FDIC, 751 F.2d 209, 211 (8th Cir. 1984).

218. Howard v. FAA, 17 F.3d 1213, 1216 (9th Cir. 1994) ("A review for 'substantial evidence' is one undertaken with some deference. Under this standard, a finding will not be disturbed if supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938))). For example, "[w]here either one of two inferences may reasonably be drawn from undisputed facts, the inference adopted by the agency or board whose duty it is to draw the inference from which it is to formulate its judgment may not be disturbed on appeal." Nw. Bancorporation v. Fed. Reserve Sys., 303 F.2d 832, 840 (8th Cir. 1962). "[*D*]*e novo* review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions." Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam).

219. A court may normally review an agency's final order to determine whether the

Amendment.

The purpose of the APA, as noted in its legislative history, was to provide a fair administrative procedure—an administrative bill of rights—to protect those whose affairs are controlled or regulated by agencies of the Federal Government; while the Act was not intended to unduly restrict the government, it was intended to reasonably protect private parties, even if that resulted in a change to established administrative operations.[220] Given this reasoning, some of the inconsistencies between the Bill of Rights and administrative law could be remedied through codification in the APA, possibly as a separate APA bill of rights.[221] These codified rights could incorporate the other provisions mentioned in this Article, not merely according to court decisions, but specific rights that protect affected parties by informing them of their rights. The purpose of codifying an APA bill of rights would not only provide affected parties the opportunity for redress, but it would also preserve the entire constitutional framework of rights rather than resorting to a fragmented version developed by different agencies and courts over time.[222]

Rather than attempting to incorporate the constitutional amendments into administrative proceedings, due to the peculiar nature of administrative law, a statutory bill of rights could work in conjunction with the court's rulings. Such an application of the APA can be equated to a specific delegation of authority over all types of administrative proceedings by every federal agency. For instance, this

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agency action is arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence. *See generally* JSG Trading Corp. v. USDA, 176 F.3d 536 (D.C. Cir. 1999).

220. Diebold v. United States, 947 F.2d 787, 795 (6th Cir. 1991).

221. *See id.* (discussing the APA's purpose of improving agency administration as a type of bill of rights for those regulated by federal agencies).

222. *See* Jinks v. Mays, 464 F.2d 1223, 1227–28 (5th Cir. 1972).

> In this day and age public agencies adopt, sometimes in the utmost good faith, regulations which are considered necessary and in the best interest of the program which they administer, little realizing that at some later date the courts, with the advantage of hindsight, will declare their handiwork violative of the equal protection clause of the Fourteenth Amendment. In the past several years legal thought regarding laws and regulations affecting individual rights and liberties have changed rapidly; that which was permissible a few years ago is no longer acceptable; the Bill of Rights has indeed become a living Bill of Rights. This fluid situation makes it inevitable that governmental bodies will sometimes run afoul of modern constitutional requirements. When this occurs, assuming the absence of bad faith and discriminatory purpose, full justice can usually be accomplished through the application of time tested legal and equitable remedies without resorting to drastic prophylactic measures designed . . . to deter future conduct . . . .

Id.

bill could specify that a licensee does not hold a right against self-incrimination with regard to business records. In this sense, it could also delineate how agencies must place individuals on notice that documents or records obtained under an investigative subpoena or collected as part of a reporting requirement may be used against them.[223] A statutory bill of rights could further codify the true meaning of the right to counsel or that the right to cross-examine witnesses is applicable upon completion of an investigation but before the commencement of a prosecution. For certain types of administrative violations, the statutory bill of rights could also provide access to a probable cause official and investigative evidence.

The notion of such a statutory bill of rights is an expansion of the original intent of the APA and a more stringent set of rights beyond simply codifying due process; it is a notion that could specify when the rights of the affected party are paramount to those of the government.[224] For example, the application of the Fourth Amendment in administrative proceedings could be an important and necessary codification. The Supreme Court has already held that a "violation of the Fourth Amendment does not itself violate the Constitution," thereby curtailing an individual's right against an unreasonable search.[225] In this context, an agency's subpoena power seems not to infringe on the Fourth Amendment if the agency's inquiry is within the agency's authority, is not too indefinite, and is reasonably relevant.[226]

Unless it is unduly burdensome to the affected party's business or

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223. *But cf. supra* text accompanying note 58.

224. *See, e.g.*, Mower v. Britton, 504 F.2d 396, 398–99 (10th Cir. 1974) (discussing an inmate's rights as paramount to the parole board's decision, which fell under the APA).

225. *See* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 362 (1998).

> [A] Fourth Amendment violation is fully accomplished by the illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can cure the invasion of the defendant's rights[,] which he has already suffered. The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures. As such, the rule does not proscribe the introduction of illegally seized evidence in all proceedings or against all persons, but applies only in contexts where its remedial objectives are thought most efficaciously served. Moreover, because the rule is prudential rather than constitutionally mandated . . . it [is] applicable only where its deterrence benefits outweigh its substantial social costs.

Id. at 362–63 (citations omitted) (internal quotation marks omitted).

226. *See* United States v. Morton Salt Co., 338 U.S.632, 652 (1950); *see, e.g.*, New York v. Burger, 482 U.S. 691, 702 (1987) (finding that a warrantless inspection of a commercial premises was reasonable because the privacy interest of the owner was weakened—because the industry was closely regulated—and the governmental interest in regulation was heightened).

professional practice, courts are very reluctant to invalidate an agency-issued investigatory subpoena.[227] Under this logic, evidence illegally obtained may not necessarily be excluded in an administrative proceeding. For example, in *Pennsylvania Board of Probation & Parole v. Scott*, the Court notes that the exclusionary rule is judicially created and that it is "applicable only where its deterrence benefits outweigh its 'substantial social costs.'"[228] As such, it does not readily apply in administrative proceedings to exclude evidence.[229]

Applying a variation of the exclusionary rule in administrative proceedings may result in deterring agencies from obtaining evidence illegally, thus holding them to higher standard of investigatory techniques and reporting requirements.[230] Arguably, the concerns over a stricter requirement may benefit the public "where its remedial objectives are thought most efficaciously served."[231] Irrespective of the reasonableness of an agency investigation, the spirit of the Bill of Rights should be preserved in an administrative law context, such as when individuals apply for licenses or appeal to agencies for authority to perform a regulated function.

An administrative bill of rights could ultimately ensure that an affected party's rights are strictly applied by the courts in an adjudicatory proceeding. This could practically be accomplished by providing a written notice to the affected party in a similar fashion as previously discussed with the *Miranda* warning.[232] A bill of rights may also be beneficial when a court is reluctant to apply the Eighth Amendment because the court incorrectly requires a punitive, almost criminal, aspect to the excessive punishment standard.[233] In the Eighth

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227. *See* Deering Milliken, Inc. v. FTC, 595 F.2d 685, 702–03 (D.C. Cir. 1978).

228. 524 U.S. 357, 363 (1998) (quoting United States v. Leon, 468 U.S. 897, 907 (1984)).

229. *See id.*

230. *See* Wong Sun v. United States, 371 U.S. 471, 487–88 (1963). In *Wong Sun*, the Supreme Court stated that there was no need to

> hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Id. (quoting John MacArthur Maguire, Evidence of Guilt: Restrictions Upon Its Discovery or Compulsory Disclosure 221(F.B. Rothman 1982) (1959)).

231. United States v. Calandra, 414 U.S. 338, 348 (1974); *see also* United States v. Leon, 468 U.S. 897, 906 (1994).

232. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

233. *See* Nat'l Taxpayers Union v. U.S. Social Sec. Admin., 302 F. App'x 115, 120 (3d Cir. 2008), *cert. denied*, 130 S. Ct. 361 (2009) (finding that a penalty imposed by an agency

Amendment context, the prohibition against excessive penalties, however, is mainly a question of whether a sentence or fine is grossly disproportionate to the violation or offense.[234] It is clear that the Eighth Amendment "protects against excessive civil fines, including forfeitures."[235] As such, it could have a strong application during the administrative proceeding prior to a judicial standard of review.[236]

The primary issue regarding penalties in an administrative proceeding is whether the agency has the delegated authority to impose the specific penalty.[237] A reviewing court, therefore, should not disturb an administrative sentence as long it was imposed by the agency within the permissible range of its delegated authority.[238] An agency may utilize guidelines to determine the type of sanction to impose after a proceeding.[239] These types of guidelines could be promulgated by every agency if they were so required under the APA in order to delineate the specific criteria for punishing an affected party, rather than merely resting on the fact that the punishment falls within the agency's general authority. The APA could also require that the agency promulgate routine adjustments to the guidelines, taking into account policy changes and any revision or finalization of agency decisions.

Finally, an administrative bill of rights in the adjudicatory arena could also elevate the notification rights of an affected party to the level that is required under the rule-promulgation and regulatory aspects of an agency.[240] For the most part, the basis of a rule regulating

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was not punishment, excessive, or a fine under the Eighth Amendment).

234. *See* Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) ("The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." (quoting Solem v. Helm, 463 U.S. 277, 288 (1983))); *see also* Balice v. USDA, 203 F.3d 684, 698 (9th Cir. 2000) (discussing the Eight Amendment's applicability in a civil fine context).

235. Hudson v. United States, 522 U.S. 93, 103 (1997).

236. *See supra* text accompanying note 219.

237. "No matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment." Newell Recycling Co. v. EPA, 231 F.3d 204, 210 (5th Cir. 2000).

238. *See id.*

239. *See, e.g.*, Pharaon v. Fed. Reserve Sys., 135 F.3d 148, 156 (D.C. Cir. 1998) (discussing that an agency may either use or depart from an established penalty guideline).

240. *See* Safe Air for Everyone v. EPA, 475 F.3d 1096, 1105–06 (9th Cir. 2007) (discussing the current notice system under the APA).

> [T]he notice requirements of the APA . . . require[] that some indication of the regulatory intent that overcomes plain language must be referenced in the published notices that accompanied the rulemaking process. Otherwise, interested parties would not have the meaningful opportunity to comment on proposed regulations that the APA contemplates because they would

a practice or enforcement of an agency order through adjudication must be clearly discernable.[241]

> In order to infuse a measure of public accountability into administrative practices, the APA mandates that agencies provide interested parties notice and an opportunity for comment before promulgating rules of general applicability. This right to participate in the rulemaking process can be meaningfully exercised, however, only if the public can understand proposed rules as meaning what they appear to say.[242]

This same principle, however, has not been applied to the formal or informal adjudicatory process.

> The terminology for hearings under the APA can be imprecise and confusing. The everyday meaning of terms like "formal" and "informal" sometimes creeps into the discussion, although those terms have specific, functional definitions under the APA.... Other terms, too, are sometimes used to refer to such procedures—"trial-type" and "quasi-judicial." These vague and indefinite terms are particularly mischievous because they evoke images of courtroom trials, and they have contributed to the false impression that the APA's requirement of on-the-record hearings involves procedures more akin to civil trials than is actually the case.[243]

The administrative structure as a whole was created to serve the public and to regulate efficiently without uncertainty.[244] The rights of an affected party at any stage, therefore, should be clear, rather than clouded or confusing to the general public.[245] While the administrative function governs the privilege to practice a profession or enter a regulated field, the protection of the public should not encourage a disambiguation between an application of the Bill of Rights in the criminal or civil realm and the administrative arena. An individual who lacks knowledge of the administrative process should know how his or her rights are truly affected without having to resort to, or rely

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have had no way of knowing what was actually proposed.

Id. (citations omitted) (footnote omitted).

241. *See id.* at 1105.

242. *Id.* at 1106.

243. Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 356 (1st Cir. 2004).

244. However, "[r]econciling the need for efficient regulatory adjudication with fairness to the parties and due concern for the public interest is a different, and difficult, problem." Chi. & Nw. Ry. Co. v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 326, 362 (1967).

245. *See Citizens Awareness Network, Inc.*, 391 F.3d at 356.

on, prior experience or outside sources of information.