

[Editor's note: This is the full text of an article that was intended to be serialized in the Section's newsletter. The first installment appeared in the March, 2001 issue.]

IN SPACE, NO ONE CAN HEAR YOU SCREAM¹
The Dearth of True Judicial Recourse In Maryland's Administrative Regime
And What Could Be Done About It

by Jack L. B. Gohn
Gohn, Hankey & Stichel, LLP, Towson and Baltimore²

Let us start by acknowledging the obvious. If you seek to resist an executive or quasi-judicial action a Maryland agency wishes to take or has taken, you will not ordinarily find the courts receptive, no matter how outrageously the agency behaves. The courts' ears have been stopped against you by a formidable array of doctrines and rules.

Some of these rules make it difficult to get into court at all, or, if you can reach the bar yourself, they will make it hard to compel the agency and its officials to come along with you. These rules include: a) sovereign immunity; b) public official immunity; c) Eleventh Amendment immunity; and d) exhaustion of administrative remedies.³ And if you are lucky enough to survive this gauntlet and come before the bench, other rules will tend to reduce your so-called hearing there to a meaningless exercise: e) substantial evidence review; f) judicial reluctance to probe the mental processes of administrative decision-makers; g) unavailability of new evidence on judicial review; h) deference to administrative expertise; i) deference to administrative construction of organic statutes; and j) deference to administrative construction of regulations. It is a wonder that any agency decision is ever reversed.

It is not that vehicles of judicial review are lacking. Where the legislature has granted it, there is so-called record review under the 7-200 series of the Maryland Rules. Where the legislature (state, county or municipal) has not seen fit to provide explicitly for review, there are mandamus and common-law certiorari. But because of the rules just enumerated and others like them, the main role of judicial review seems to be affirming the majesty and the infallibility of the State. A guarantee of similar outcomes is considered a scandal when it is enshrined in the laws of, say, China or Cuba or Zimbabwe. But Amnesty International never comes calling in Maryland.⁴

This paper asks the reader to "entertain conjecture of a time" when the courts are not so hemmed in by the rules that they are prevented from taking real charge of most disputes between agencies and those aggrieved by them. There are ways to get there from here. Let us consider them.

A) Sovereign Immunity

The roots of the sovereign immunity doctrine of course run deep. The outrages inflicted on the victims of tyrants throughout history by and under the vicious and palpable lie (a/k/a legal fiction) that "the King can do no wrong" have been ameliorated in two ways since the King was replaced by governors and legislators. First, it has

¹ Advertising slogan for *Alien* (20th Century Fox, 1979).

² The author is indebted to Professor Abraham Dash of the University of Maryland School of Law, who read this paper and made several useful suggestions.

³ This is not even to mention standing, ripeness, and primary jurisdiction.

⁴ Our hard-heartedness toward those aggrieved by agency action is actually regarded as a good thing. The modern federal administrative state was born amid the great urgency of the economic upheavals that led to the Progressive movement, followed by the Great Depression and then the Second World War. In that environment huge problems had to be solved with haste. Government had too few resources to address every priority, and choices had to be made. The bottom priority, usually, was individualized justice. The States, in turn, found a ready-made edifice of law in the federal system, and, for the most part, simply adopted it. As a result, we are not only consistently, systemically unjust to those who seek to challenge agency action, we are oft-times proud of it, as a sign of our commitment to solving big problems without wasting resources.

been given a humane gloss, and second, it has been mended to some degree by waivers.

Hence we have apologies for the doctrine that the state cannot be sued. Thus it is said that the policy underlying the State's sovereign immunity not only protects the public treasury but also protects the State and its instrumentalities from standing trial;⁵ and that the reason for the immunity is that to subject the state to the coercive control of its own agencies would not only be inconsistent with its sovereignty, but would so hamper and impede the orderly exercise of its executive and administrative powers as to prevent the proper and adequate performance of its governmental functions.⁶ It is also often said by way of justifying sovereign immunity that one claiming injury at the government's hands may, and, absent a standing waiver, *must* seek recourse from the legislature.⁷ This argument has some force when the recourse is a prospective thing, i.e., a new, generally applicable waiver. Laws of general applicability *are* the general stock-in-trade of legislatures. But legislatures are not generally in the business of affording retrospective, individualized justice. One can sometimes open a can with a bayonet, but that is not the ideal tool, and good results are not guaranteed. In our polity, the appropriate "can-opener" for individualized justice is the court system.

There are various ways in which waivers have been effected, which do permit some access to the court system. The two most important are the Tort Claims Act⁸ and the law authorizing contract claims.⁹ These permit the litigation of some claims against state agencies. For instance, if a State vehicle has run you over or you have a payment claim on a contract with a State agency, these may well get you into court. The city or County government may also be sued in tort under the Local Government Tort Claims Act.¹⁰ The vast majority of situations in which individualized justice is sought from the State, however, will come via what one might call quasi-waivers, i.e., opening of access to quasi-judicial administrative remedies. If you want a certificate of need to operate a medical facility or to defend your professional license against the efforts of a board to remove it, or to challenge a personnel decision affecting you as a state employee, or to defend your driver's license against administrative removal, then you will have to go to an administrative remedy. It will be a quasi-judicial remedy, and may or may not be adequate. If you think it is adequate, then: a) you are to be congratulated; and b) you fall outside the scope of this article by definition, because this has to do with efforts to challenge the action of the agency *outside* the agency.

It is sufficient to observe at this point that sovereign immunity cuts off access to the courts for a large number of claims against agencies.

In this State there is overwhelming, emphatic judicial precedent that only the Legislature can waive sovereign immunity. So were the doctrine to be dismantled, it would necessarily be by legislative action.

B) Public Official Immunity

The King is not alone in lacking that simple freedom to do wrong bestowed on ordinary mortals. The King's ministers are quite likely afflicted with a similar moral incapacity, thanks to a wide variety of laws. When you sue the government under the Maryland Tort Claims Act, for instance, you will not be able to sue the state officials involved for anything they did within the scope of their duties unless motivated by malice or tainted with "gross negligence."¹¹ When you sue a municipal government under the Local Government Tort Claims Act, the

⁵ *State v. Hogg*, 311 Md. 446, 455, 535 A.2d 923, 927 (1998).

⁶ *Baltimore v. State*, 173 Md. 267, 271, 195 A. 571, 573 (1937).

⁷ *Jekofsky v. State Roads Commission*, 263 Md. 471, 287 A.2d 40 (1972).

⁸ Md. Code, State Gov't §12-104.

⁹ Md. Code, State Gov't §12-201.

¹⁰ Md. Code, Courts & Jud. Proc. §§5-301 *et seq.*

¹¹ Md. Code, State Gov't §12-105; Courts & Jud. Proc. §5-522(b).

officials cannot be reached for anything they did within the scope of their duties unless motivated by malice, never mind gross negligence.¹² Quite apart from these broad-brush immunities, there are dozens of “special interest” protections for governmental actors, generally although not exclusively found in Subtitles 5, 6 and 7 of Title 5 of the Courts and Judicial Proceedings Article. These may afford protections from certain kinds of action (don’t bother suing the Department of Liquor Control for Montgomery County in tort),¹³ for claims arising in certain factual circumstances (no matter what a police officer does to you while responding to a domestic abuse call while acting in good faith and in a reasonable manner, he/she will be immune),¹⁴ or from all claims arising from a respondent’s status as a governmental functionary (there is no action against members of the State Board of Examiners for Speech-Language Pathologists for anything they did while acting as such).¹⁵ For liability under 42 U.S.C. §1983, there is “public official immunity.” In general, if the public official sued under §1983 acted in reasonable good faith in light of the existing law, he or she cannot be liable.¹⁶ This doctrine is judge-made.

In sum, even if the public official whose actions aggrieve you can be put in the dock at all (and this may not be possible), you will generally have to show that he or she acted *ultra vires* or with malice. Obviously, making effective proof of malice will require an inquiry into the public official’s state of mind. As will be seen below, that kind of inquiry is often impossible to make even as to first-line decision-making public officials; it is harder still when the bad actors are the reviewing officials, or worse, the members of boards and commissions who often make the ultimate decisions. There may very well be malice, but there is only the slimmest chance that the tools for proving it will ever be made available. Effectively the malice requirement becomes a way of non-suiting genuinely aggrieved parties.

There is one approach to which public official immunity is not a major impediment, and that is to actions for mandamus or common-law certiorari. These actions are effectively the vehicle of review of governmental actions when the legislature (state or municipal, as the case may be) has failed to provide for review under the 7-200 rules.¹⁷ But this is a small number of cases, and in these the public official’s private purse (or that of the government or its insurer as subrogee) is not in issue. It appears that public officials whose actions one seeks to control via a writ of mandamus may always be named in the complaint,¹⁸ and those whose actions may be reviewed under common-law certiorari may well be “persons” to be named in the petition.¹⁹

As noted, the many rules shielding public officials from direct liability (as opposed to the mere *responsibility* these officials would encounter under mandamus or certiorari) are the creations of both legislatures and judges. Obviously, nothing can be done at the state level about immunities under §1983. But as to the legislatively-created public official immunities, there is a node of public policy issues that ought to be confronted together if there is a desire to change the situation.

Obviously, allowing all public officials to be exposed to unlimited personal liability for their misdeeds would be unthinkable. Exposure to such liability could scare away conscientious and competent officials just as

¹² Md. Code, Courts & Jud. Proc. §5-302(b).

¹³ Md. Code, Courts & Jud. Proc. §5-504.

¹⁴ Md. Code, Courts & Jud. Proc. §5-610.

¹⁵ Md. Code, Courts & Jud. Proc. §5-719.

¹⁶ *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), *Davis v. Scherer*, 468 U.S. 183, 194, 104 S.Ct. 3012, 3019 (1984).

¹⁷ See *Bucktail v. Talbot County*, 352 Md. 530, 723 A.2d 440 (1999) and *Board of License Comm’rs v. Corridor Wine*, 361 Md. 403, 761 A.2d 916 (2000).

¹⁸ See Rule 15-701.

¹⁹ See Rule 7-301.

effectively as it would the corrupt and inept, and governments could find it much harder to attract and keep required personnel. But in practice no public official operates under unlimited exposure. All governments provide their officials with insurance coverage to the extent of statutory exposure limits plus the cost of defense; this shields the officials from bearing any personal burden as the result of good faith actions taken within the scope of their employment. As a rule, this protection extends *only* to non-malicious actions taken within the scope of employment (coverage for deliberate misdeeds or outside the area of insurable interest being problematic issues in insurance law). And legislatures are understandably reluctant to open up exposures where there is no insurance. These considerations make it unlikely that legislatures will willingly agree to waive many existing public official immunities.

There could be a different approach, which would be to expand waivers of sovereign immunity so that all misdeeds by public officials of whatever sort were fully compensated. If governments took on themselves all liability for the misdeeds of their officials (preserving whatever discipline or rights of recourse they might wish against fiduciary breach by errant public officials), then it would be a matter of practical indifference to most aggrieved parties when the “other shoe” dropped, and all public officials were granted total personal immunity.

That is not to say that those aggrieved by governmental action should be deprived of declaratory relief identifying individual public official wrongdoers. Some such remedy would probably serve a number of salutary purposes. But it need not be accomplished in conjunction with a direct attack on a public official’s private purse.

On the other hand, where governments themselves are largely untouchable, as they are at present, the attack on the less-than-fully immunized public official may be the best way to establish the truth and vindicate the rights of the aggrieved. So nothing should be done further to immunize public officials until and unless sovereign immunity is greatly diminished or abrogated altogether.

C) Eleventh Amendment Immunity

42 U.S.C. §1983²⁰ is the major federal bulwark against violations of federal civil rights by non-federal governmental actors. It is a remedy that may be sought in either federal or State court. It usually affords the only route to scrutiny of the deeds of non-federal actors in a federal court. The Eleventh Amendment of the United States Constitution,²¹ however, is a major hindrance to relief under 42 U.S.C. §1983. Unwaived, it defeats all §1983 relief,²² apparently in state court as well as federal,²³ against State officials, leaving §1983 relief only against local

²⁰ This statute provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

²¹ The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” Although the Amendment does not on its face bar suits against “one of the United States” by its own citizens, this implication has long been established law. *In re Ayers*, 123 U.S. 443 (1887).

²² This includes equitable relief as well as legal. *Missouri v. Fiske*, 290 U.S. 18, 27, 54 S.Ct. 18, 21, 78 L.Ed. 145 (1933) .

²³ It also apparently precludes invocation of state court jurisdiction as well as federal court jurisdiction. *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240 (1999). It should be noted, however, that Maryland courts have not yet acknowledged *Alden*, and as a theoretical matter they might be able to continue fail to do so as a matter of State sovereignty. See *Bunch v. Robinson*, 122 Md.App. 437, 456, 712 A.2d 585, 594 (1998).

officials. A State may waive Eleventh Amendment immunity,²⁴ but is under no compulsion to do so, and a waiver of sovereign immunity in a State's own courts does not constitute a waiver of Eleventh Amendment immunity in federal courts or as to federal causes of action like §1983.²⁵ Maryland has not issued any evident Eleventh Amendment waivers of which this author is aware, certainly no §1983 waivers.²⁶

In effect, therefore, the Eleventh Amendment operates in Maryland to establish substantive sovereign immunity against §1983 for State, but not local actors. There has understandably developed much lore on the distinction between state and municipal officials, given the importance of this distinction, and given the essentially hybrid nature of many governmental officials in Maryland, viz. sheriffs and school boards.

The arguments against the effective sovereign immunity of State under §1983 are the same as the previously advanced arguments against sovereign immunity in general. And the fix, again, would and could only be legislative action, since it appears that little short of explicit legislative action would be accepted by the courts as a waiver. There does remain one possible area for judicial initiative. As noted above in Note , Maryland courts have so far failed to acknowledge recent federal case law closing state courts to federal causes of action under the Eleventh Amendment. With whatever authority or correctness, they could theoretically continue to do so. But this is unlikely; it is probably only a matter of time before a legislative waiver alone will be the only means by which the Eleventh Amendment's bar to §1983 relief as against Maryland State government agencies and officials could be set aside.

D) Requirements to Exhaust Administrative Remedies

Despite the unquestionable truth of the maxim that justice deferred is justice denied, the principle that administrative remedies should be exhausted is not a bad rule in most circumstances. But certain exceptions should be recognized and meaningfully enforced. The law already recognizes some of these exceptions, at least in principle. These include:²⁷

1. Where the legislature has indicated that exhaustion of administrative remedies is not required;
2. Where there is a direct attack on the authority of the legislature to pass the legislation from which relief is sought;
3. When the agency has required a party to follow a significantly unauthorized procedure;²⁸

²⁴ *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

²⁵ *Kennecott Copper Corp. v. State Tax Com'n*, 327 U.S. 573, 579, 66 S.Ct. 745, 748 (1946).

²⁶ See, e.g. *Kess v. Maryland*, 2001 WL 85179, *3 (D.Md.) (no waiver of FLSA immunity); *Sharafeldin v. Maryland Dept. of Public Safety and Correctional Services*, 94 F.Supp.2d 680, 687 (D. Md. 2000) (no waiver as to contract claim); and, most to the point, *Knussman v. State*, 65 F.Supp.2d 353, 359 (D.Md. 1999) (no waiver as to §1983 claims). Indeed, the University System of Maryland's Eleventh Amendment immunity is specifically unwaived. Md. Code, Educ. §12-104(i)(4).

²⁷ *Prince George's County v. Blumberg*, 288 Md. 275, 418 A.2d 1155 (1980), *cert. denied*, 499 U.S. 1083, 101 S. Ct. 869 (1981). For a roughly equivalent list of exceptions on the federal side, see *McCarthy v. Madigan*, 503 U.S. 140, 146-49, 112 S.Ct. 1081, 1087-89 (1992).

²⁸ While a claim of "substantially unauthorized procedure" theoretically excuses exhaustion of administrative remedies, the commitment of the Court of Appeals to this exception seems less than wholehearted. In *Maryland Com'n on Human Relations v. Mass Transit Admin.*, 294 Md. 225, 449 A.2d 385 (1982), it was claimed that the MCHR's processing of an administrative complaint against the MTA for discrimination against the obese could not proceed because obesity was not within the statutory definition of "handicap" without which the MCHR lacked jurisdiction and its procedures were certainly unauthorized. This argument did not sway the Court of Appeals at all, despite the fact that if the MTA was correct, it was being forced to go through interminable MCHR proceedings even though the MCHR lacked jurisdiction. (On the sheer interminability of MCHR proceedings at the time, see *Gee v. Mass Transit Admin.*, 75 Md.App. 253, 540 A.2d 1194 (1987), *cert. denied*, 75 Md.App. 253, 540 A.2d 1194 (1988).)

4. Where the administrative agency cannot provide any substantial remedy;
5. When the object of and the issues presented by the judicial proceeding only tangentially or incidentally concern matters the agency was created to resolve.

These exceptions are fine, so far as they go, but there are at least two more exceptions Maryland courts should recognize. One is the situation where invocation of administrative remedies would be futile, because the result would be a foregone conclusion. This exception, recognized in federal law, is applicable where the agency's stated policy is contrary to the position of the party challenging the agency.²⁹ If, from the circumstances, it is clear that the agency has already made up its mind on the issue in dispute, then the only serious justification³⁰ for delaying judicial intervention is to enable the crafting of a factual record at the administrative level. But once the facts are recorded, a recognized shortcut to judicial intervention should be set in place, one in which, upon a prima facie showing that the agency has spoken or has a closed mind on some policy issue, the burden of proof should be on the agency to show that it still possesses an open mind.

Another place to recognize an exception is where the agency's jurisdiction to act at all is under challenge. Arguably, this exception is already recognized under the first of the six enumerated exceptions above (the legislature has not required it). But the case law suggests that this only applies "when a recognized alternate remedy under either common law principles or under some other statute ha[s] been invoked."³¹ Most of the time, the aggrieved party's quarrel will be with the agency's interpretation of the provisions of its organic statute setting forth the agency's scope of operation, and will not arise under some different statutory or common law provision. Nor, as observed in Note above, does this exception seem to fall within the ambit of the third enumerated exception (the agency requires substantially unauthorized procedure). Rather, it seems that this exception is not presently authorized. But it should be.

It should be because it is simply not fair to force any party to submit to onerous delay, waste of resources, and loss of business opportunity where the agency never had the right to demand them in the first place. Nor is it any answer to point to the ameliorative power of Md. Code, State Gov't §10-224, which allows for small businesses and non-profits to recover litigation costs up to a paltry \$10,000 for cases in which the government initiated an administrative procedure against these parties without substantial justification. In the first place, our courts are apt not to acknowledge that an agency's exceeding of its jurisdiction is by definition or without more acting without substantial justification. Moreover, individuals and large companies are just as likely to be the victims of unjustified administrative enforcement as small companies and non-profits. \$10,000 will not often buy an OAH hearing with experienced counsel, never mind what the full panoply of intra-administrative and judicial review costs. Of course, the force of these objections could be lessened by the Legislature passing something closer to the federal Equal Access to Justice Act,³² which (while it sets unrealistically low attorney rates and excludes claimants above certain net worths), still avoids capping total compensation and sets well-recognized tests for whether the government's position was substantially justified. But compensation is still a poor second to allowing the aggrieved party to obtain a quick judicial read on the agency's jurisdiction.

The recognition of additional grounds for the excuse of exhaustion would rest in the hands of either the legislature or the courts.

E) Substantial Evidence Review

The single rule of judicial review that is frequently cruellest and perhaps least defensible is substantial

²⁹ *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138-39 (D.C. Cir. 1987); *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 105-06 (D.C. Cir. 1986).

³⁰ Following a notional hope of changing the agency's mind is seldom if ever a realistic reason. See *McCarthy v. Madigan*, Note above, 503 U.S. at 148-49, 112 S.Ct. at 1088.

³¹ *White v. Prince George's County*, 282 Md. 641, 650, 387 A.2d 260, 266 (1978).

³² Codified at 5 U.S.C. §504 and 28 U.S.C. §2412.

evidence review (as that term is defined by Maryland, *not* federal, administrative law). More than anything else, this cripples meaningful judicial review, even when judicial review is procedurally available. Substantial evidence review applies to quasi-judicial administrative fact-finding, and is the principle by which courts uphold any fact found by an administrative decision-maker for which there exists “substantial” evidence.³³ Under the federal Administrative Procedure Act,³⁴ it is clear that evidence which is completely overwhelmed by contrary evidence is not “substantial,” and a scintilla will not suffice.³⁵ Hence to assess whether federal administrative evidence is truly substantial calls for some actual weighing of the evidence by a reviewing court. That saving grace is completely lacking in Maryland administrative law, where substantial evidence is deemed to be present if there is any evidence, no matter how slight, supporting the administrative fact-finder’s conclusions. Hence in Maryland affirmance appears to be automatic upon the successful outcome of a single mechanical operation: Identify The Scintilla.³⁶ The notion of the reviewing court actually attempting to assess evidence and thereby do justice on its own is treated with a singular horror. The catchphrase is forever repeated in the decisions: “The court should not substitute its judgment for that of the agency.”

To which the question must be posed: Why Not? When a court reviews the actions of an agency, the process is not called an appeal. Most frequently it is called judicial review. The term “appeal” is eschewed both for constitutional reasons and as an acknowledgment of reality: agencies, even functioning quasi-judicially, are not courts. Instead, on judicial review, it is the agency’s own act which is being questioned. In fact, the agency is usually the respondent. And if the agency is able to foreclose almost all meaningful independent review of its fact-finding, the agency thereby controls meaningful review of what may well be the single most important indicium of the quality of its own performance. Even while a respondent, the agency remains for most purposes a judge – its own judge. This is simply wrong.³⁷ *Baltimore & O.R. Co. v. Canton Co.*, 70 Md. 405, 17 A. 394, 395 (1889). Not

³³ Substantial evidence review is also a creature of the common law, but in cases governed by the Administrative Procedure Act, it is mandated by Md. Code, State Gov’t §10-222(h)(3)(v).

³⁴ 5 U.S.C. §706(2)(E), in language very reminiscent of the passage from the Maryland Administrative Procedure Act quoted in the last note, permits reversal of factfinding which is “unsupported by substantial evidence” – a phrase substantially modified by the further directive to the reviewing court to “review the whole record.”

³⁵ See, e.g., *Musgrave v. Sullivan*, 966 F.2d 1371 (10th Cir. 1992). When the federal APA was adopted, the Attorney General issued an interpretive Manual (1947) which is generally considered highly persuasive on the federal APA because of its contemporaneousness. At 109, it referred to the substantial evidence provision of the APA now found at 5 U.S.C. §706(2)(E), as codifying, inter alia, *Consolidated Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 59 S.Ct. 206 (1938), where, significantly, it was said: “*Substantial evidence is more than a mere scintilla*. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” 305 U.S. at 228. [*Emphasis added.*] The Senate Committee passing the federal APA explained: “The requirement of review upon the whole record means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case.” Sen Doc. No. 248, 79th Cong., 2d Sess. 214, 280 (1946). The force of this view was adopted by the Supreme Court in *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951).

³⁶ For instance, it is said:

A reviewing court may, and should, examine facts found by an agency, to see if there was evidence to support each fact found. If there was evidence of the fact in the record before the agency, no matter how conflicting, or how questionable the credibility of the source of the evidence, the court has no power to substitute its assessment of credibility for that made by the agency, and by doing so, reject the fact.

Commissioner, Baltimore City Police Dept. v. Cason, 34 Md.App. 487, 508, 368 A.2d 1067, 1079, *cert. denied*, 280 Md. 728 (1977). This is really arbitrary and capricious review, not true substantial evidence review.

³⁷

It is a maxim of every code, in every country, that no man should be judge in his own case. The learned wisdom of enlightened nations, and the unlettered ideas of ruder societies, are in full

having to do the hard work of retracing and evaluating an agency's fact-finding may be welcome to judicial-branch judges who feel overwhelmed by their other responsibilities. But it is still wrong.

To be sure, there are justifications advanced.³⁸ Agencies are supposed to be – at least in their own spheres – far more knowledgeable than courts. They are thought to possess a factual expertise which prevents them from needing to reinvent the wheel, as a judicial-branch judge would need to do in some instances, and also a heightened familiarity with the agency's organic law which may to some degree inform the finding of fact. It is sometimes added that if we do not trust these (indirectly) politically-accountable professionals with making their own decisions – if we seriously check their powers with those of the theoretically politically *unaccountable* courts, then the professionals will grow discouraged about making decisions at all. Moreover, substantial evidence is looked to as a way of preserving trial courts from shouldering the burden of reassessing evidence, thereby promoting an efficient use of judicial resources. Substantial evidence review is also lauded as discouraging all but those with the strongest of cases from burdening the judicial system with demands for review in the first place. Moreover, substantial evidence review decreases the drag on the delivery of governmental protections for the public³⁹ – by, for instance, making it easier to strip bad doctors of their licenses and kick welfare cheats off the rolls. However, weak as substantial evidence review is, the State(different from federal courts) actually mixes up substantial evidence review with arbitrary and capricious review, which makes a bad situation worse.

Most of these arguments are open to serious question. If agencies really know so much that a non-expert cannot be trusted to review their decisions, then why are OAH ALJs so frequently detailed to make these decisions for them?⁴⁰E. Tomlinson, *The Maryland Administrative Procedure Act: Forty Years Old in 1997*, 56 MD. L.REV. 196, 253 (1997) And in any event, can it really be said that enormous expertise is required to decide, for instance, the facts underlying the Department of Motor Vehicles' decision (through an ALJ) whether to suspend a driver's license? And the argument that the immanence of meaningful judicial review might discourage administrative decision-makers from deciding cases has no apparent greater or lesser force than the same argument applied to judicial-branch judges grappling with the awareness that appellate judges may be reviewing their work-product. It is a matter of common experience that *nisi prius* judicial decisions get made.

accordance upon this point; and, wherever tribunals of justice have existed, all men have agreed that a judge shall never have the power to decide where he is himself a party. In England it has always been held that, however comprehensive may be the terms by which jurisdiction is conferred upon a judge, the power to decide his own case is always a tacit exception to the authority of his office. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not. All his powers are subject to this absolute limitation; and when his own rights are in question he has no authority to determine the cause.

³⁸ The following arguments in favor of substantial evidence review are all articulated in different form in Professor Michael Asimow's attack on California's "independent judgment" rule, "The Scope of Judicial Review of Decisions of California Administrative Agencies," 42 UCLA L. REV. 1157, 1184-89 (1995).

³⁹ "We're from the government and we're here to help you" is a proposition often jokingly enumerated with two others, the first being "the check is in the mail" and the second not being printable in these pages.

⁴⁰ ALJs are naturally given specialized training for each agency whose decisions they make or recommend. But, as Professor Edward Tomlinson has pointed out:

The substitution of generalist central office ALJs for specialist agency hearing examiners is nevertheless likely to reduce the role of expertise. Despite the OAH's efforts to cross-train ALJs for all subject matter areas in which they conduct hearings, ALJs are likely, in most cases, to have less experience, technical competence, and specialized knowledge than the agency hearing examiners they replaced. The legislature, when it chose the central panel system, favored independence over expertise.

And as to the arguments that substantial evidence review screens out weak claims and decreases the drag on the agencies' missions to protect the public, these premises are almost certainly true. It is also almost certainly true that strong claims are screened out and the drag on overzealous and downright tyrannical agency behavior is also materially lessened.

Even if these arguments had more merit, they would fail to come to grips with the real problem. That problem is that, not being judges or properly voir dired and instructed juries, administrative decision-makers seldom come either with expertise in legally appropriate fact-finding⁴¹ or with reasonable guarantees of impartiality. To choose but one example from a thousand, a member of the Maryland Board for Professional Land Surveyors is likely to know a great deal more than the ordinary judge about the use of total stations or the significance of consumer waivers in the commissioning of location drawings. But that same member may have far less experience than the same judge in weighing the credibility of witnesses, far less understanding of the delicate interplay of burdens of proof or production, and far less understanding of the rules of evidence, even administrative evidence. And the Board member may be subject to internal politics within the Department of which his Board is a part, may be tempted to ignore *ex post facto* concerns in a desire to establish new policy. Another example: A hearing board rendering a disciplinary decision within a police department under the Law Enforcement Officers' Bill of Rights surely knows a great deal about police procedure. But anyone who has ever dealt with these boards knows that generally the police chief has made his or her wishes known, and the board is not about to challenge it; the board will generally find a way to vindicate the official will, including finding all facts necessary. In short, administrative fact-finders cannot reasonably be presumed to possess the kind of expertise in the finding of facts combined with the kind of independence which hopefully do characterize judges -- and juries under the guidance of judges.

Even when matters are turned over to ALJs in the Office of Administrative Hearings who are (now) always lawyers and who do understand their independence, the agency may well retain final say over whatever the ALJs determine. It is quite possible to win a case before the ALJ, to have the administrative prosecutor take the matter up before the agency on exceptions, and then to lose the case before the agency. That board members will have seen none of the witnesses, may never have stolen a glance at the transcript, and may well decide the case the way they do for strictly political reasons. (Compliance with the *Shrieves* rule⁴² can safely be left to the agency's counsel, who, if smart enough, will be able draft a ruling that properly genuflects to *Shrieves* while obstructing its purpose.) And most later substantial evidence review will defer to the agency, not to the ALJ!

In sum, most of the arguments *in favor* of the substantial evidence rule are really arguments about the efficiency of allocation of adjudicative resources. Most of the arguments *against* substantial evidence have to do with justice. While we can all agree that an unstinting pursuit of justice can be too costly in terms of limited adjudicative resources, substantial evidence review leaves fact-finding, one of the most important components of the delivery of justice, in the hands of those who generally lack the training and may well lack the inclination to advance justice, while tying the hands of those very professionals, namely judges, who most understand and are most committed to the delivery of justice. In other words, the vaunted efficiency is accomplished by a potentially brutal diminution in quality. We need to think long and hard about whether this efficiency is worth the cost.

Should we conclude that the cost is too high, there are various things we might set out to change. The simplest would be simply to adopt, explicitly, the federal understanding of substantial evidence. This would be

⁴¹ For instance, in a recent hearing in which this author participated, the lay chair of a board instructed the author not to make any objections to questions being posed by board members to witnesses. Obviously, without counsel being able to register objections, the client's case was seriously prejudiced; "substantial evidence" was very likely being created without valid objections being lodged. Just as obviously, no ALJ would have issued such an instruction.

⁴² In *Department of Health & Mental Hygiene v. Shrieves*, 100 Md.App. 283, 641 A.2d 899 (1994), which explicated *Anderson v. Department of Pub. Safety & Correctional Servs.*, 330 Md. 187, 623 A.2d 198 (1993), it was established that when the ALJ is reversed by the agency on exceptions, it is the agency's finding which is accorded substantial evidence review, except in the limited circumstance where the ALJ made credibility determinations based on witness demeanor. And in that limited circumstance, the agency may still overturn the ALJ's fact-finding, but only after it provides "strong reasons."

simplest not only because it would change matters the least but because it would require nothing more elaborate than a ruling from the Court of Appeals announcing that certain previous rulings had been slightly erroneous. If we accept that federal notions of substantial evidence were intended to be part of the standard of review under the Maryland APA (and presumably in non-APA record review matters), then the adjustment would be swift. It might not be profound, because it would increase only marginally the agency's burden of production on appeal. Instead of a scintilla, the agency would then need to produce only a scintilla-plus. That "plus" might be quite small. The difference might be like the difference between .1% and 5%. In reality, few cases would come out differently.

A more determined effort might include rethinking the *Shrieves* decision. *Shrieves* elevates the work product of lay persons and politicians above the work product of those tribunals that are the closest thing in the administrative world to genuine courts. Reversing the balance of deference mandated by *Shrieves* would predictably produce a much greater effect than merely adopting a federal definition of substantial evidence. This is because, as practitioners who regularly litigate against agencies know, agencies often reverse ALJs, and agencies hang onto their power to do so for a reason, and that reason usually has nothing to do with individualized justice. Approving the converse of the *Shrieves* rule would also, it should be noted, predictably work toward economies of adjudicative effort, because once agencies understood that the ALJ received the deference in fact-finding, many of them might surrender their adjudicative functions altogether.⁴³ Even reversing *Shrieves* without federalizing the definition of substantial evidence might have a profound effect, because ALJs are perceived to rule in favor of individuals more frequently than do agencies, and if the ALJ whose fact-finding is at loggerheads with the post hoc fact-finding of the agency must be sustained unless there is not a scintilla to support *the ALJ*, then results will frequently be altered as well. And even if the statistics did not bear out these assumptions as to results, it would still leave critical fact-finding in the hands of impartial and properly-trained quasi-judicial professionals. This would lead to greater acceptability of the outcome.

Shrieves is also judge-made law, and could be judicially reversed.

Another possible attack on the problem would be to move from substantial evidence review to "clearly erroneous" review,⁴⁴ applicable to the review by appellate courts of lower courts (when the latter sit without juries).⁴⁵ This standard would require that the agency's fact-finding be affirmed so long as there is not a very substantial preponderance of the testimony to the contrary. As was pointed out in an influential early article in the Harvard Law Review,⁴⁶ "clearly erroneous" and "substantial evidence" are hard to describe in ways that make them sound distinct, but in federal practice, at least,⁴⁷ there is a real difference. It is even greater than the difference between federal and state substantial evidence review, i.e., the difference between a scintilla and whatever (no matter how small) is greater. "Clearly erroneous" is certainly not an easy standard for an appellant to meet, but at

⁴³ Although there is a practical impediment that might also fruitfully be addressed. When agencies turn over their adjudication to the Office of Administrative Hearings, their budgets are assessed to compensate the OAH. At least one agency known to this author conducts difficult and time-consuming contested case hearings to save money. Eliminating the financial disincentive to delegation of hearing power would produce a greater number of ALJ hearings -- and in the agency in question the delegation is for the purpose of making a final administrative decision; no exceptions are available to either side.

⁴⁴ This standard of review of agency fact-finding was rejected at the federal level in *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955). But this rejection occurred at a point when the federal version of substantial evidence review, more generous than Maryland's, was well established.

⁴⁵ At the federal level under F.R.Civ.P. 52(a), in Maryland under Md. Rule 8-131(c).

⁴⁶ R.L. Stern, Review of Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 HARV.L.REV. 70, 71 (1944).

⁴⁷ In Maryland, for instance, the two standards appear to have been conflated, at least on occasion. It was said, for instance, in *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 41, 382 A.2d 564 (1978), that "if *substantial evidence* is present to support the trial court's determination, it is not *clearly erroneous* and hence will not be disturbed on appeal." [*Emphasis added.*]

least it gives the appellant a fighting chance to prove that there is something seriously at odds with the weight of the evidence in some finding of fact below.

Making a “clearly erroneous” standard applicable to Maryland APA contested cases would require legislative action. Making it applicable to non-APA cases would presumably require nothing more than a judicial change of heart.

The problem with either federalizing “substantial evidence” or adopting a “clearly erroneous” standard is that either would leave the party contesting agency fact-finding still contending with enormous judicial deference to fact-finding by tribunals which, as often as not, are comprised of judicially-untrained and judicially-uninstructed lay people whose work product has typically been “prettied up” after the fact by agency counsel so as to frustrate meaningful judicial review. It leaves the foxes still seized of the only keys to the henhouse. Instituting the converse of the rule in *Shrieves* might be a much more meaningful corrective, because it would divert deference to fact-finders who may lack subject-matter expertise but who are in all other respects more trustworthy.

An even bolder step would be to adopt something like California’s “independent judgment” rule. In cases where it applies,⁴⁸ the rule requires the reviewing trial court (though not the appellate court sitting in review of the trial court)⁴⁹ to exercise an independent judgment of the facts:

Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determined that the findings are not supported by the weight of the evidence.

Code Civ. Proc. §1094.5(c). This means that in the cases to which the rule applies, the trial court will review the evidence and reach its own conclusions. This does not mean a total lack of deference to the agency. Indeed, the standard implies that the findings of the agency come before the court with a strong presumption of correctness; however, this presumption does not translate into a refusal to re-weigh the evidence before the agency after a scintilla or other specified quantum in favor of the agency’s finding is identified. “Independent judgment” has just been unanimously and ringingly re-endorsed (and thoroughly explicated anew) by the California Supreme Court.⁵⁰

Adoption of “independent judgment” or something like it is, in this author’s view, an absolute precondition to meaningful judicial review of agency fact-finding. There will almost always be *something* in the record which could *arguably* support the facts found by an agency — no matter how bad the agency’s faith, no matter how political the agency’s agenda, no matter how little that something might have had to do with the agency’s real thought-processes. Some expert will give an opinion contradicted by all reputable treatises in her field; some self-serving bureaucratic document will be consistent with the single one of three possible explanations of events that could give rise to the agency’s desired inference; some phrase spoken by the regulatee taken out of context may be torturable into a meaning consistent with a fact found by the agency. It would be the unusual agency fact-finding which lacked some basis like these -- and unfortunately it is all too common for quasi-judicial fact-finding to rest on bases no more substantial. “Substantial evidence” is a mere fig-leaf to cover the proposition that the State Always Wins -- at least in matters of fact-finding.⁵¹ Independent judgment would enable the court to set aside such

⁴⁸ Independent judgment does not apply in review of California’s “constitutional agencies” or in cases where the litigant challenging administrative action cannot claim injury to a “fundamental right.” While these distinctions are important in California law, they are not important for present purposes.

⁴⁹ Appellate courts review trial courts’ fact-finding on the substantial evidence standard. In Maryland, the tasks of the trial court and the appellate courts on review of administrative agencies are essentially the same. *Smack v. Department of Health and Mental Hygiene*, 134 Md.App. 412, 417, 759 A.2d 1209, 1212 (2000).

⁵⁰ *Fukuda v. City of Angels*, 20 Cal.4th 805 (1999). It is a reasonable assumption that if “independent review” actually created an intolerable burden on trial judges, the resulting distress would have been acknowledged in this opinion.

⁵¹ Reversals of agencies usually occur as a result of constitutional or administrative due process violations by

threadbare “evidence,” and to assure that no agency acts on such ill-founded “facts.”

E) Judicial Reluctance to Probe the Mental Processes of Administrative Decision-Makers

As intimated in Note , above, the usual route to overturning bad-faith administrative fact-finding (the courts being precluded by substantial evidence review from second-guessing almost all of it on the merits) is by demonstrating breaches in proper procedure, including bad faith. However, courts are about as eager to allow showings of bad faith as they are to assess the evidence independently. This is a matter of principle, though it is difficult to determine exactly what principle might be involved,⁵² 300 Md. at 215, 477 A.2d at 767. As *Patuxent Valley* acknowledged, the force of *Morgan* had been slightly blunted by *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825 (1971), which recognized an exception for situations where the administrative decision-maker acted without facing any requirement to articulate findings of fact or a rationale. But the *Overton Park* exception does little good where the issue is whether the findings of fact or rationale were articulated in bad faith. over and above a desire to avoid unseemly scenes or inconvenience administrators. This principle has been bolstered on ordinary record review by Rule 7-208(c), which provides that: “Additional evidence in support of or against the agency’s decision is not allowed unless permitted by law.” Notwithstanding, it appears that, the administrator’s good faith, etc. may be probed on judicial review in APA contested cases under Md. Code, State Gov’t §10-222(g)(2), which provides: “A party may offer testimony on alleged irregularities in procedure before the presiding officer that do not appear on the record.” (This would be the “permitted by law” referenced in Rule 7-208.)

“May offer” is far different from “must be allowed to offer.” Indeed, it is highly questionable whether most of the time it actually means “may.” As the Court of Appeals has made clear in the *Patuxent Valley* case,⁵³ and more recently in *Stevens v. Montgomery County*, 337 Md. 471, 654 Md. 877 (1995), testimony of administrative decision-makers, particularly of “high-level” ones, and probably testimony about quasi-judicial administrative decision-makers at all levels, will be excluded unless a “strong showing” of bad faith, etc., is made. (There seems to be no law yet on whether *Patuxent Valley* and *Stevens* apply in proceedings like mandamus which are not confined within the four corners of a pre-existing administrative record.)

Patuxent Valley and *Stevens* fail to disclose where the raw materials for such a showing are likely to be

the agencies, the great equalizer in such matters. As slipshod as agencies typically are in analyzing evidence, they are often equally slipshod in following their own procedures, and here, alone, of all the possible bases for reversing administrative action, courts will sometimes have the tools and show the fortitude to do justice to those wronged by agencies.

⁵² The principle seems to have made its major penetration into Maryland law in the case of *Public Service Com'n of Maryland v. Patuxent Valley Conservation League*, 300 Md. 200, 213-14, 477 A.2d 759, 766-67 (1984). There the Court of Appeals adopted federal law on the subject, in particular the holding in *United States v. Morgan*, 313 U.S. 409, 61 S.Ct. 999 (1941), and various lower-court cases applying it. In *Morgan* the Secretary of Agriculture, before making a challenged decision, had written a letter to the *New York Times* which gave rise to an inference of bias in the decision. Justice Frankfurter (a New Dealer whose faith in administrators rivaled that of Charlie Brown in Lucy Van Pelt at kickoff time) noted that “the Secretary wrote a patently sincere denial of bias,” also dubbed “a dignified denial,” and protested with palpable horror that the Secretary should never have been compelled to testify concerning his thought processes. The *Patuxent Valley* court wrote, in part of *Morgan*:

The reasoning underlying the above-cited cases is that judicial review is generally confined to an objective examination of the record before the court. Absent exceptional circumstances, which preclude effective review of an agency’s action on the record, an administrative official cannot be compelled to give testimony explaining the agency’s decision. Thus, only a strong preliminary showing of bad faith or improper behavior will allow a party challenging agency action to depose the individual decision makers.

⁵³ See preceding Note.

found. Ordinarily the only source of facts will be the record itself, and the shaping of the record will frequently be controlled by the very decision-maker whose feet of clay one wishes to expose. And if that decision-maker does not supervise the making of the record, it will probably be made, in large measure, before that decision-maker, the secretary or the board, becomes involved, and thus before that decision-maker does whatever smacks of bad faith, and upon which a party might wish to make a record. The record will therefore seldom feature admissions by the decision-maker to political motivations, bribes, malignant authoritarianism, prejudice against members of any group (protected or not) to which the aggrieved party belongs, laziness or hyperzealousness. Yet somehow, mostly using this record, a party is supposed to cobble together a “strong showing.” For the most part, this kind of bootstrapping will be impossible even for a party actually disadvantaged as a result of administrative bad faith. Hence what *Patuxent Valley* and *Stevens* have achieved could be described with a memorable phrase from the religious and literary commentator C.S. Lewis: “We castrate and bid the geldings be fruitful.”⁵⁴

But let us not lose heart (or any other bodily part). Let us consider the “strong showing” requirement not so final as castration and more akin to a reversible vasectomy, because, fortunately, it is quite reversible. It is a matter of pure judicial fiat, subject to judicial reconsideration. The question should therefore be asked: what could be substituted?

We can agree that it is not desirable that, on every judicial review, the administrative decision-makers be hauled into court to give an accounting of their motivations and thought processes. But it is equally undesirable that aggrieved parties be almost always blocked from invoking such an accounting. We need a standard of selection that usually prevents frivolous wasting of administrative resources while usually compelling the abusive decision-maker to testify. Perfection in this regard not being attainable, however, the risk of error should rest on the administrator, not on the aggrieved party. (It needs to be recognized that usually the evildoer is the one who has control of the evidence of his or her misdeeds.)⁵⁵ 51 Cal.App.3d at 361-62, 124 Cal.Rptr. at 248. A working standard might be a “weak showing,” i.e. some plausible evidence, specifically including conclusoriness or lack of coherence and rationality in written findings of fact and conclusions of law, which suggests some incompetence or hidden agenda.

Under present law, even if a “strong showing” is made, another feature of *Patuxent Valley* and *Stevens* may swing into play, which is that the case may well be remanded for record development and fact-finding to the very decision-maker whose bona fides are under challenge.⁵⁶ This is so obviously unjust as to require no comment at all. Apart from that, it is bad policy. It builds no incentives into the system for agencies to administer fairly and well. If an administrative decision-maker is tempted to act in bad faith, it would be a far greater disincentive for that decision-maker to know that the victim will have a complete opportunity to aerate the facts in a forum over which the decision-maker has no control. Again, a simple overruling of precedent would right this wrong.

F) Unavailability of New Evidence on Judicial Review

The problem with making a post-hoc case regarding the bias of the decision-maker is a special case of a larger problem, which is that, at least on ordinary record review, there is no opportunity to expand the record before

⁵⁴ C.S. Lewis, *The Abolition of Man*, at 35 (1947, repr.1986).

⁵⁵ It was well-put in *Credit Managers Ass’n of Southern Cal. v. Superior Court*, 51 Cal.App.3d 352, 124 Cal.Rptr. 242 (1975), where the defendant was held not entitled to dismissal because the charges against it were conclusory and sketchy:

:

[A] plaintiff need not plead facts with specificity where the facts are within the knowledge and control of the defendant and are unknown to the plaintiff.... In our view, the victim of a wrongdoer who successfully conceals his misdeeds has as much right to, and is in far greater need of discovery than the victim who is fully advised of all of the details of the wrong. This is particularly true where the wrongdoer is a fiduciary who has the burden of giving an account of his stewardship. It is not true that a litigant is only entitled to discovery if he does not need it.

⁵⁶ *Stevens*, 337 Md. at 483-84, 654 A.2d at 883.

a real judge. This may not be a problem in those cases where an ALJ has conducted a proper administrative trial, although even there, if there has been an improper exclusion of evidence, the reviewing court, upon recognizing the impropriety, will probably need to remand the matter to the agency to hear the evidence, which sets up a cumbersome delay. Courts also have the option in review of APA contested cases to “order the presiding officer to take additional evidence” before completing judicial review.⁵⁷ But in real-life administrative hearings, a remand or an order to take additional evidence frequently creates problems of its own. Administrative decision-makers who have been reversed for failure to conduct a proper inquiry before acting may well approach the remand with the attitude that they will do whatever it takes to justify their previous outcome. Or they may have become unavailable. (It is rare for a multi-member board ever to be composed of exactly the same members by the time a remand occurs.) It would be far more economical and fairer for the courts to conduct hearings on whatever evidence their review convinces them the record lacked before matters came to the courts. Or at least for the courts to have that option.

But would this not weaken the exhaustion of administrative remedies rule? And would it not call upon courts to exceed their judicial capacities and exercise administrative (read executive) discretion?⁵⁸ Well, probably yes. We are not talking about theoretical consistency here, but about justice. This means justice for those exhausted by administrative remedies, and justice where it appears that administrative discretion is likely to be abused. And in fact, in policing the boundaries between agencies and courts, the Court of Appeals has had occasion to acknowledge the practical need for “elasticity” in conceptualizing the constitutional nature of agency function.⁵⁹ There should be no greater reluctance to acknowledge the need for “elasticity” in conceptualizing the function of the court.

In sum, it would be a welcome development if the courts acknowledged that there is no constitutional bar to conducting additional factfinding where further administrative factfinding is inconvenient or suspect, and for the legislature to countenance such activities in APA review by amending the APA to provide for it.

H) Deference to Administrative Expertise

It is hard to dispute the presence of a pleasing match between problems and decision-making in cases where administrators who have a great familiarity with the technical facts of their regulated field bring that familiarity to bear upon factual issues within that technical sphere. For instance, when a plumber is charged with having done something technically amiss in the pursuit of her trade, a board comprised of plumbers would be helpful. But such a match is not always present in the real world of administrative decision-making.

For instance, the administrative decision-maker may not be a plumber, but instead an OAH ALJ, and hence not much better versed in the technicalities of the profession than a judicial-branch judge may be. Or the question may be presented to a board with a good supply of plumbers, but it may not be a technical plumbing question.⁶⁰ Or it may be that the skill set of the administrative decision-maker matches the question posed, but the procedures of the agency do not provide the decision-maker with meaningful opportunity to exercise his expertise.⁶¹ To all of

⁵⁷ Md. Code, State Gov't §10-222(f).

⁵⁸ See *Ocean City Bd. of Sup'rs of Elections v. Gisriel*, 102 Md.App. 136, 148, 648 A.2d 1091, 1096 (1995).

⁵⁹ *Shell Oil Co. v. Supervisor of Assessments of Prince George's County*, 276 Md. 36, 46, 343 A.2d 521, 527 (1975).

⁶⁰ In *Maryland-National Capital Park and Planning Commission v. Washington Nat. Arena*, 282 Md. 588, 603, 386 A.2d 1216, 1227 (1978), it was acknowledged that “application of principles of public policy and doctrines of constitutional law ... does not require the kind of special expertise and technical knowledge normally employed in administrative fact-finding and rule-making.”

⁶¹ One state board which shall be nameless is notorious for paying no attention to efforts of practitioners before it to call its members' attention to the administrative record. To all appearances, the agency is a complete captive of its counsel, whose expertise is in law, and whose rulings issued under the *nom de plume* of the agency receive the sort of deference upon judicial review which would only be appropriate if counsel possessed the board members' expertise. And indeed, the press of business before the agency is such that it would be impossible for the

these situations, in general, the courts respond in about the same way: demanding that the litigant exhaust remedies and deferring to the conclusions reached as a result of that supposed exercise of expertise.

Such blind deference is inappropriate. The reviewing court should review the fit between the question presented and the actual expertise of the decision-maker, and should further scrutinize the extent to which the decision-making process actually made use of any such expertise revealed by the first inquiry. This change could be effected by simple judicial decision.

I) Deference to Administrative Construction of Organic Statutes

Judicial reference to construction by an agency of its organic statute comes in two strengths: deferential and super-deferential. The distinction turns on whether the agency's regulation interpreting the organic statute is or is not deemed to be a "legislative rule." A legislative rule, i.e. a rule considered to have been passed pursuant to an explicit legislative invitation to interpret the statute, is only overturned "if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"⁶² But even an interpretation not embodied in a legislative regulation will often receive great deference.⁶³ Things in Maryland have not gone quite as far as in the federal system, where *Chevron* deference is the rule (however confusing that rule may sometimes be).⁶⁴ But no one would argue that an individual litigant's interpretation of an agency's statute starts with anything like the presumption of correctness attaching to an agency's interpretation.

This presumption effectively carves out a very large exception from the ordinary scope of a court's duties,⁶⁵ and *pro tanto* diminishes the meaningfulness of judicial review. As with fact-finding, there are probably arguments to be made that shifting much of the responsibility and power of interpretation from the courts to the agencies is a salutary thing in terms of allocating decisional resources. And those arguments may be the real reason for this oppressive deference. But if so, the courts are neither admitting that this is their thought process nor indeed admitting to any thought process at all. The reported decisions amount to thoughtless repetition and little more.⁶⁶

agency members to apply much expertise to the voluminous records before them.

⁶² *Maryland Pennysaver Group, Inc. v. Comptroller of Treasury*, 323 Md. 697, 709, 594 A.2d 1142, 1148 (1991), quoting *Batterton v. Francis*, 432 U.S. 416, 425-26, 97 S.Ct. 2399, 2405-06 (1977).

⁶³ At times little deference is paid, particularly if the agency in question is a liquor licensing board. For instance, see *Baltimore County Licensed Beverage Ass'n, Inc. v. Kwon*, 135 Md.App. 178, 189-90, 761 A.2d 1027, 1032-33 (2000). With other agencies, the courts seem more solicitous of agency views. See, e.g. *Baltimore and Ohio R. Co. v. Bowen*, 60 Md.App. 299, 305, 482 A.2d 921, 924 (1984). At times, this deference becomes intense, as in *Baltimore Gas and Elec. Co. v. Public Service Com'n of Maryland*, 305 Md. 145, 161-62, 501 A.2d 1307, 1315 (1986).

⁶⁴ Since *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778 (1984), federal courts have been directed to defer to most agency interpretation of statutes that are ambiguous on their face. The Supreme Court has not followed this line consistently, quite notably in its recent decision of *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655 (2000) (Thomas, J.) (refusing to follow *Chevron* where agency interpretation is only articulated in guidelines and memoranda not passed according to public notice-and-comment procedures of federal APA). See the concurrence by Justice Scalia in which he pointedly disagrees, and says that *Chevron* mandated deference regardless of the medium in which agency interpretation was expressed.

⁶⁵ "We note that legal interpretation of laws, including the Code, are primarily for the judge." *Wilbur v. Suter*, 126 Md.App. 518, 527, 730 A.2d 693, 698 (1999). "Construing statutes in connection with applying statutory provisions to specific cases, is a large and essential part of the judicial process. It is one of the principal functions which courts were created to perform in our governmental scheme." *Mangum v. Maryland State Bd. of Censors*, 273 Md. 176, 192, 328 A.2d 283, 292 (1974).

⁶⁶ This author has reviewed literally dozens of Maryland opinions stretching back nearly a century in which the rule of resort to administrative construction of statutes has been acknowledged, without once encountering an

There is nothing preventing the courts from changing their standards of review on their own.

J) Deference to Administrative Construction of Regulations.

It is said that “courts bestow special favor on an agency's interpretation of its own regulation,” in recognition of “an agency's superior ability to understand its own rules and regulations.”⁶⁷ At first blush, this sounds reasonable -- certainly more reasonable than deference to the agency as to what *the legislature* meant. After all, the agency itself passed the regulation; it should know what the regulation means. But in real life, this does not hold up. Regulations are generally written by agency staffers, and then sent through a lengthy process of review involving counsel, public input, the decision-making of the head of the agency, etc. There is no one individual whose meaning the regulation exists to express and implement. And with predictable turnover in agency staff and senior personnel, those who can remember the meanings that existed in the minds of the cadre of individuals who collectively authored the regulation will all depart. Of course, there may be agency lore and tradition as to the meaning of a regulation, and this should be valuable evidence -- one form among many. But in the end, the regulation is a collective artifact, and its significance is a problem that should be analyzed along the same lines as the analysis used to construe those other collective artifacts, statutes and contracts.

And as always, there is a problem with the self-interest of the agency. Where one is fighting the agency, the agency is not a neutral party but an interested one. It should not be allowed too much control over the reading of the very yardstick against which its performance is apt to be evaluated. The danger increases where the agency is producing an interpretation off the cuff. Post hoc rationalizing at the time of litigation provides little reliable information to the court.

Yet again, this is a matter which could be remedied by a change in judicial outlook. The courts are not required by any statute to defer; they can adjust their own degree of deference.

In conclusion, we operate in a judicial system where those challenging agencies seldom obtain a meaningful hearing. This makes a mockery of the traditional role of the courts as even-handed agents of justice. What is particularly distressing about the situation is that, after all, public officials are our employees, and should be available to render an accounting. And the very time we most need to compel an accounting is when we are in conflict with them. If we can even bring them to the bar at all, they get to tell their side of the story (both of fact and law) without serious challenge, and if our side is heard at all, it is heard with the greatest of skepticism.

If we wanted to change things, we could. Some of the change would require legislative action, and some would require courts to rethink their precedents. If there was a will, however, all of it would be possible.

attempt to explain the rationale for the rule. Why administrators should be more able than ordinary litigants to discern the intention of the legislature is not intuitively obvious.

⁶⁷ *Department of Health & Mental Hygiene v. Reeders Memorial Home, Inc.*, 86 Md.App. 447, 453, 586 A.2d 1295, 1297 (1991).