

3-15-1997

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Recommended Citation

Marykay Foy, *The Authority of an Administrative Agency to Decide Constitutional Issues: Richardson v. Tennessee Board of Dentistry*, 17 J. Nat'l Ass'n Admin. L. Judges. (1997)
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THE AUTHORITY OF AN ADMINISTRATIVE AGENCY TO DECIDE CONSTITUTIONAL ISSUES: RICHARDSON V. TENNESSEE BOARD OF DENTISTRY

Marykay Foy*

The tradition preventing administrative agencies from deciding any constitutional issue is changing.¹ Since the birth of the administrative agency, administrative law judges, courts and legislators have functioned under an assumption that administrative agencies cannot consider constitutional challenges. *Richardson v. Board of Dentistry*, 913 S.W.2d 446 (Tenn. 1995) is an example of how this assumption has recently been challenged. In an opinion by Justice Penny J. White, the Tennessee Supreme Court recognized that administrative law judges can resolve some types of constitutional challenges.

Richardson categorized challenges which an ALJ may face: facial challenges, "as-applied" challenges, and challenges to the agency's rules or procedures. *Richardson* delineated the authority of an agency to resolve constitutional challenges in each category. *Richardson* provides clear guidelines and explicitly gives agencies increased authority to address some constitutional challenges.

The traditional approach does not rest on an explicit constitutional command but can be traced to implications of the separation of powers doctrine, to theories of checks and balances and the broad authority given courts.² These interpretations are fueled by apprehensions that special interest groups might use agency powers to further their own goals, suspicions of the administrative agencies'

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¹Recent cases from a variety of states (discussed *infra*) have challenged this prohibition, affecting the relationship between administrative agencies and Article III courts. In evaluating the philosophical and constitutional foundations of the administrative process's interaction with Article III Courts, Professor Davis notes that "[even the Supreme Court] continues to struggle in its efforts to resolve basic definitional disputes that determine the permissible institutional structure of government [within the separation of powers doctrine]." 2 KENNETH CULP DAVIS & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE § 2.4 at 4 (Supp. 1995).

²See Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L.REV. 1682, 1706 (1977).

competence in adjudicating such claims, and general mistrust of government.³

Mistrust of agency power may reflect the broad scope of agency authority. Administrative agencies can increase your taxes;⁴ restrict your business,⁵ take your land,⁶ terminate your employment,⁷ force you to take drugs,⁸ or prohibit you from writing movie reviews in your school newspaper.⁹

Richardson acknowledged an agency's authority to address constitutional issues and offers clear guidelines on when and how this

³Interest group theories on administrative discretion propose a view that administrative agencies operate as a product of the political process, with the accompanying anxieties of politicians catering to special interest groups. This view fuels the suspicion that ALJ's decisions are political rather than reasonable, just and impartial. See Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 Wash. U.L.Q. 1, 24 (1994).

Professor Krauss, in commenting that the Supreme Court's current policy of judicial restraint has left the power of the administrative agency unchecked and unaccountable without the adequate safeguards of 'legal' justice notes that "[t]he American people have been led to believe that they have been oppressed by a government that is too large and too expensive. The point is debatable . . ." E. P. Krauss, *Unchecked Powers: The Supreme Court and Administrative Law*, 75 MARQ.L.REV. 797, 836 (1992).

⁴*Northern States Power Co. v. Bugher*, 525 N.W.2d 723 (Wis. Ct. App. 1994) (sustaining an agency of a charitable contribution deduction for state tax purposes).

⁵*Liability Investigative Fund Effort, Inc., v. Medical Malpractice Joint Underwriting Association of Massachusetts*, 569 N.E.2d 797 (Mass. 1991), (Commissioner of Insurance has primary jurisdiction over the physician consumer protection law to the extent in which the physician requested relief of malpractice rate-making complaints). See also *Chemical Specialties Manufacturers Association v. Jorling*, 626 N.Y.S.2d 1; 649 N.E.2d 1145 (N.Y. 1995), (Department of Environmental Conservation can ban the sale, use and distribution of DEET).

⁶*Newlin Corp. v. Department of Env'tl. Resources*, 579 A.2d 996 (Pa. Commw. 1990), *appeal denied*, 588 A.2d 915 (Pa. 1991), (takings claim waived because the claimants failed to raise constitutional objections before the administrative agency). See also *Nodell Inv. Corp. v. City of Glendale*, 254 N.W.2d 310 (Wis. 1977), (property owners had to exhaust administrative remedies because the board of appeals had the power to invalidate the allegedly unconstitutional conditions attached to granting building and occupancy permits even though the board lacked the power to invalidate zoning legislation).

⁷*Horrell v. Department of Administration*, 861 P.2d 1194 (Colo. 1993), (previously replacing state-employed custodians by contracted services allowed the custodians claimants to petition for judicial review without the need to exhaust administrative remedies).

⁸*Beeman v. Department of Health and Mental Hygiene*, 666 A.2d 1314 (Md. Ct. Spec. App. 1995), (forcible administration of antipsychotic medicine).

⁹*Desilets v. Clearview Regional Board of Education*, 647 A.2d 150 (N.J. 1994), (excluding a junior high student's review of R-rated movies from the school newspaper may violate his First Amendment rights, depending on the administrative agency's findings).

authority is to be used. Constitutional issues were divided into three categories and the Court granted jurisdiction to administrative agencies for two of three categories. This newly-created subject matter jurisdiction is concurrent with the court's power so as to ensure judicial review. Other state courts have also tended toward the same path, but few have so completely and comprehensively addressed the issues.

Richardson's Facts and Procedural History

Harold Richardson owned and operated the Budget Dental Laboratory and Madison Dental Center in Nashville, Tennessee.¹⁰ Richardson lacked a dentistry license from the State of Tennessee.¹¹ The State Board of Dentistry served Richardson with a Notice of Charges proposing a civil penalty of \$38,500 for owning a dental practice and practicing dentistry without a license.¹² Richardson sought a declaratory order presenting three constitutional challenges.

Richardson's first questioned whether the Board, as part of the Executive Branch, could hear a case that carried a potential criminal penalty, asserting a violation of the separation of powers doctrine.¹³ He also raised a due process question through a 'void for vagueness' argument. Finally, Richardson questioned the Board's authority to assess a substantial penalty without a jury trial. In addition to these constitutional claims, Richardson asserted that the Board lacked

¹⁰Richardson, 913 S.W.2d at 450. Richardson was charged with violating T.C.A. §63-5-107 (which declares that it is unlawful for any person to practice dentistry without a state license). *Richardson v. Tennessee Board of Dentistry*, No. 01-A-01-9405-CH00207, 1994 WL 590032, at *7 (Tenn. App. 1994). Richardson was also charged with violating T.C.A. §63-5-121 (which mandates that dental practices be owned by a dentist licensed to practice in Tennessee). Richardson, 913 S.W.2d at 450 n.1

¹¹*Id.*

¹²The Board sought the maximum fine of \$500 per day for owning a dental practice for a fifty-seven day consecutive period and the maximum fine of \$1,000 for each of the ten times Richardson practiced dentistry. While Richardson owned and operated these facilities since 1986, the charges were for violations that occurred between March 15, 1990 and June 8, 1990. *Id.*

¹³*Id.* at 451. Richardson added an additional constitutional challenge in his second appeal to the Chancery Court based on Fifth Amendment grounds. Richardson asserted that because this violation could carry a criminal penalty, he should not have to comply with the State's Request for Admissions based on his right against self-incrimination.

jurisdiction to punish an unlicensed private citizen.¹⁴

The Board refused to consider Richardson's constitutional challenges to either the statute itself or to the statute's application.¹⁵ Instead, the Board framed the issue as whether the statute applied to Richardson.¹⁶ The Board found that the statute¹⁷ applied to both licensed persons, as well as those who are required to be licensed, and held that the Board had the authority to impose civil penalties.¹⁸

Richardson appealed the administrative law judge's rulings to the Chancery Court.¹⁹ Richardson argued that the Board lacked the authority to conduct a case that may become a criminal proceeding, and the Board could not provide the constitutional protections permitted to a criminal defendant.²⁰ Because this case carried a potential criminal penalty, Richardson asserted that the Board lacked jurisdiction. The Chancery Court rejected both arguments and affirmed the Board's

¹⁴*Id.* at 451. Richardson argued that T.C.A. § 63-1-134 was not applicable to him because he is not a person required to be licensed by the Board. Furthermore, because he does not hold a license, the Board of Dentistry has no jurisdiction over him. *Richardson v. Tennessee Board of Dentistry*, No. 01-A-01-9405-CH00207, 1994 WL 590032, at * 2.

¹⁵*Richardson*, 913 S.W.2d at 450. After considering Richardson's petition, an administrative law judge ruled that the Board could not hear arguments on the constitutionality of the statute or the constitutionality of its application.

¹⁶*Id.* at 451.

¹⁷Richardson was charged with violating two statutes: T.C.A. §§ 63-5-107 and 63-5-121. The Board held that: "(1) The Board has no jurisdiction to consider federal or state constitutional challenges to application of [T.C.A.] § 63-1-134. (2) [T.C.A.] § 63-1-134 applies to persons who are required to be licensed by the board to practice dentistry regardless of whether they apply for a license. (3) Therefore, if the State proves the allegation against Richardson described in findings of fact 2, civil penalties can be imposed." *Richardson v. Tennessee Board of Dentistry*, No. 01-A-01-9405-CH00207, 1994 WL 590032, at * 1.

¹⁸The administrative law judge noted that the Board was not assuming concurrent jurisdiction with the criminal court because the Board was only considering a civil penalty over which the Board has jurisdiction. *See State ex rel. Town of South Carthage v. Barrett*, 840 S.W.2d 895 (Tenn. 1992). (Statute granting jurisdiction over state crimes to un-elected judges held unconstitutional). *Richardson v. Tennessee Board of Dentistry*, No. 01-A-01-9405-CH00207, 1994 WL 590032, at * 3. While the Tennessee General Assembly punished violations of the Dental Practice Act with criminal and civil penalties, the State had elected to pursue only a civil penalty in this case. *Id.* at * 2-3.

¹⁹*Richardson*, 913 S.W.2d at 451. Richardson appealed through a judicial review of a 'final' agency declaratory order. *Id.* at 461 n.13.

²⁰*Richardson v. Tennessee Board of Dentistry*, No. 01-A-01-9405-CH00207, 1994 WL 590032, at *4, (quoting the Chancery Court's order of February 1, 1994).

order.²¹ Richardson appealed to the Court of Appeals of Tennessee.

The Court of Appeals Opinion

The court of appeals found that the nine constitutional issues now raised by Richardson *coram non judice* and therefore, void.²² Only those issues resolved by the Board could be considered in the Chancery Court. Because the Board did not address the constitutional issues raised by Richardson, the Chancery Court could neither review, consider nor decide these issues.²³ The only valid judgment was that the statute did apply to unlicensed persons.²⁴

However, the invalid judgment of the Chancery Court preserved Richardson's constitutional issues in his petition for review which were then addressed by the appellate court.²⁵ The appellate court held that the because this violation was also considered a crime, and because the Board had no jurisdiction to determine guilt or innocence, the application of this statute was unconstitutional.²⁶ The court reversed and vacated the actions of the Board and the judgment of the Chancery Court.²⁷

The Supreme Court of Tennessee's Opinion

The Supreme Court on appeal considered whether the "Chancery Court is authorized under the Uniform Administrative Procedures Act to resolve constitutional issues not addressed in the

²¹*Id.* In affirming the administrative law judge's order, the Chancery Court noted that "In an earlier interlocutory proceeding . . . [Richardson] sought relief from a declaratory order of the Board which held that he could be assessed these 'civil penalties'. In that appeal, [he] made the same arguments he has made in this appeal[.] . . . [T]his Court concluded that this was not a criminal prosecution and it has not yet changed its mind." *Id.* at *4.

²²*Supra* note 20 at *6.

²³The appellate court relied on the narrow and statutorily mandated scope of review of the record before the Board citing *DePriest v. Puett*, 669 S.W.2d 669 (Tenn. App. 1984), *Id.* at *5-6; and T.C.A. § 4-5-322(g) (courts are confined to the record made by the agency). *Id.* at *4.

²⁴*Id.*

²⁵*Id.*

²⁶*Id.* at *7.

²⁷*Id.*

administrative order”²⁸ The Court described two methods under Tennessee’s Administrative Procedure Act (“TAPA”) for securing judicial determination of constitutional issues: either immediate judicial review in the Chancery Court of any non-final Board’s rulings; or a request for a declaratory judgment by the Chancery Court on the legal validity of a statute, agency rule, or order.²⁹ The Court recognized that neither immediate judicial review nor a declaratory judgment under the TAPA require constitutional challenges to be raised at the agency level.³⁰

The Supreme Court reversed the Court of Appeals judgment and remanded the case to the Board of Dentistry to assess Richardson’s penalties.³¹

While the opinion of the Supreme Court in *Richardson* ruled on six issues, the holdings concerning the authority of administrative agencies to consider as-applied and procedural constitutional challenges have the most far-reaching effects for Tennessee Agencies. The Court recognized that contested cases may involve more than one facet of constitutionality by allowing an agency to use its authority to address ‘as-applied’ and agency rule or procedural constitutional challenges.

In particular, the Court held: (1) challenges to the facial constitutionality of a statute may not be determined by an administrative agency; (2) constitutional challenges to the application of a statute to a case may be resolved by an administrative agency; (3) an administrative agency may address the constitutionality of an agency procedure or rule; (4) while a party may challenge the constitutionality of a statute or an agency procedure or rule at the agency level, the party’s failure to do so does not preclude the party from raising issues upon judicial review; (5) the constitutional issues raised in Richardson’s petition before the Chancery Court precluded further constitutional consideration on the initial challenges and was a final judgment; and (6) because the statute of limitations for potential criminal charges had expired, the privilege against self-incrimination did not protect Richardson in circumstances that would impose only

²⁸Richardson, 913 S.W.2d at 451.

²⁹Id. at 457-8.

³⁰Id. at 458.

³¹Id.

civil penalties.

Facial Constitutional Challenges.

Richardson held that facial challenges to a statute's constitutionality cannot be resolved by an administrative law judge in a contested case. This holding echoes not only precedent in Tennessee, but precedent in the majority of other states and the federal courts.³² Agencies have been urged to consider facial challenges in order to provide a complete record for judicial review, or to allow for efficient resolution of cases, or to educate the ALJ on how constitutional protections interact with the nature of the agency's functions. Despite these arguments, there exists a traditional and solid boundary between judicial and administrative authority in dealing with facial challenges.³³ This boundary holds an explicit prohibition on the authority of an administrative agency to declare a statute unconstitutional.

In *Richardson*, the court was explicit, "[T]he legislature may not

³²Crowell v. Benson, 285 U.S. 22 (1932) (Trials *de novo* are required for 'jurisdictional facts' presented to an administrative agency hearing). See also Johnson v. Robison, 415 U.S. 361 (1974); Weinberger v. Salfi, 422 U.S. 749 (1975); and Ryan v. Bentsen, 12 F.3d 245 (D.C. Cir. 1993) (Ryan excused from exhausting administrative remedies because it would be futile to ask an agency to rule a statute they administer unconstitutional). The *Ryan* Court cites Supreme Court cases which support this decision. However, the court required Ryan exhaust his administrative remedies due to the expedited appeal process SSA provided to determine if exhaustion would be futile. See also State v. Superior Court, 524 P.2d 1281 (Cal. 1974), note 9 *supra*.

³³Agencies lack the power to hold statutory provisions unconstitutional. 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.5 at 331(3d ed. 1994). The Supreme Court has stated that adjudicating the constitutionality of congressional statutes is ordinarily beyond the jurisdiction of administrative agencies. Johnson v. Robison, 415 U.S. 361 (1974).

See also Califano v. Sanders, 430 U.S. 99 (1977); "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to courts is essential to the decision of such questions . . ." Califano, 430 U.S. at 109 (1977). But see a later comment by the Court on the issue of judicial review: "The extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is a difficult question of constitutional law." Superintendent, Mass. Corr. Institution v. Hill, 472 U.S. 445, 451 (1985) (holding that Massachusetts's Constitution did not require judicial review of an agency's decision to revoke good-time credits for prisoners).

confer upon an agency the power to determine the constitutionality of a statute, nor may an agency assume that power. That power rests with the judiciary."³⁴ The limit on an agency's authority is demarcated by the constitutional requirements of open access to the courts and a right to justice.³⁵ This traditional prohibition is supported in the federal arena by the limitations of Article III of the U.S. Constitution and by the nondelegation doctrine implicit in Article I, and as well by due process considerations.³⁶

Agency actions are further limited by the underlying premise that agencies have the duty to assume the constitutionality of statutes they enforce.³⁷ The alternative rule would confer a responsibility that an agency is not elected to make and a duty that only courts customarily exercise.³⁸ The presumptive validity of statutes precludes an ALJ from

³⁴913 S.W. 2d at 454-55. (Citations omitted).

³⁵*Don's Sod Co. v. Department of Revenue*, 661 So. 2d 896 (Fla. App. 5th Dist. 1995), (holding that administrative proceedings did not satisfy the constitutional requirements of open access to the courts because the taxpayer had to pay the tax before challenging his tax assessment).

³⁶See Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 Harv. L.Rev. 1682, 1686-91(1977).

³⁷"[W]here a rule or regulation of a public administrative agency is within the scope of the authority of such agency it is considered prima facie, or presumptively, valid and reasonable, and the one who raises the question has the burden of pleading and proving facts showing the invalidity of such rule or regulation. "*Kuprion v. Fitzgerald*, 888 S.W.2d 679, 692 (Ky. 1994). See also *Central Power and Light Co. v. Sharp*, 919 S.W. 2d 485 (Tex. App. 5th Dist., 1996) (error denied, 1997 WL 126855 (Tex. Mar. 21, 1998)). The *Central Power* Court noted; "[T]he legislature has delegated to the Comptroller the power to adopt rules for the enforcement and collection of the franchise tax This delegation of power is particularly appropriate where . . . the legislature itself cannot practically and efficiently exercise the power it has delegated." 919 W. 2d at 492.

³⁸Compare, See, *Administrative Office of the Illinois Supreme Court v. State*, and *Union Teamsters, Chauffeurs and Helpers Union, Local 726* (Ill. 1995)(separation of powers doctrine enjoins the state board for the Public Labor Relations Act from exercising administrative authority over Supreme Court employees). See also *Silverman v. Berkson*, 661 A.2d 1266, (N.J. 1995) cert. Denied, 116 St. Ct. 476 (1995) (holding that the state's Bureau of Securities may subpoena a nonresident and a state court may enforce this subpoena after reviewing due process considerations). "courts play a critical role in [the] administrative process. . .judicial involvement ensures administrative due process, . . .clarifies the rights arising from specific disputes in matters concerning both the general public and the individual involved, . . . [and] aid an administrative . . . body in the performance of duties legally imposed on it." *Silverman*, 661 A.2d at 1273. Cf. *McHugh v. Santa Monica Rent Control Bd.*, 777 P.2d 91 (Cal. 1989), (administrative agencies have wide discretion in selecting the means to fulfill duties the legislation has delegated to agencies, including determining

addressing the facial constitutionality of a statute in a contested case.³⁹ Additionally, because agencies usually initiate hearings in contested cases, (as the Tennessee Board did with Richardson), this presumption supports an agency's inclination to uphold a statute.

As Applied Challenges

What is progressive in the *Richardson* opinion is the Court's grant of initial subject matter jurisdiction to administrative agencies, concurrent with the courts, for 'as applied' challenges and constitutional challenges to an agency's procedure. Allowing an agency to "resolve questions of the unconstitutional application of a statute to the specific circumstances of [a] case"⁴⁰ allows the agency to correct drafting errors or alter an unconstitutional exercise of a statute's effects.

The court indicated that since an unconstitutional rule was an unconstitutional application of an otherwise constitutional statute a challenge to a rule was cognizable by the agency. After it found that this approach complied with The Tennessee APA as well as judicial precedents,⁴¹ the Court recognized the agency's authority to resolve these issues subject to judicial review.⁴²

restitution and assigning damages but not treble damages because such damages risk arbitrariness inherent in any scheme of administrative adjudication.). *McHugh*, 777 P.2d at 107, 111.

³⁹Courts operate under the presumption that all statutes are constitutional and reasonable doubts are resolved in favor of its constitutionality. *See State v. Philipps*, 521 N.W.2d 913, 914-15 (Neb. 1994) (the burden is on the claimant to clearly establish that a statute, enforced by an administrative agency, is unconstitutional before a court may declare a statute void); *United States v. Caroline Products*, 304 U.S. 144 (1938).

⁴⁰*Richardson*, 913 S.W.2d at 455.

⁴¹*Richardson*, 913 S.W.2d at 455. *Richardson* cited two Tennessee Supreme Court cases: *L. L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991) (holding that administrative agencies have the authority to consider the constitutionality of whether a sales tax statute applied to catalog sales); and *Crawford v. Tennessee Consolidated Retirement System*, 732 S.W.2d 292, 297 (Tenn. App.) *perm. to appeal denied* (Tenn. 1987) (primary jurisdiction doctrine supports giving the agency first crack at the constitutional issue, hence the reviewing court benefits from agency expertise.)

⁴²*Richardson*, 913 S.W.2d at 455.

Procedural Challenges.

Richardson similarly recognized the agency's power to address arguments. Its procedures were constitutionally deficient.⁴³ While Richardson's discussion of the point is brief, it's logic is forceful, for it recognizes the value of immediate attention to an alleged problem with agency procedure. If there is a procedural problem, the agency can correct it.

Most Other Courts Agree Facial Challenges Ordinarily Are Beyond Agency Competence

California flirted briefly with permitting agencies to reach facial challenges, but pulled back. In *Southern Pacific Transportation Co. v. Public Utilities Commission*⁴⁴ the California Supreme Court assigned to administrative officials the responsibility of obeying and applying constitutional principles in the face of a contradictory law. The California Supreme Court noted that the wide grant of power given by the State Constitution and statutes to the public utilities commission trust the agency to honor the Constitution.⁴⁵ In light of the commission's responsibilities, claimants were required to present all issues, including constitutional issues, to the commission.⁴⁶

However, by constitutional referendum California quickly rejected this broad holding.⁴⁷ Iowa agreed with the thrust of the California courts decision, for it recognized the value of a developed agency record for facial challenges in court. The Iowa Supreme Court observed that "facial constitutional issues are more effectively

⁴³913 S.W.2d 455.

⁴⁴556 P.2d 289 (Cal. 1976). However, the decision in *Southern Pacific* was effectively overruled by constitutional amendment that required judicial action prior to an agency declaring a statute unenforceable, or refusing to enforce because of federal prohibitions. *Reese v. Kiser* 760 P.2d 495, 498 n.6 (Cal. 1988).

⁴⁵*Southern Pacific*, 556 P.2d at 292.

⁴⁶The California Supreme Court suggested that the traditional prohibition of an agency from considering constitutional issues would allow school boards operating under separate-but-equal statutes to ignore the decision of *Brown v. Board of Education*, 347 U.S. 483 (1954). *Southern Pacific*, 556 P.2d at 290 n.2.

⁴⁷*Reese v. Kiser*, 760 P.2d 495, 498 n.6 (Cal. 1988).

presented for adjudication based upon a specific factual record," made before an ALJ.⁴⁸

The general rule that agencies cannot rule on the constitutionality of a statute they must enforce is a tradition honored by the *Richardson* Court. *Richardson* requires a *de novo* judicial review in court for facial challenges and allows a *de novo* court review to the constitutional application of a statute to the facts of a case or the constitutionality of rules or procedures employed by an agency. This aspect of the Court's holding is quite traditional and shared by the majority of courts today.

Exhaustion Requirements

While Tennessee has chosen to divide constitutional challenges into three categories depending on the nature of the claim asserted in a contested case, other states look at other factors, particularly on exhaustion of administrative remedies. For example, the Michigan Appellate Court decision found an agency's order reasonable, but questioned whether the agency's order when reaching a constitutional challenge precluded the necessity of exhausting administrative remedies.⁴⁹ The New York Appellate Division determined that an administrative remedy could be granted by an agency, and required exhaustion prior to resort to the courts.⁵⁰ The Arkansas Supreme Court demanded that the constitutional challenge be an essential, non-

⁴⁸Shell Oil Co. V. Bair, 417 N.W.2d 425, 429-30 (Iowa 1987) (noting that an agency's consideration of facial challenges is an efficient and effective means of compiling a record). For an example from another State, see also *Newlin Corp. V. Dept. Of Envtl. Resources*, 579 A.2d 996 (Pa.Comm. Ct. 1990) (holding a takings constitutional challenge waived because the claimant failed to raise the takings issue before the agency)

⁴⁹*Consumers Power Co. v. Association of Businesses Advocating Tariff Equity*, 518 N.W.2d 514 (Mich. Ct. App. 1994) *appeal denied sub nom.*, *Association of Businesses Serv. Advocating Tariff Equity v. Michigan Pub. Comm'n.*, 530 N.W.2d 750 (Mich. 1995).

⁵⁰"Constitutional claims that hinge upon factual issues reviewable at the administrative level must first be addressed so that a necessary factual record can be established. Mere assertion that a constitutional right is involved will not excuse failure to pursue established administrative remedies that can provide the requested relief." *Corcella v. Seifert*, 181 A.2d 677, 678 (N.Y.App. Div. 2d 1992). See also *Matter of Perrotta v. City of New York*, 107 A.2d 320, *aff'd* 489 N.E.2d 255 (N.Y.App. Div. 2d 1985) (exhaustion required when agency might provide relief).

incidental element of the case before excusing the requirement of exhausting administrative remedies.⁵¹ The Colorado Supreme Court questioned whether agency expertise is necessary or relevant before requiring exhaustion of administrative remedies if the contested case involved more than one claimant.⁵² In considering a case with one claimant, the New Jersey Supreme Court found a First Amendment constitutional challenge fell within the administrative agency's jurisdiction and expertise.⁵³

The Nebraska Supreme Court prefers to determine whether potential constitutional issues are legislative or quasi-judicial before subjecting agency decisions to judicial review.⁵⁴

California courts, however, will review agency rulings on a *de novo* basis if 'fundamental vested rights' are at stake.⁵⁵ The California

⁵¹ "[A]n administrative agency is vested with quasi-judicial powers to determine some incidental questions of law, and while that agency receives great deference from judicial forums in its areas of exclusive jurisdiction, issues based solely on constitutional claims are not within the agency's jurisdiction." *Lincoln v. Arkansas Public Service Commission*, 854 S.W.2d 330, 332 (Ark. 1993).

⁵² *Horrell v. Department of Administration*, 861 P.2d 1194 (Colo. 1993)(en banc)(state employees did not have to exhaust administrative remedies when challenging state statutes on constitutional grounds because no factual disputes were not involved). An agency can, however, evaluate whether an otherwise constitutional statute has been applied in a unconstitutional manner to a particular person, but this case involved a group of persons, former state custodians. *Id.* at 1198 n.4.

⁵³ The Supreme Court noted that administrative agencies are clearly empowered to determine agency issues despite the fact that constitutional claims were implicated. *Desilets v. Clearview Regional Board of Education*, 137 N.J. 585, 647 A.2d 150 (N.J. 1994)(finding the Commission of Education the most appropriate forum to determine if restrictions on a student's First Amendment rights effectuated a legitimate educational goal).

⁵⁴ *Slack Nursing Home v. Department of Social Services*, 528 N.W.2d 285 (Neb. 1995)(Holding that the agency's use of salary surveys for a nursing home's administrative salary expenses fell properly within the agency's authority). The Court concluded that: Although courts have no jurisdiction to review wholly legislative acts, some agency determinations possess quasi-judicial characteristics and are appealable. Therefore, the character of a particular function as quasi-judicial or legislative in nature is an essential factor in determining the scope of judicial power and the extent to which a court may, with or without express authorization, review action of an administrative agency. *Slack Nursing Home*, 528 N.W.2d at 294. The *Slack* Court cautioned that this definition could be difficult to determine: "[w]e have not heretofore attempted to define precisely the line between the judicial function and power and the legislative one. Probably we cannot do so." *Id.* at 295.

⁵⁵ "Fundamental vested rights" are determined by the economic impact of an agency's decision on the claimant and the character and nature of the individual right affected by agency's decision. If a fundamental and basic right of an individual is affected by an agency

Supreme Court did not specifically address if a constitutional issue were present, yet constitutional challenges were implicitly recognized and assigned a level of review which allows administrative agencies the authority to address some constitutional issues.⁵⁶

Federal courts have also recognized that administrative agencies do, and sometimes must, address constitutional issues if these questions fall within their jurisdiction.⁵⁷ If an agency's findings on a constitutional challenge can contribute to the record, exhaustion may be required by a court.⁵⁸

A number of federal courts have also addressed similar concerns. The U.S. Court of Appeals for the Ninth Circuit questioned whether the claimant affected a 'public right' in assigning the agency authority to resolve a case in the face of a Seventh Amendment jury trial claim.⁵⁹ The D.C. Circuit considered the Social Security's

decision, the ALJ's ruling will be reviewed under an independent judgment test in which the trial court makes its own findings of fact from the evidence in administrative record. For a discussion of this test and a comparison with the substantial evidence test used in California, see Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 U.C.L.A. L. Rev. 1157 (1995).

⁵⁶The California Supreme Court described one approach to constitutional review as "[t]he view of our sister states has the advantage of avoiding meaningless wooden distinctions between 'quasi-judicial' and 'judicial' powers [their] decisions forthrightly recognize that administrative agencies do indeed exercise 'judicial-like' powers, and accept the need for broad administrative powers in our increasingly complex government." *McHugh v. Santa Monica Rent Control Bd.*, 777 P.2d 91, 107 (Cal. 1989).

⁵⁷*Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563, 1569 (Fed. Cir. 1995) cert. denied 116 S. Ct. 773 (1996) (the hearing board of the Office of Senate Fair Employment Practices has clear jurisdiction over constitutional challenge to a statute's mandatory retirement provisions for officers of the Capitol Police force).

⁵⁸See 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE*, § 15.5 at 331-33 (4d ed. 1994) "When the nature of the constitutional question suggests that agency fact-finding or expertise are likely to provide significant aid to a court in resolving constitutional questions, the court requires exhaustion." *Id.* For a description on the constitutional takings challenge facing environmental agencies see Johnthan S. Klavens, *At the Edge of Environmental Adjudication: An Administrative Takings Variance*, 18 Harv. Envtl. L.Rev. 277, 279 (1995). The author discusses *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), to demonstrate how agencies should be allowed to adjudicate a takings claim to save parties years of protracted litigation and save the state from the escalating damages that may be eventually awarded to a claimant. See *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).

⁵⁹See *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418 (9th Cir. 1994) (holding that an agency's decision to require a Savings & Loan officer of a failed S&L to pay restitution, an equitable remedy that enforced the "public rights" in the S&L's financial

expedited appeal process enough of a benefit to warrant exhaustion for a constitutional issue.⁶⁰

Other States

While Richardson relies exclusively on Tennessee precedents, other state and federal courts have found that agencies can, and in some instances, must, rule on the constitutionality of a statute applied in a particular case. The Maryland Supreme Court has held that constitutional claims requiring fact-finding must be addressed at the agency level before any judicial review can be conducted.⁶¹ In a similar vein, the California Supreme Court has held that an agency holds the power to make an initial determination on a takings challenge and this power must be used in order to properly exhaust the administrative remedies before beginning a judicial review.⁶²

There are cases where, because a constitutional argument is offered, agencies retreat from offering any ruling. In these situations, a court may demand that an agency consider the 'as-applied' constitutional challenge so that the judicial review process can proceed on a possible statutory basis without the necessity of resorting to constitutional issues.⁶³ Alternatively, an agency may consider an as-

security, properly falling within the agency's jurisdiction).

⁶⁰Ryan v. Bentsen, 12 F.3d 245 (D.C. Cir. 1993)(holding that the need for exhausting administrative remedies would facilitate the constitutional question presented because the Social Security Administration provided an adequate internal process for addressing constitutional issues.).

⁶¹Insurance Commissioner v. Equitable Life Assurance Society, 664 A.2d 862 (Md. 1995)(Insurance Commissioner must rule on whether the insurance code permitting actuarial justified gender-based rating differences conflicts with the Maryland Equal Rights Amendment prohibiting sex discrimination).

⁶²State v. Superior Court, 524 P.2d 1281 (Cal. 1974)(en banc)(noting that while facial challenges can be brought at any time, the application of the statute to the facts of a case is essentially seeking to review the validity of an administrative action properly brought before the South Coast Regional Commission in seeking a building permit). Review of an agency order simply determines if the final agency order is valid. To determine the validity of an agency order, 'as-applied' constitutional challenges must be addressed by the Commission before judicial review commences. 524 P.2d at 1289.

⁶³See Employment Department v. Vitko, 134 Or. App. 641, 896 P.2d 611 (Or. Ct. App. 1995)(remanding a case back to an agency because of the agency's refusal to hear any constitutional arguments resulted in a claim where 'an explicit statement of the facts[,] . . . the principles of law which control[,] . . . and the rational relationship between the facts and

applied challenge that results in an implicit facial constitutional ruling. An agency ruling on an as-applied challenge may illuminate the constitutional defects of a statute invalidating the statute in the particular application before the agency. In the course of considering a case, the facial validity of a statute must be considered even if not specifically addressed by the agency. This consideration may result in an agency refusing to rule on an issue.⁶⁴ The thin line that separates an as-applied challenge from a facial challenge may result in a case that is precluded from judicial review.⁶⁵ The *Richardson* Court allows for judicial review in cases falling on either side of this line.

In other cases, it is not a matter of the agency refusing to rule on a case involving constitutional issues but rather the claimant who refuses to bring a constitutional issue before the agency. A claimant's refusal can be based on a desire to avoid futile pursuits because of the agency's lack of jurisdiction over constitutional issues.⁶⁶ In other cases,

conclusions . . ." were missing from the record resulting in the absence of a possible statutory base for judicial review). *Id.* at 613.

⁶⁴The differences between facial challenges and 'as-applied' challenges can be subtle and subject to disagreement even upon judicial review. In one case, the majority of the Supreme Court of Colorado found a facial challenge when previously state-employed custodians asserted that the State Personnel Board violated the Civil Service Amendment to the Colorado Constitution by replacing the custodians with contract services. The Court reversed the summary judgment for the State Personnel Board because this was a facial challenge in which the custodians did not have to exhaust administrative remedies. Three judges dissented, finding this an as-applied challenge rather than a facial challenge. In the dissent, J. Mullarkey criticized the court's holding because, "[The] characterization of the employees' claims as purely facial challenges is erroneous and unduly restricts the Board's constitutional and statutory authority to handle personnel disputes." *Horrell v. Department of Administration*, 861 P.2d 1194, 1201 (Colo. 1993).

⁶⁵The thin line between facial challenges and as-applied challenges has been recognized by courts. A federal court used Professor Davis's treatise to describe one facet of this distinction: A fundamental distinction must be recognized between constitutional applicability of legislation to particular facts and constitutionality of the legislation. When a tribunal passes upon constitutional applicability, it is carrying out the legislative intent, either express or implied or presumed. When a tribunal passes upon the constitutionality of the legislation, the question is whether it shall take action which runs counter to the legislative intent. We commit to administrative agencies the power to determine constitutionality of legislation.

⁶⁶*Republic Industries Inc. v. Central Pa. Teamsters Pension Fund*, 693 F.2d 290, 295 (3rd Cir. 1982) (citing 3 KENNETH CULP DAVIS ADMINISTRATIVE LAW TREATISE § 20.04 at 74 (1958)). See e.g., *Globe Glass & Mirror Co. v. Brown*, 888 F.Supp. 768 (E.D.La. 1995) (a federal plaintiff does not have to exhaust administrative and state court remedies to bring a suit under the a federal civil rights statute because plaintiff recognized that his constitutional

the claimant may not have raised certain constitutional challenges before the ALJ.⁶⁷

In some states, a claimant's failure to raise a constitutional issue at the agency level precludes judicial review.⁶⁸ These states assign primary exclusive jurisdiction to the agency requiring exhaustion of administrative remedies before judicial review commences. *Res judicata* principles or the doctrine of claim preclusion may also result in forfeiting a constitutional claim not raised in earlier litigation.⁶⁹ Other states, like Tennessee, allow for judicial review of any issue that may involve a constitutional question with both the agency and a court having concurrent initial subject matter jurisdiction.⁷⁰

challenges to a state's unfair trade practice act could not be addressed by a state insurance commissioner).

⁶⁷Richardson presented a second additional constitutional argument based on Fifth Amendment grounds only to the court rather than to the Board of Dentistry. Richardson, 913 S.W.2d at 452.

⁶⁸*See e.g.* Farm Bureau Town and Country Insurance Company of Missouri v. Angoff, 909 S.W.2d 348, (Mo. 1995)(an insurer was required to exhaust all administrative remedies despite the fact that the insurer's facial claim challenged the constitutionality of a redlining statute). *See also* Hickey v. North Dakota Department of Health and Consolidated Laboratories, 536 N.W.2d 370 (N. D. 1995)(issues not raised before an agency will not be considered for the first time on appeal and consequently, the claimant failed to properly preserve due process issue for judicial review).

⁶⁹*See e.g.* Northern States Power Co. v. Bugher, 189 Wis. 2d 541, 525 N.W.2d 723 (Wis. 1995)(constitutional challenge barred because claimant had had a fair opportunity to present this argument during earlier administrative hearings and judicial review). Board of Education of South-Western City Schools v. Kinney, 494 N.E.2d 1109, 1111 (Ohio, 1986) (as applied challenge is required to be raised in administrative agency).

⁷⁰*See e.g.* Griffiths v. City of Ashland, (Ky. App. 1995) Board of Education of South-Western City Schools v. Kinney, 494 N.E. 2d 1109, 1111 (Ohio, 1986) (as applied challenge required to be raised in administrative agency). 920 S.W. 2d 78("Our system of jurisprudence does not require one to exhaust administrative remedies, much less endure lower court prosecution when the constitutionality of an ordinance is in question.") *Id.* at 79. *See also* Grounds v. Tolar Indep. Sch. Dist., 707 S.W.2d 889, 892 (Tex. 1986)(exhaustion not required if issue is question of law); Compare Consumers Power Co. v. Association of Businesses Advocating Tariff Equity, 518 N.W.2d 514 (Mich. App. 1994) *appeal denied sub nom.*, Association of Businesses Serv. Advocating Tariff Equity v. Michigan Pub. Comm'n., 530 N.W.2d 750 (Mich. 1995)(no further factual development was necessary to consider constitutional questions, failure to raise in circuit court did not preclude appellate court considering constitutional claim); Universal Am-Can Ltd. v. Kelly, 197 Mich. App. 34, 494 N.W.2d 787 (Mich. Ct. App. 1993)(appeal denied, 505 N.W. 2d 587 (Mich. 1993) a commerce clause challenge did not require exhausting administrative remedies).

Impact

The *Richardson* Court delineates three areas where constitutional issues may arise, and dictates the authority agencies hold in each of these areas. With judicial review assured in each of these areas, judicial reviews of the agency's record and the doctrine of exhausting administrative remedies are affected by the Court's holding that constitutional issues do not have to be raised at the agency level.

The agency must determine the nature of the exact constitutional challenge raised,⁷¹ for a claimant may have to wait until judicial review for certain constitutional issues. Moreover, a claimant may sometimes raise constitutional challenges for the first time in court.

Tennessee's approach in allowing constitutional issues to be raised for the first time in court makes sense. *Richardson* describes the practical advantages of allowing claimants to raise constitutional challenges at the time judicial review commences.⁷² The inherent processes of an administrative agency presents obstacles in consistently assuring claimants a "full and fair" hearing.⁷³ A variety of agencies employing diverse procedures may not offer consistent constitutional protections.⁷⁴ Because of the informality of some procedures or the lack of an ALJ's legal training in constitutional issues, judicial review is kept broad enough to assure access for a constitutional issue raised at any time. This eases the burden on the claimant who does not risk

⁷¹There are examples where an 'as-applied' constitutional challenge results in an implicit facial constitutional ruling. See e.g. *Tracy v. State*, 655 N.E.2d 1232, 1237 n.8 (Ind. App. 1995)(claim to a DEA administrative forfeiture implicitly challenges the forfeiture statute (concurring dissenting opinion statute); *Celebrity Custom Builders v. Industrial Claim Appeals Office of the State of Colorado*, 916 P.2d 539, 541 (Colo. App. 1995)(ALJ's ruling that ERISA's definition of 'wages' preempted the state's definition of 'wages' implicitly determined that the state statute was unconstitutional and was not within the ALJ's authority). Two First Amendment cases underscore the necessity in determining facts in order to reach a possible constitutional question. See, *Pickering v. Board of Education*, 391 U.S. 563(1968)(where the Court examined the record to assure that a teacher's statements were truthful and therefore protected by the First Amendment); *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (independent constitutional judgment of facts required of supreme court of whether allegedly obscene material constitutionally protected).

⁷²*Richardson*, 913 S.W.2d at 457.

⁷³*Id.*

⁷⁴*Id.*

losing the ability to raise a constitutional issue by res judicata principles, collateral estoppel or the doctrine of claim preclusion. Moreover, adverse decisions may be challenged on constitutional grounds by an attorney hired after all administrative remedies are exhausted, saving the expense of hiring attorneys for administrative hearings.

The broad scope of judicial review presented in *Richardson* also recognizes the unequal positions usually occupied by a claimant and an agency. Claimants focus on contesting an agency decision rather than protecting constitutional rights. Agencies focus on enforcing legislation which may have created the agency and maintains its work. Because the Constitution is not a prime focus in a contested case, neither party considers, nor may know if constitutional rights are at stake until after an agency's ruling.⁷⁵ The juxtaposition of an unsophisticated claimant, (possibly without the benefit of an attorney), confronting an experienced ALJ, proficient in the specialized work of the agency, offers compelling reasons to ensure the widest possible judicial review.

However, because the *Richardson* Court does not require constitutional challenges to be addressed by an agency, this concept of fairness comes at a price of judicial efficiency. The necessity of obtaining administrative rulings to 'as applied' and procedural constitutional challenges rests on policy considerations concerning the integrity of the agency adjudication system. To allow an agency to rule on these challenges promotes the use of agency expertise, preserves a complete record in the event of a judicial review, and assures judicial efficiency by avoiding unnecessary adjudication of constitutional challenges.⁷⁶ In some cases, a thorough agency review facilitates a possible ensuing judicial review.⁷⁷ Thorough agency reviews also

⁷⁵*Richardson* noted this possibility. 913 S.W.2d at 458.

⁷⁶"Objection at the agency level will allow incorrect procedures to be eliminated thereby saving time and expense for the parties." *Richardson*, 913 S.W.2d at 457.

⁷⁷See e.g. *Relay Improvement Association v. Sycamore Realty Co. Inc.* 661 A. 2d 182 (Md. Ct. Spec. App. 1995) aff'd, 684 A.2d 1331 (Md. 1996)(owner's failure to seek release of property from rezoning development precluded a constitutionally based zoning estoppel defense). The *Relay Improvement* Court insisted that if an agency's factual findings are inadequate the necessary facts may not be supplied by the parties and the courts will not scour the record in search of evidence to support the agency's conclusion. 661 A.2d 188.

provide a complete record allowing claimants a understandable ruling that can be challenged in the courts.⁷⁸

Recognition that administrative agencies can address constitutional issues implicitly grants an ALJ increased authority. While this grant of increased authority may appear to create a conflict of interest in a typical agency examiner,⁷⁹ central panel system such as in Tennessee assures some greater degree of impartiality.⁸⁰ By requiring agency reviews for 'as-applied' and procedural constitutional challenges, Tennessee can fully utilize the benefits of a central panel system

Conclusion

The *Richardson* opinion does not abandon all traditional constraints on ALJ constitutional 'competence' but it certainly ushers in a notable change for Tennessee's administrative agencies. The decision recognizes that administrative agencies must exercise 'judicial-

⁷⁸See e.g. *Bader v. Board of Education of the Lansingburgh Central School District*, 627 N.Y.S.2d 858, 860 (N.Y. App. Div. 1995)(agencies must address constitutional issues to enable the claimant to understand the ruling in order to make an intelligent challenge adequate for judicial review).

⁷⁹"The fact that agency employers are often named litigants or interested parties in the proceedings [administrative law judges] conduct, prevents full public confidence in the impartiality and the fairness of those proceedings." Victor W. Palmer, *The Evolving Role of Administrative Law Judges*, 19 New Eng. L.Rev. 755, 798 (1984).

"The federal judge is, after all, the personification of the judicial branch of the government: a robed authority figure who can demand and receive respect and obeisance even from presidents . . . ALJ's on the other hand, in spite of being called judges and functioning as such, are subject to doubts about their independence due in part to their employment status as agency personnel." Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 Admin. L.Rev. 109, 110 (1981).

[I]t would seem clear that courts should scrutinize agency deliberations with great care, granting little, if any deference and generally hindering agency efforts to promulgate rules. This is because administrative agencies, like legislatures, are subject to substantial interest group influence. In order to prevent agency capture by special interest groups, the judiciary should subject agency action to rationality review and rigorous mean-ends analysis. Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 Geo. L.J. 671, 675 (1992).

⁸⁰T.C.A. § 4-5-321 (1991). (Administrative Procedural Division). Some critics charge that independence may not be fully realized because these ALJ's also serve within agencies. Criticism of the central panel system also notes that ALJ's may lack the specialization intra-agency ALJ's hold.

like' power to reflect the need for broad administrative power to be exercised to ensure complex government works. With broad judicial review allowed, this power can be exercised within the clear guidelines offered by the *Richardson* opinion, confined by a Constitution interpreted by the courts. A traditional prohibition has changed; the *Richardson* opinion clarifies how much it has changed.