Judicial Protection of the Individual Against Administrative Actions in the United States and in Germany

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JUDICIAL PROTECTION OF THE INDIVIDUAL AGAINST ADMINISTRATIVE ACTIONS IN THE UNITED STATES AND IN GERMANY

by

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A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment of the Requirements for the Degree

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JUDICIAL PROTECTION OF THE INDIVIDUAL AGAINST ADMINISTRATIVE ACTIONS IN THE UNITED STATES AND IN GERMANY

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PART I

GENERAL INTRODUCTION

A) differences between the judicial review in the U.S. and in Germany

There are many differences between the german and the U.S. legal system. Besides one of the most obvious differences - a common law and case by case system on one and a civil law system with only written law on the other side - the source and the purpose of the two legal systems differ in a fundamental and eminent way: the U.S. law is made "by the people for the people" whereas the law in Germany is made by elected representatives to protect the rule of law.

The U.S. legal system is build upon the realization of the introduction of the U.S. constitution: "We the people..." and refers to the will of the people as the main source of the law.¹ The german legal system's main aim is to establish reliance in the whole legal system knowing and accepting

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¹ see: Winfried Brugger, "Verfassungen im Vergleich", in: "Ruperto Carola, Forschungsmagazin der Universitaet Heidelberg", 3/1994,22,23
that this may oppose or even harm individuals.\(^2\) That of course does not mean that the german legal system is enacted only to serve legal principles but as all of the german laws are enacted to serve an abstract and not an individual case, the application of the law for an individual therefore may be or can be more difficult because in a civil law system there is more weight put on the abstract principles than on certain individual problems.

In the U.S. the judges find the law and the judges represent the people, sometimes assisted by a jury. Though of course the jurors do not make the law - nobody will deny the great impact this jury system has on the development and outcome of the legal system.

The aim is to make law with "common sense" and with the peoples will. With that the people have a greater influence on how they want the law to be and in what direction this legal system then really moves. Furthermore, as the elected chief of the executive appoints the most important judges these judges will find the law in a foreseeable way and most often will represent and express the ideas about ethics and law that the majority thinks is correct.

Being a representative democracy - Grundgesetz art 20 (2)\(^3\) - the only influence people in Germany have on the law is to elect the members of Parliament but the fact that "their" candidate is elected does not necessarily correspond with their thoughts about the law and it has nothing to do with the law the Parliament lateron will enact. Of course the legal procedures that lead to an enactment of a law do obey almost the same democratic necessities in both countries - but nevertheless the people in the U.S. have more influence on their representatives because representatives in Germany first obey their party's will before listening to the wishes of their voters. Doing this a "fundamental change in the conventional, liberal form of representative democracy" has occurred and produced a new system, the "party state".\(^4\)

Because the law is abstract nobody's special interests will be thought of except for those interests presented by mighty lobbyists with financial or other influence.

The judicial branch really is independent because all judges have life tenure and can only be removed by impeachment. More than that not the executive branch elects the judges but there are certain commissions that appoint the judges.

\(^3\) Grundgesetz (GG), German Constitution, enacted May 23rd 1949; Beck-Texte im dtv, 31st ed., February 1st 1994

The judges are not appointed because of their membership to a certain political party or because they have certain beliefs or opinions but because of their legal ability. The judicial branch is seen as a 'political' neutral and independent branch that is the one with the knowledge and the independence to say how the law is to be used and how the law should be interpreted. Not "common sense" or "people's opinions" but the legislators intention and its aim is the main source interpreting the law should there be doubts on how the law was meant to be.

To balance the abstract and objective way with the disadvantages that may occur to the individual each individual has the constitutionally guaranteed entitlement to sue before the Federal Constitutional Court\textsuperscript{6}, GG art 93 (1) No 4.

Certain formal requirements have to be fulfilled, of course, like standing and exhaustion of remedies, Bundesverfassungsgerichtsgesetz\textsuperscript{7} sects. 90 - 96.

\textsuperscript{5} see: D.Clark, "The Selection and Accountability of Judges in West Germany", 61 S.Cal.L.Rev. 1795,1818,1829 (1988)

\textsuperscript{6} Federal Constitutional Court (F.C.C.) = Bundesverfassungsgericht (BVerfG), located in Karlsruhe

\textsuperscript{7} Bundesverfassungsgerichtsgesetz (BVerfGG), code with the procedural rules, requirements and rights of the BVerfG
There are about 3000 constitutional complaints each year and if the formal requirements are fulfilled the F.C.C. has to review the lawsuit. The Justices of the F.C.C. do not have the possibility to select the cases they think are most important or interesting but they have to review all of those constitutional claims if the formal requirements are fulfilled.

Main aim of the F.C.C. is to protect the individual and his/her constitutionally guaranteed rights whereas the main aim of the Supreme Court is to give final decisions on important questions and to establish legal uniformity in cases where different courts decided nearly the same problems in different ways.

This thesis will try to give an introduction into the different systems of judicial review of administrative actions of the United States and Germany. In this first part a short introduction into the different legal systems and administrative agencies will be given. Part II will explain the system of judicial review of administrative actions in Germany. After describing against which administrative actions there is the possibility to obtain judicial review

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* this is the main aim of the BVerfG towards the individual but it of course has other constitutional cases, like e.g. claims between the federal and state governments or the verification of compatibility of laws with the Grundgesetz
there will be sections concerning the time when judicial review has to be obtained, which different lawsuits exist as well as when these lawsuits will be admitted and will be successful. In Part III the American system of judicial review of administrative actions will be presented. This part will contain a general overview of the judicial review in general as well as a description of the actions which are reviewable by courts. There furthermore will be a section dealing with the scope of review and the requirements that are necessary to obtain judicial review of administrative actions.

Part IV then will be engaged with the examination and the comparison of the respective historic and cultural influences on the development of the legal systems in general and especially the judicial review of administrative action. In this part the source of law, the purpose and the aims of the law as well as the attitude towards the government and the administrative agencies will be examined. Part V will summarize the differences and similarities concerning the judicial review of administrative actions in the two legal systems and will arrange them in order with the respective attitudes towards the law and the political system. The Conclusion then will state the impacts of the different legal systems on the judicial review of administrative actions.
1) administrative judicial branch

An important difference between the german and the U.S. legal system is that there is the common belief in the U.S. that a judge should not be specialized in a certain field of law.

Instead of that the judge should be able to judge the cases and problems that arise in different fields of law. This system relies on the belief that people who are able to judge problems in a general way are much better in obeying the common sense and with this finding the law of the people.

In the F.R.G. - though of course the law is meant to serve the needs of the people - there are too many laws, the law is too complex and there are too many special rules even for legally trained persons to judge all legal problems that may arise.

Therefore, there is not only the necessity to let people who have been legally trained work with the law but more than that there are different judicial branches for the most important legal subjects; the three main court branches are (a) civil law courts, (b) administrative law courts and
(c) criminal law courts.¹⁰

Furthermore there are special courts that deal with legal problems in commerce law, labor law, there are fiscal and social courts.

There are five Supreme Courts in Germany above which there still is the Federal Constitutional Court "which monitors all state bodies, including the supreme Federal Courts themselves, to ensure adherence to the constitution".¹¹

To divide judges on different legal subjects is not a sign of distrust in their legal (or even intellectual) capacity but it is the proper way to ensure a fast and reliable judicial branch because "only a well - timed judicial review is a just judicial review".¹²

Too many special problems arise in each field of law and it would take too much time for judges to adjust themselves to the sometimes very different topics.

¹⁰ The opinion of Peter L. Strauss that the existence of a special administrative court would violate the separation of powers because the administrative court would put too much power to the executive branch therefore is not necessarily correct unless the administrative court would be a part of the administrative agency; see: Peter L. Strauss, "An Introduction to Administrative Justice in the United States", p. 211, (1989)


Because of this there is an own judicial branch that deals only with administrative law which is quite necessary as there are many different fields of administrative law. Administrative law in Germany can be divided into two parts: 
(1) the first part is the "general" administrative law that regulates the forms of actions an agency may choose to take, the procedures it has to obey by doing anything with or towards a citizen as well as the general rules of due process and fairness; 
(2) the second part is called the "special" administrative law and contains different subjects the different and special administrative agencies are working with; this can be police law, building law, municipal law, immigration law and many more, in short: it contains all public law (except for constitutional law) that occurs between the citizens and the administrative and regulative acting sovereign. 
The "general" administrative law is federal law to ensure fairness and equality in procedural rights for all citizens in the same way, the "special" administrative law is enacted by each of the 16 states, GG art 70 (1), and therefore it may vary slightly from state to state. 
To take legal action against an act/order of an administrative agency there are three instances of administrative courts. The first is the "ordinary" administrative court of which there are several in each of the states. The second instance is the higher administrative
court of which there usually is one in each state. The court of the last resort is the Bundesverwaltungsgericht which's decision is final in matters of administrative law. The decision is not final though, if it interferes with constitutionally guaranteed rights of the plaintiff. The plaintiff then may try to defend him- or herself against the decision of the F.A.C. before the Federal Constitutional Court.

The plaintiff may sue before the F.C.C. if he/she fulfills the formal requirements where he/she especially has to signify in a plausible way that his/her constitutionally guaranteed rights are harmed through the decision of the Federal Administrative Court.

2) the rule of law

The "rule of law" whether seen as an abstract principle or as an active-duty of the sovereign power is one of the (if not the) main necessities of a democratic and just society and political system. The means of guaranteeing the "rule of law" may be different from country to country. But as a backbone to ensure this rule of law a Constitution has to

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13 some states have two; also the names may differ from state to state: in some states the higher administrative court is called "Verwaltungsgerichtshof", in some it is called "Oberlandesgericht"

14 Bundesverwaltungsgericht (BVerwG), Federal Administrative Court (F.A.C.), located in Berlin
either guarantee the possibility to obtain judicial review of sovereign actions or it has to take care that the "actors" of the sovereign power do not have the possibility to act arbitrary without ensuring the possibility to obtain judicial review for the concerned people.

a) "rule of law" in Germany

As mentioned above the first and main purpose of the german legal system is not necessarily to obey the people's will but to guarantee and rely on a just legal system. Because of this the "fathers" of the constitution did not invent some democratic "instruments" like e.g. the referendum but instead of that just relied on the representative democracy. This is one of the main lessons the Germans and the "fathers" of the constitution learned from history.\textsuperscript{15} Though it is sad if a country receives a good constitution very late - there nevertheless is the good thing about it that the "fathers" of the constitution have had the possibility to think about lessons and conflicts learned from earlier constitutions in Germany, from constitutions in other countries and from the history as well as from social and cultural development.

\textsuperscript{15} see: K. Stern, "General Assessment of the Basic Law - A German View", 17, 19, in: "Germany and its Basic Law" ed. by P. Kirchhof/D. Kommers (1993); history has shown that "people's will" is not necessarily consistent with prior "wishes" and that referendum's can be "directed" in a special direction.
And though the German constitution was amended 40 times the "fathers" of the constitution had learned their lesson from history well and embodied the important requirements and guidelines for a free democratic country obeying the rule of law in the constitution without the possibility to ever change them.\textsuperscript{16}

The rule of law (or at least its main expression) is written down in GG art 20 (3)\textsuperscript{17}: "The legislator has to obey the constitutional order, the executive and judiciary shall be bound by law and justice".

Combined with the impossibility to ever change this article of the constitution - GG art. 79 (3) - this is the biggest guarantee in favor of the rule of law. Nevertheless there are several other articles of the constitution that embody the rule of law.

The F.C.C. always tried to avoid fixing itself on a certain point of view whether the principle of the rule of law was

\textsuperscript{16} GG art. 79 (3): the most important articles of the Constitution can never ever be changed (the so called "eternity - article"); this was one, if not the biggest mistake of the Constitution of the Weimarer Republic (1919-1933) that otherwise obeyed the principle of the rule of law; see: E.Schmidt-Assmann, supra note 2, 987,996

\textsuperscript{17} though most of the scholars believe that the principle of the rule of law is embodied in GG art. 20 (3) - some scholars believe that this principle is written down in GG articles 28 (1), 20 (1), see: E.Schmidt-Assmann, supra note 2, pp.987,989; see also: President of the Federal Constitutional Court Roman Herzog, "Kommentar zu Art. 20 GG, (II Abschnitt)", pp.20-26, in: Maunz/Duerig, "Kommentar zum Grundgesetz", (1993)
embodied in GG art 20 (3) or in GG art 28 (1) but instead of that in its decisions the Court spoke about the rule of law as a general principle of the constitution.\textsuperscript{18}

The Federal Constitutional Court said that this principle was not enacted in a few written sentences but that it rather is a combination of many principles and ideals reflected in the whole established system, organization and purpose of the Grundgesetz.\textsuperscript{19}

b) rule of law in the United States

In the U.S. the rule of law is not explicitly enacted in the Constitution. Certain features of course are secured in the Constitution like e.g. the separation of powers, due process of law, the assurance of certain fundamental human rights and through the whole structure of the Constitution the guarantee of a "dichotomy between general rule of law and personal discretion to do justice"\textsuperscript{20} is promised.

Reasons for not explicitly mentioning the rule of law may be (a) that the "framers" of the Constitution held the principle of the rule of law as an obvious content of the

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\textsuperscript{18} K.Stern, supra, note 15, p.613

\textsuperscript{19} Judgement of July 1st 1953, Bundesverfassungsgericht, 1st senate, Entscheidungen des Bundesverfassungsgerichts 2,380,403, (later: BVerfGE 2,380,403)

whole Constitution and that (b) there may be differences between common law and civil law systems in the essential understanding of what the rule of law really is. The rule of law may be a "higher" law or a general principle providing justice and judicial review of governmental actions\textsuperscript{21} which is achieved through a variety of different "instruments" like e.g. open findings, open precedents and avoiding the unnecessary use of discretion.\textsuperscript{22}

Rule of law in the U.S. means supremacy of law over individual decisions\textsuperscript{23} which of course includes the law enacted by Congress.\textsuperscript{24}


\textsuperscript{22} K.C. Davis, supra note 21, Vol. I, p.117

\textsuperscript{23} K.C. Davis, supra note 21, Vol. I, pp. 97 - 102

\textsuperscript{24} A plain distinction between the difference in the meanings of the "rule of law" in the United Stated and Germany is e.g. that in the U.S. the "due process of law" is constitutional guaranteed only for cases where "life, liberty or property" are at stake. In all other cases judicial review either is guaranteed within the explicit statute or it is not possible to obtain, see: R.Pierce,Jr./S.Shapiro/P.Verkuil, "Administrative Law and Process", p. 124, 2nd ed., (1992); in Germany judicial review can be obtained if a right/entitlement of the person is violated whereby a right/entitlement can be given not only by the Constitution but by every code whereby the statute does not have to state that there is the possibility to obtain judicial review.
The rule of law requires that the agencies acting for the sovereign power do not act arbitrary\textsuperscript{25} or can be controlled concerning their legal decisions/actions. Not the abstract rule of law is the main aim of the Constitution but to ensure a "liberal" democracy with "equal protection of the laws"\textsuperscript{26} for every citizen.

B) Differences in Purpose and Aim of the Administrative Agencies

1) administrative agencies in Germany

The administrative agencies in Germany exist to execute the laws and the regulations. Structure and purpose of the administrative agencies aim to accomplish the rule of law and therefore the administrative agencies are a neutral sovereign - body (or branch) executing the laws of the legislator.\textsuperscript{27} Bound to the law the administrative agencies are dependent on the normative legal

\textsuperscript{25} see: K.C. Davis, supra note 21, Vol. I, p.104

\textsuperscript{26} U.S.Constitution 14th Amendment sec.1

\textsuperscript{27} see: Rudolf Dolzer, "Verwaltungsermessen und Verwaltungskontrolle in den Vereinigten Staaten", in: "Die Oeffentliche Verwaltung", 578,579, (1982)
status. The legislator can influence the administrative agencies insofar as agencies can be closed or that the legislator can organize new agencies. The legislator may - by doing this - attach importance to certain subjects that it thinks are more important than other subjects. But first of all most agencies that do exist in Germany can not be closed and even if the legislator creates new agencies - as they have to obey the rule of law they are working in an objective and neutral way which can not be influenced by certain political interests or "visions".

The executive branch has no influence at all especially because the "fathers" of the Constitution made it possible to create only a few federal agencies, GG art. 87 (3).

Most of the administrative agencies therefore are not federal but county or city agencies. These administrative agencies are not involved in the political process.

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29 because they are needed to administrate the "daily necessities"

30 except on very few agencies like e.g. the "Deutsche Bundespost" (German postal service) where the head of the "agency" is an executive secretary

31 dealing with the ability to create new agencies: Judgement of February 28th 1961, 2nd senate, BVerfGE 12,205,229
2) administrative agencies in the United States

In the United States the administrative agencies are very close to the executive and are a part of the political process.\(^2\) This is a necessity of art. II § 3 of the U.S. Constitution which rules that the President "...shall take care that the laws be faithfully executed...". As the administrative agencies execute the laws the President of course has to have influence on the agencies because he is the person who is responsible that the "... laws be faithfully executed ...".

Though the administrative agencies do execute the laws they have broad powers in "executing the laws". They have quasi-legislative and quasi-judicial power.\(^3\) These quasi-legislative and quasi-judicial powers can be very broad. As long as Congress enacts an "intelligible principle to which the agency must conform ...".\(^4\) the judicial branch will not strike down the particular delegation.\(^5\) Congress often delegates legislative powers quite broadly because Congress defers to the specific knowledge of the agency.

\(^2\) R.Dolzer, supra note 27, 578,579

\(^3\) see: K.C. Davis, supra note 21, Vol. I, p.182

\(^4\) J.W.Hampton, Jr & Co V. United States, 276 U.S. 394, 409 (1928)

As an administrative agency may make "legislative" decisions the judicial branch is restrained controlling those decisions because it will not decide "legislative" or political questions. More than that the courts put more weight on verifying the formal instead of the objective parts of an agency decision because the administrative agency has special knowledge or "technical expertise" in the special topic they are working with.

Though the administrative agencies have traditionally been a part only of the executive branch Congress created independent agencies because Congress wanted "agencies that exercise judicial functions" to be independent and

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36 the "intelligible principle" nevertheless allows Congress to delegate a broad amount of authority; "Broad delegations of power by Congress have been justified as necessary to deal with the realities of modern Government", see: M.Strobel, supra note 35, 1321,1328


"freedom from the Presidential domination".\textsuperscript{40} The question that arose though was whether the "independent" agencies were constitutional.\textsuperscript{41} The President's influence on these independent agencies is diminished considerably as he may remove officers of those independent agencies only for cause.\textsuperscript{42} This can be contrary to the President's constitutional duty "to take care that laws be faithfully executed".
"freedom from the Presidential domination". The question that arose though was whether the "independent" agencies were constitutional.

The President's influence on these independent agencies is diminished considerably as he may remove officers of those independent agencies only for cause. This can be contrary to the President's constitutional duty "to take care that the laws be faithfully executed".

The Supreme Court so far held the existence of these independent agencies nevertheless constitutional.

The executive has broad powers as it controls the administrative agencies but as the President executes the laws which are made by Congress the separation of powers are


41 this may be questioned as "independence and separation of powers are linked concepts", see: P.Verkuil, "Separation of Powers, the Rule of Law and the Idea of Independence", in: 30 Wm & M.L.Rev. 301,322, (1989); it therefore can be difficult for the President to fulfill his constitutionally demanded tasks

42 "The condition that makes the independent agencies truly independent is a statutory restriction on removal for cause", P.Verkuil, supra note 41, 301,330

balanced." Even though the President has great influence on the agencies the organic acts of the agencies are made by Congress.


" such as: "appointment of members, budgetary controls and simple power of persuasion", G.Robinson, supra note 44, p. 238,245
Part II

POSSIBILITY OF JUDICIAL REVIEW IN THE GERMAN LEGAL SYSTEM

1) judicial review of what kind of administrative actions?

a) no "numerus clausus"

In a civil law system rights and duties are written down in codes. Because of this a problem may arise if a certain right is needed (and though the existence/need of this right may be generally accepted) this right nevertheless is not available because it is not enacted in a code. This can be an especially dangerous situation if there should be the need to take legal action against a certain sovereign action and no suitable lawsuit is available for the citizen in the VwGO. This is quite uncomfortable as irretrievable situations and facts may be established if there is not the possibility to take legal action against the sovereign.

Though the legislator may enact restrictive presuppositions for the admissibility of lawsuits it may not prohibit the

" see: E. Schmidt-Assmann, "Kommentar zu Art. 19 (4) GG", in: Maunz/Duerig "Kommentar zum Grundgesetz", p.127, (1993); the federal legislator enacted the VwGO as "final" code for procedural requirements so that the states may not establish new procedural rules or requirements for the administrative courts, GG art. 74 No 1; see: judgement of February 17th 1981, 7th senate, BVerwGE 61,360,363
possibility to obtain judicial review." To ensure the possibility to take only certain legal actions would be the same as to prohibit the possibility to obtain judicial review in some circumstances. Because of this it is possible to enact only certain lawsuits if there is the guarantee that it is possible to obtain judicial review with other legal actions than the enacted lawsuits whenever there should be the need for it. Therefore there is no "numerus clausus" of the possibilities of the lawsuits. If there should be the need for legal protection and none of the enacted lawsuits would really help to reach the required aim there of course nevertheless is the possibility to sue.

b) action/inaction

As it is known that an inaction can cause the same damage as an action can the legal action may be brought against agency actions as well as inactions. The agency may reject to act in a desired way or it may just work very slowly so that after a certain period of time it is unreasonable for the citizen to wait any longer. The

47 Judgement of April 15th 1980, 2nd senate, BVerwGE 54, 94, 97

48 though the states may not create and enact new types of lawsuits, Judgement of October 11th 1966, 1st senate, BVerfGE 20, 238, 251

agency may act in a way the citizen does not want to endure and which he/she does not have to endure. The main question therefore is not whether the agency acted or did not act but if the rights or legal entitlements of the citizen are or have been restricted.

c) judicial review of all administrative actions? The same is true concerning the possibility to review different forms the agency choose to act or cases where the agency did not want to act. Whether the agency enacted an administrative act, order, statute or just gave advice does not matter at all (concerning the question if there is judicial review or if there is not).

"The protection of the GG art 19 (4) is available no matter what type of administrative action the administrative agency choose".\textsuperscript{50}

There are different lawsuits to take legal action against the different types of action but after all those types of actions are artificial and do only exist to serve a certain purpose.

d) judicial review of discretionary decisions of the agency Many statutes give the administrative agency discretion in finding a decision after weighing the legal and factual

\textsuperscript{50} E.Schmidt-Assmann, supra note 46, p.41
arguments and possibilities. The court of course may not substitute its own opinions for those of the agency. The discretionary decision of the agency nevertheless can be and has to be controlled, at least to some extent.\textsuperscript{51}

VwVfG § 40 rules that while the agency uses discretion it has to use this in the sense of the respective law and the agency may not infringe the legal limits of the discretion. There are four types of mistakes an agency can make while using its discretionary power and which can be controlled by the court:

* if an agency makes a decision based on facts that do not exist\textsuperscript{52};
* if an agency makes a decision thinking that there are certain limits of discretion whereas those limits do not exist in this concrete case\textsuperscript{53};
* if the decision of the agency was arbitrary\textsuperscript{54};
* if the agency does not really use its discretion and does not put any weigh on the individual case but instead acts to standardize its acts.

\textsuperscript{51} see: W. Schmitt Glaeser, supra note 49, p.99

\textsuperscript{52} F.Kopp, "Verwaltungsverfahrensgesetz", p.576, 3rd ed. (1983)

\textsuperscript{53} Judgement of February 3rd 1959, 2nd senate, BVerfGE 9,137,147-149

\textsuperscript{54} Bundesverwaltungsgericht, Judgement of September 27th 1978, in: 32 Neue Juristische Wochenschrift Pt 2, 1112,1113
If the agency makes mistakes within those four categories the court can find them out. Other decisions of the agency - even though the agency could have made better decisions - are within their discretionary power and not justiciable.

2) at what time can judicial review be obtained?

a) usually the agency has acted

Usually judicial review can only be obtained if an action of the administrative agency already has happened because only unless you know of a certain act or order you can react. If a person receives an administrative act he/she has to react within a certain period of time because there is only a limited period of time in which a lawsuit can be brought to a court, Verwaltungsgerichtsordnung\textsuperscript{55}, § 74 (1)(1 month).

To keep the administrative agency efficient and in order there are certain time limits until when an action, a complaint or a pretrial review (Vorverfahren) may be brought for administrative review to the agency, VwGO sec. 68 (1). This period of time only starts running the day the addressee receives the administrative act or on the day it was declared to him in his/her presence, not the day it was released.

\textsuperscript{55} Verwaltungsgerichtsordnung (VwGO), rules of the administrative courts; Beck-Texte im dtv, 19th ed. November, 1st 1993
There are different circumstances possible though that may require a court's decision or action before an administrative act is released: (aa) it is possible that an agency did not react within a certain period of time to a certain request by a person, e.g. request for a building permission, (VwGO sec. 75: 3 months); (bb) if there is the plausible and foreseeable chance that the agency will act in a certain way which will harm subjective rights of a person and (cc) there furthermore is the possibility that there is the urgent need for a person to uphold a certain situation or legal status before it is changed irretrievably by the administrative agency.

to (aa): The lawsuit needed to take legal action if the administrative agency did not act within 3 months - VwGO sec. 75 - though requested is called Verpflichtungsklage (action against a public authority to compel the performance of an administrative act for one's benefit) and will be discussed under d).

b) provisional judicial review

to (bb): There are different possibilities to take legal actions in advance if there is the foreseeable and plausible chance that the agency will act in a certain way. This preventional judicial review is a constitutional demand and necessity - deriving from GG art 19 (4). Not only to guarantee the possibility to obtain judicial review but also the efficiency of this judicial review is guaranteed through
the Grundgesetz.\textsuperscript{56} Derived from GG art 19 (4) the right to have an efficient judicial review became one of the fundamental rights of the german constitution.\textsuperscript{57} Prevential review is a necessity to assure an efficient protection by the courts.\textsuperscript{58}

c) preventive judicial review

to (cc): Citizens must have the possibility to obtain judicial review of certain actions that otherwise would diminish a certain entitlement or legal right. This judicial review in Germany is called provisional judicial review and is a result of GG articles 19 (4), 20 (3). This kind of judicial review is necessary to avoid even the possibility that arbitrary decisions may establish an unwanted or unjust legal status quo. Provisional judicial review is a mixture of providing reliance in the legal system and control of the executive branch.\textsuperscript{59}

\textsuperscript{56} Judgement of November 12th 1958, 2nd senate, BVerfGE 8,274,326; Judgement of July 18th 1973, 1st senate, BVerfGE 35,382,400

\textsuperscript{57} Judgement of April 2nd 1969, 1st senate, BVerfGE 37,67,77

\textsuperscript{58} Judgement of September 8th 1972, Bundesverwaltungsgericht, 4th senate, Entscheidungen des Bundesverwaltungsgerichts 40,323,326, (later: BVerwGE 40,323.326)

\textsuperscript{59} see: E.Schmidt-Assmann, supra, note 2, 987,1030
3) the judicial review

a) formless remedies

There are three possibilities to complain about certain actions of the administrative agencies within the respective agency. There is a remonstrance, a request for administrative review as well as a request for administrative review by a superior officer. In contrast to legal remedies these three remedies/complaints do not lead the claimant to a court and in most cases they are used to protest against certain actions that do not have a legal impact. But they can be taken prior or even at the same time of obtaining judicial review against the same action. These are "complaints" which are expressed by an individual against a certain action of an administrative agency or behavior of one or several of their ministerial/administrative officers and these complaints will be judged only by the administrative agency itself. These complaints may be about a certain act of the administrative agency, an unfriendly civil servant or the wish to have a certain act or an agency officer controlled by a superior officer. Those "complaints" can be made by everybody who has been addressed by the action or who has contacts with an administrative agency without any time limits or other formal requirements.
They may be not as efficient as obtaining judicial review by a court but they often are faster than a decision of a court and are about complaints that may be not important enough to go before a court. And even if a complaint should be denied there usually still is the chance to file a suit.

b) distinction between admissibility and success

The judge who judges a lawsuit is doing this in two steps: first he/she examines whether the formal requirements are fulfilled and then he/she judges on the merits. The review of a lawsuit therefore is divided into two parts and the review of the formal requirements can be as enduring as the review on the merits, though usually it is not as difficult and therefore does not take as long as the verification of the controversial legal problems. Without any doubt the main importance lies on the judicial review of the legal problems but to avoid misuse of the judicial branch - which would lead to serious disadvantages for the whole society - the legislator has to enact certain procedural requirements to ensure the ability of the judicial branch working in an efficient way. Thereby the legislator has to obey certain limits and standards - esp. those required by GG art 19 (4) - but as

as this is still the agency deciding over complaints made about officers or actions of the agency itself it is clear that a conflict of interests may arise. Nevertheless the establishment of these complaints was/is an expression of confidence in certain principles
long as these procedural rules do not diminish constitutional rights these procedural and sometimes even other requirements have to be accepted by the citizens/plaintiffs as a legal demand in order to conserve the functioning of the judicial branch.

c) action to rescind / Anfechtungsklage

When an administrative agency wants to regulate a certain object or subject against or in favor of an individual or a small group of persons - in most cases it will enact an administrative act. This is a special way to act because an administrative act is enacted towards an individual or a small group (where the affected persons do not necessarily have to know each other) and therefore it is "personal" but nevertheless this act is legally binding. As the action to rescind /Anfechtungsklage - which is enacted in VwGO § 42 (1) - is the proper way to sue an administrative agency because of the enactment of an administrative act this legal action probably is the most often used remedy. The aim of the plaintiff that can be reached with this remedy is to cancel the administrative

61 Judgement of January 12th 1960, 1st senate, BVerfGE 10,264: with this decision the BVerfG upheld a rule demanding an advanced payment for court costs

62 a "small group" can be several people but not that many as that they could not be individualized by certain characteristics
act. If a court finds that the administrative act is unlawful it will declare this act void, VwGO § 113 (1).

aa) The act against which this lawsuit can be taken necessarily must be an administrative act. There is a definition in VwVfG § 35 that explicitly says what an administrative act is. There especially have to be five components: the act must be (1) a sovereign act of an (2) administrative agency dealing with (3) public law to (4) regulate an individual case that has an (5) external affection.\textsuperscript{63}

The action to rescind may also be taken against an invalid administrative act\textsuperscript{64} because an administrative act has to be fulfilled/obeyed unless a court declares it void or if it is very evidently invalid. But as a false diagnosis of the validity of the administrative act by the addressee is of course the sole problem of the addressee it usually is better to take legal action to make sure whether the act is invalid or not.

bb) If the administrative act can be divided into several parts and these different parts still make sense a plaintiff may sue only against the part that he dislikes, VwGO sec. 113 (1). This is very useful if only one part of the act

\textsuperscript{63} see: F. Kopp, supra note 52, pp. 462 - 502; external in the sense that something is ordered against the addressee that other people not directly affected nevertheless do notice (or at least: can notice)

\textsuperscript{64} F.Kopp, "Verwaltungsgerichtsordnung", p 176, 6th ed.1984
incriminates the addressee while the rest of the act is favoring his interests.
The court then will declare void only the part against which the plaintiff sued while the rest of the act will be upheld even if it should be unlawful. This is written down in VwGO sec. 88 that rules that the court is bound to the claim of the plaintiff.\textsuperscript{65}

VwGO §§ 88, 113 (1) explains that if the plaintiff sued against the complete administrative act the court will declare only those parts of the administrative act void that really are unlawful while the rest of the act will be upheld. That clarifies that there is no use in suing against an administrative act just because the plaintiff dislikes it.

If the administrative act was changed or amended in the (legally required) administrative pretrial review but the plaintiff still wants to take legal action against the administrative act - not the original but the act in the form it received through this pretrial review will be reviewed by the court, VwGO § 79.

cc) What is important is the fact that the execution of the administrative act still must be possible or - vice versa: the administrative act may not be settled/executed

\textsuperscript{65} F. Kopp, supra note 64
irretrievable or canceled by the administrative agency at the time the plaintiff starts legal proceedings.

If the administrative act is executed or settled - because the plaintiff first obeyed the act and then went to court or because the administrative act had to be executed because of urgent and overweighing public interests, VwGO sec. 80 (2) - but still can be reversed the action to rescind nevertheless is the correct legal action.

As the plaintiff first has to take action in an administrative pretrial review, VwGO sec. 68 (1), and this may take some time there may be circumstances in which the administrative act settled itself. To avoid this and to protect the addressee of the administrative act VwGO §§ 80,80a rule that while taking a pretrial review or a legal action before a court this administrative act may not be enforced/implemented.""7

If the administrative act settled itself and actually nothing has changed or is happening anymore there nevertheless is the possibility to sue the administrative agency because of a legal wrong they tried to enforce with this act or just because this meanwhile settled act implemented a certain negative status on the plaintiff of

"" see: W. Schmitt Glaeser, supra note 49, p.90

""7 except in those cases mentioned above where there is an overweighing public interest, VwGO sec. 80 (2)
which he tries to get rid of. This legal action is called Fortsetzungsfeststellungsklage (FFK).

dd) The plaintiff does not necessarily have to be the sole addressee of the administrative act, he/she does not have to be among the addressees at all. Instead of that it is important that the plaintiff can show in a plausible way that there is the very likely possibility that one or even several of his subjective personal public rights have been harmed.

The action to rescind is successful if the plaintiff has the claimed legal subjective position/right and if this right/position is harmed in an unlawful way through this administrative act.

d) writ of mandamus / Verpflichtungsklage

The Verpflichtungsklage is a legal action to condemn an administrative agency to enact a desired administrative act to which the plaintiff has to have a legal right, VwGO § 42 (1) 2nd alternative.

The aim of the lawsuit therefore is to enforce a certain desired action from the administrative agency that is not acting as it should.

There are two possibilities why this lawsuit may be used: (1) the citizen may have applied for a certain administrative act at the competent agency. When the citizen applied and nevertheless the agency did not act within 3
months, the citizen may use this lawsuit to enforce a decision, VwGO § 75;

(2) a citizen may use this lawsuit to enforce a certain administrative act from the agency if he/she had applied for an administrative act but the agency refused to enact this administrative act. The reasons why the agency did not want to enact this administrative act are irrelevant for the citizen concerning his/her right to take legal action against the agency.

aa) Just as the Anfechtungsklage the Verpflichtungsklage can only be used in cases concerning an administrative act. The plaintiff must have the desire to receive an administrative act, not just any action of the agency, VwGO § 42 (1).

bb) Before going to court the plaintiff has to have obtained a pretrial review at the administrative agency without any success, VwGO sec. 68 (1). If the administrative agency did not act at all there is nothing against which the citizen may complain (at the agency level).

cc) The plaintiff has to claim that his/her rights may be harmed through the agency by not enacting the desired administrative act. Furthermore the plaintiff has to prove in a plausible way that he has a subjective public right to demand this certain desired administrative act from the agency, VwGO § 42 (2). This public right must be harmed

" if the agency refused to enact the administrative act as explained above under (2)
through either rejecting the application or through not acting at all. The agency may enact a certain part of the desired administrative act but may nevertheless refuse to enact other parts.\textsuperscript{69} The plaintiff may sue against this partial denial of his/her desire as well.

dd) The citizen must have applied /asked for the administrative act at the competent and responsible administrative agency because the administrative agency must have the legitimate right and entitlement to enact an administrative act respectively dealing with a topic the citizen asked for.

ee) If the application to enact an administrative act was rejected by the administrative agency the plaintiff has to take legal action within 1 month since the day he received notice of the rejection, VwGO § 74 (2).

ff) If the plaintiff wins the lawsuit the administrative agency either will be condemned to enact a certain specified act ("Spruchreife") or it may be condemned to enact an administrative act regarding the legal opinion of the court about a certain topic ("Bescheidungsurteil").

ff a) "Spruchreife": if the legal and factual assumptions are fulfilled and no other requirements are needed to enact this certain specified and required administrative act the court will order the agency to enact explicitly this desired act.

\textsuperscript{69} W. Schmitt Glaeser, supra note 49, p. 175
ff b) "Bescheidurteil": the court orders the administrative agency to enact the required administrative act whereby the agency has discretion in factual but not in legal matters.

e) action for a declaratory judgement (Feststellungsklage)
As the name of this legal action already elucidates - people using this lawsuit do not want to receive or reject a certain action but instead of that want to have clarity about a legal relationship, status or legal act.
VwGO § 43 that regulates the action for a declaratory judgement lists two possibilities when this legal action can be useful:
(1) the action for a declaratory judgement is the correct legal action to ascertain the invalidity of an administrative act. Different from the Anfechtungsklage that aims at the declaration of the illegality of an administrative act this administrative act has to be declared invalid. An administrative act is invalid if e.g. an agency enacted this act without being authorized by statute to enact an administrative act like this. An invalid administrative act has no legal authority or power but as the act was enacted by an agency representing the sovereign power this act may be - solely through the possible appearance of legality - a burden for the...
addressee. To free himself from this burden the citizen must have the chance to let this act be declared invalid.
The invalid administrative act has no legal power at all whereas in contrast to that the illegal administrative act is illegal but has to be obeyed by the addressee unless a court declares it void.

(2) The second possibility to use this legal action is to ascertain the existence (positive) or non-existence (negative) of a legal relationship, VwGO § 43 (1). This legal relationship has to establish a concrete case between at least two legal personalities based on public law.\(^7\) to (1): If the plaintiff wants to ascertain the invalidity of an administrative act the act in question necessarily has to be an administrative act within the meaning of the Verwaltungsverfahrensgesetz § 35.\(^7\) The plaintiff must have applied without success at the competent administrative agency to have this administrative act declared invalid, VwVfG § 44 (5).

If the plaintiff has had the chance to enforce his legal rights with either the Verpflichtungsklage, Anfechtungsklage or the allgemeine Leistungsklage he can not file an action

\(^7\) Judgement of November 28th 1975, 7th senate, BVerwGE 50,11,19; Judgement of June 26th 1981, 4th senate, BVerwGE 62,342,351

\(^7\) Verwaltungsverfahrensgesetz (VwVfG); code of the different possibilities an administrative agency may act Beck -Texte im dtv, 19 th ed. November 1st 1993
for declaratory judgement because this lawsuit is subsidiary to the other legal actions, VwGO § 43 (2).

aa) A pretrial administrative review is not possible and therefore not required.

bb) There is no time limit within which the lawsuit must be brought before a court.

cc) The plaintiff has to have an entitled interest (not necessarily a legal interest) in the decision and an interest in an early decision of the court.\textsuperscript{73} The interest affected may be of an economic, social or political nature.\textsuperscript{74}

dd) The lawsuit is successful if the administrative act is invalid as a matter of fact or if the asserted legal relationship exists or does not exist (however the plaintiff claimed the relationship to be).

f) Fortsetzungsfeststellungsklage (FFK)

This lawsuit mentioned in VwGO § 113 (1) sentence 4 is used against administrative acts that settled itself and therefore do not exist anymore. The aim is to have this respective administrative act declared illegal. The FFK therefore is an exception to the general rule that there

\textsuperscript{73} W. Schmitt Glaeser, supra note 49, p. 200

\textsuperscript{74} VGH Baden Wuerttemberg, judgement of February 27th 1989, in: 43 Neue Juristische Wochenschrift (Pt 1), 268 (1990) (VGH, Verwaltungsgerichtshof, higher administrative court)
has to be either an action or an inaction to sue against. Though enacted to serve GG art 19 (4) the FFK more likely is a result of GG art 20 (3) and the principle of the rule of law. The sovereign power - enacting laws or acting through administrative agencies - has to be controlled by the judiciary and more than that the citizens must have the right to restrain against the appearance that an enacted administrative act was correct though it was not and therefore did him/her a legal wrong. The sovereign has the obligation to avoid possibilities in which a negative appearance or an impression of unlawfulness is thrown upon a citizen. When an administrative act (that orders the addressee to do or not to do a certain thing) settles itself there is always the danger that a certain negative impression remains.

There are three possible cases in which the FFK can be used:

(1) If an administrative act settles itself after the plaintiff filed a lawsuit but before a decision of the court was made - the plaintiff then can either withdraw the lawsuit or he can change the Anfechtungsklage subsequently to a FFK. 75 With this FFK the plaintiff aims to receive the decision of the court that the - by now - settled administrative act has been illegal.

75 Judgement of December 1st 1982, 7th senate, BVerwGE 66,307
(2) Another possibility to use the FFK is the case that an administrative agency rejected to enact a desired administrative act. Even if this desired administrative act should not be necessary anymore (because e.g. the factual situation changed) there still is the possibility to sue the agency in some cases.

The aim of this FFK is the subsequent declaratory judgement that the rejection to enact the desired administrative act was illegal.\footnote{F.Kopp, supra note 64, p. 998; a case where this subsequent declaratory judgement could be necessary is when the owner of a property applied for a permission to build a house on his property but this application was denied by the competent agency. If the owner then wants to sell his property it is of course less valuable than it would be having the possibility to build a house. In this case the owner has the urgent interest to let the refusing agency’s decision be declared illegal (if he really had the legal entitlement to receive a building permission) so that more people will be interested in buying this property because they have the possibility to build a house; in this case the owner has a respectable interest in a court’s decision.}

(3) Analogous to VwGO 113 (1) sent. 4 the FFK is possible in cases where the administrative act settled itself before the plaintiff could take legal action with an Anfechtungsklage.\footnote{W. Schmitt Glaeser, supra note 49, p. 207; Judgement of February 9th 1967, 1st senate, BVerwGE 26, 161,165} In this case no pretrial administrative review (VwGO § 68 (1)) is necessary if the administrative act settled itself before the time limit to take this pretrial review was over. If the administrative act settled itself...
after the time limit was over but the plaintiff did not take this pretrial review - the lawsuit will not be admitted.\textsuperscript{78}

aa) To pass the admissibility examination the formal requirements of the Anfechtungsklage have to be fulfilled.

bb) The administrative act must have settled itself after the lawsuit was filed but before the court came to a decision.\textsuperscript{79}

cc) The plaintiff has to change\textsuperscript{80} the lawsuit from an Anfechtungsklage to a FFK.

dd) Furthermore the plaintiff has to have a special interest that the administrative act that settled itself should be declared illegal. This interest can be of legal, economic, political, religious or any other nature.\textsuperscript{81} A special interest is e.g. if there is the danger that an administrative act will be repeated.\textsuperscript{82}

\textsuperscript{78} Judgement of February 9th 1967, 1st senate, BVerwGE 26,161,167

\textsuperscript{79} this is necessary only in case (1)

\textsuperscript{80} only in case (1)

\textsuperscript{81} VGH Baden Wuerttemberg, Judgement of February 27th 1989, in: 43 Neue Juristische Wochenschrift, (Pt 1) 268, (1990)

\textsuperscript{82} Judgement of September 3rd 1963, 1st senate, BVerwGE 16,312,316
g) action requesting a change of a legal right

There are several administrative law lawsuits that contain topics dealing with civil law, too. These lawsuits are not used very often but they nevertheless can be very important and useful.\footnote{these lawsuits are not very important in the sense that not very many people actually use them; of course this says nothing about how important or useful they might be for the people depending on them; trying to enlist all administrative law remedies these should not miss here}

(1) There is the lawsuit to resumption of proceedings, VwGO § 153 in combination with ZPO § 578\footnote{Zivilprozessordnung, code of civil procedures}, that aims to remove a final administrative court decision because of eminent procedural mistakes.\footnote{W. Schmitt Glaeser, supra note 49, p.28}

(2) Another lawsuit is the petition for modification of judgement, VwGO § 173 in combination with ZPO § 323, that aims at the removal of a final administrative courts decision. Reasons for this removal are changes in the state of affairs or in the facts that lead the court to this decision.\footnote{Othmar Jauernig, "Zivilprozessrecht", p.226, 22ed. 1988} The former decision was correct - based on the facts that have been available at the time the decision was made - but the facts available right now would lead to a different result.

(3) Furthermore there is the possibility to bring an action for avoidance of an arbitral award, VwGO § 173 in connection with ZPO § 1043. In this case the removal of an arbitral award can be demanded, ZPO § 1041, because of formal or procedural mistakes.  

(4) The action raising an objection to the judgement claim is written down in VwGO § 167 (1) in connection with ZPO § 767. This lawsuit is used to raise defenses against an established claim, e.g. defense of performance, waiver or dath.

h) action for performance, Allgemeine Leistungsklage
This lawsuit is not explicitly written down in the VwGO but it is derived out of the whole system of the VwGO, especially keeping in mind the fact that there is no numerus clausus of the types of lawsuits. The legal sources of the action for performance are VwGO § 40 (1) and VwGO § 43 (2). More than that this lawsuit can be seen as a result of GG art 19 (4) in combination with VwGO § 40.  

This lawsuit is used to demand or to retrieve a certain act of an administrative agency. It can be used to refrain from

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87 O. Jauernig, supra note 86, pp. 325/326,


89 W. Schmitt Glaeser, supra note 49, p.213
an administrative act, too. Very important is that the
demanded or prevented act may not be an administrative act.\textsuperscript{90}

aa) The desired or unwanted and prevented action of the administrative agency has to be an act with legal relevance, though it may not be an administrative act. It must be an action of an agency concerning/dealing with an individual case.\textsuperscript{91}

bb) The plaintiff has to claim in a plausible way that his subjective rights are hurt because of the administrative agency’s action/inaction, VwGO § 42 (2).

cc) A pretrial review is not necessary and there is no time limit until when legal action has to be taken.

i) Klageart sui generis

Though it was planned\textsuperscript{92} to enact only certain types of lawsuits the German Bundestag stood away from that intention.

\textsuperscript{90} Judgement of February 25th 1969, 1st senate, BVerwGE 31,301

\textsuperscript{91} Whether the act really must deal with an individual case is controversial; in favor: VGH Hessen, Judgement of March 15th 1968, DVBL 1969, 504; against: VGH Bayern, Judgement of December 12th 1980, BayVBL 1981, 499,503; the VGH Bayern is of the opinion that even statutes can be a matter of dispute with this lawsuit; citations from Schmitt Glaeser, supra note 49, p.215

\textsuperscript{92} Bundestags - Drucksachen 3/1955; cited from W. Schmitt Glaeser, supra note 49, p. 223
Taking this position the German Bundestag tried to avoid a certain enumeration of types of lawsuits because they feared that otherwise they would enact an immovable and not useful legal system.\

Therefore there is no numerus clausus of lawsuits today but instead of that there is the possibility - derived out of GG art 19 (4) and of VwGO § 40 - to take any legal action before an administrative court if the matter of dispute is one of public law.

For example there nowadays is a lawsuit called "Kommunalverfassungsstreit" (dispute between municipals) dealing with disputes of municipal law between counties or cities. Though the existence of this lawsuit as an own type still is controversial it shows the possibility to take legal action without using one of the statutorily enacted types of lawsuits.

93 Keeping in mind that the German legal system relies on statutes what means that these statutes have to be broad and abstract to serve their purpose; though the legislator enacted nearly all possibilities to take legal action they kept in mind that the principle of the rule of law demands more than that.

94 First named this way by the OVG Lueneburg, DOEV 1961,548; cited from W. Schmitt Glaeser, supra note 49, p. 224

95 W. Schmitt Glaeser, supra note 49, p. 224
j) Normenkontrollverfahren, VwGO § 47

This lawsuit is a mixture of a constitutional and administrative law remedy.
As the name already points out it is used to control regulations on a level below federal or state laws.
The Federal Constitutional Court controls federal and state laws and their compatibility with the constitution, GG articles 93 (1) No 2, 100 (1).96

VwGO § 47 gives the higher administrative courts - VGH,OVG - the right to declare void regulations (a) enacted because of BauGB § 246 (2)97, VwGO § 47 (1) no 1 and (b) other regulations enacted by states (though not state laws) if the state enacted laws that declare it possible to take this legal action, VwGO § 47 (1) No 2.98

Important is that this judicial review can only be obtained against regulations below formal state law.

96 The Federal Constitutional Court is the only Court in Germany that can declare laws void, see: BVerfGG § 32 (2)

97 BauGB = Baugesetzbuch, code concerned with building law

98 the federal government can not order the states to enact this kind of law dealing with state regulations; there is not the obligation of the federal or the state governments deriving from GG art. 19 (4) to give the opportunity to have this kind of judicial review because even if there would not be the chance to take legal action against a regulation there still is the possibility to take legal action against an act that was enacted because of this regulation, see: F. Kopp, supra note 64, p.342
aa) The decision about compliance with legislative law or the damage of an individual’s subjective rights can only be issued by a higher administrative court (VGH/OVG).

bb) There has to be a petition aiming at the declaration of invalidity of a certain norm.

cc) Everybody has the right to file such a petition if he/she received or will receive (VwGO § 47 (2)) a disadvantage because of this regulation. Not only individuals but also every agency can file a petition to control a regulation.

Though it is controversial what a disadvantage in this sense is meant to be there is unity in the opinions concerning the fact that this must be a legally protected interest.  

Some are of the opinion that the possibility that factual or economic interests may be damaged are disadvantages within the meaning of VwGO § 47 (2), too.  

dd) There is no pretrial review and there is no time limit to sue.

k) provisional judicial review

In a legal system where the rule of law is the main principle and aim there has to be the possibility to obtain

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"9" Judgement of July 14th 1978, 7th senate, BVerwGE 56,172,175

100 VGH Baden Wuerttemberg, Judgement of February 2nd 1977, in: 30 Neue Juristische Wochenschrift 1977, (Pt 3), 1212
judicial review prior to the execution of an action of an administrative agency. This is necessary to avoid the possibility that arbitrary or unjust actions may establish an unwanted and unjust legal status quo. Because this provisional judicial review has to be well-timed and fast to be effective there only can be a summary examination before the court makes a decision. But as this is "only" provisional review to protect a certain status quo and not a final decision - even if the provisional decision should be wrong it can and will be changed in the court's final decision.

The main essence about provisional review is not the fact that it is provisional but that it is fast and well-timed. The provisional review reverses the "assumption of the legality" of the action of the sovereign into its contrary and it remains like this until the final decision is issued.

aa) If a person wants to take legal action against an administrative act he/she has to enforce his/her rights with an Anfechtungsklage where there is the legal requirement to obtain a pretrial administrative review, VwGO § 68 (1).


102 "Only well-timed judicial review is just judicial review", P. Kirchhof, supra note 12, 453, 464

103 W. Schmitt Glaeser, supra note 49, p. 149
While obtaining the pretrial review or while taking legal action with an Anfechtungsklage the VwGO §§ 80,80a rule that the administrative act can not be executed unless a final decision has been made by the court concerning the legality/illegality of this administrative act. The execution of the administrative act is stopped even if it may be addressed to several persons or if many people are affected but only one takes legal action, VwGO § 80a. Because the pretrial review and the Anfechtungsklage have to be taken after the enactment of the administrative act the prohibition to execute the administrative act is retroactive to the time the act was enacted.¹⁰⁴ The agency that executes an administrative act before the time limit to take legal actions has passed acts at its own risk.¹⁰⁵ This means that if the citizen takes legal actions within the time limit but after the agency executed the act the agency has to reverse the execution of the administrative act.¹⁰⁶

There are some exceptions though from the fact that the administrative act may not be executed before the time limit (VwGO §§ 70 (1), 74 (1): 1 month) is over:

¹⁰⁴ W. Schmitt Glaeser, supra note 48, p.153

¹⁰⁵ Judgement of October 11th 1967, 5th senate, BVerwGE 28,63,65

¹⁰⁶ W. Schmitt Glaeser, supra note 49, p. 155
(1) VwGO § 80 (2) No 1: if a public authority demands taxes the agency may execute the administrative act ordering the citizen to pay the taxes;

(2) VwGO § 80 (2) No 2: important and urgent orders of the police may be executed immediately;

(3) VwGO § 80 (2) No 3: in cases where the immediate execution is ordered by explicit federal law;

(4) VwGO § 80 (2) No 4: in cases where the immediate execution is favored by public interests or by outweighing interests of one of the participants.

The agency is legally required to submit a written statement why an immediate execution is necessary. If the agency does not submit this statement the execution was illegal. The execution of the administrative act is illegal, too, if the reasons the agency stated were not based upon important "overweighing" public interests.\(^{107}\)

bb) The plaintiff has to apply for provisional judicial review by the competent administrative court in the case of VwGO § 123. With this provisional review the plaintiff wants the court to force the administrative agency to give him/her a certain legal position/advantage. There is the possibility to receive a provisional decision if there is the danger that a legal position may be changed irretrievable or that

\(^{107}\) this is very important because otherwise the provisional review would be enacted in the VwGO but not enforceable, reliable and effective
the enforcement of a legal position/right would be much more
difficult, VwGO 123 (1) sentence 1.
VwGO § 123 (1) sentence 2 states that there also can be a
provisional decision if there is a controversial legal
relationship between an agency and one (or more) citizen
that may change. When this change would harm one of the
participants if the court would not act immediately a
provisional judicial decision should be made.
cc) Even in the Normenkontrollverfahren the higher
administrative court can make a provisional decision if it
should be necessary.
Different from the other cases where provisional review is
available in this case the plaintiff tries to end the
execution of a legal norm which affects many people.
Because of this a high standard concerning the affected
interests is required to release a provisional judicial
decision concerning a regulation.
The plaintiff has to state in a plausible way that there are
very important reasons to receive this provisional decision
or that this provisional decision is the only way to avoid
severe disadvantages.\footnote{108}
The court will release a provisional review on behalf of
VwGO § 47 (8) only if it is of the opinion that to stop the
execution of the regulation has to be required imperatively
because otherwise severe damages would occur.

\footnote{108} Finkelnburg/Jank, supra note 101, pp. 156/157
1) preventive judicial review

The preventive judicial review is a necessity of GG art 19 (4): "Legal protection is not efficient if the judicial review is confronted with a fait accompli".\textsuperscript{109} GG art 19 (4) "orders" preventive judicial review in some cases.\textsuperscript{110} There is the problem though that a preventive decision of a court interferes with other branches while they still are in the process of finding a decision. Because of this the preventive judicial review should not be one of the "standard" judicial reviews made possible through GG art 19 (4). Therefore the plaintiff of the preventive judicial review has to proof a special legitimation to use this legal action.\textsuperscript{111}

The necessity to have a special legitimation is realized in the way that the plaintiff has to have a "special need" for legal protection. This special need for legal protection is missing if it can be expected that the plaintiff obtains the "usual" judicial review after the agency acted.\textsuperscript{112} The "special need" for legal protection has to be much more

\textsuperscript{109} E.Schmidt-Assmann, supra note 46, p. 152

\textsuperscript{110} Judgement of July 20th 1962, 7th senate, BVerwGE 14,323,328

\textsuperscript{111} E.Schmidt-Assmann, supra note 46, p. 153

\textsuperscript{112} Judgement of September 8th 1972, 4th senate, BVerwGE 40,323,326
intense than the usual "general need" for legal protection.\textsuperscript{113}

aa) With the preventive Feststellungsklage the plaintiff wants the court to forbid the agency to act in a certain way.\textsuperscript{114} This action may be an administrative act or any other form the agency chooses to take. As this is preventive review the agency so far did not act but it is "obvious" that it will act in a certain way. Not the fact that it is "obvious" that the agency will act is the most important issue concerning this legal action but to avoid the possibility that an irretrievable situation may be established is the main concern. It can be "obvious" that the agency will act if e.g. the agency acted like this before in corresponding situations.

The plaintiff has to have a special and qualified interest in a legal protection of his rights. Reasons for that are e.g. the irretrievable execution of the administrative act or the irretrievable consolidation of a certain situation or legal status quo if the administrative act was enacted or if the agency would act in the expected way.

bb) The preventive Unterlassungsklage aims to prohibit the agency to enact a certain administrative act. This lawsuit is almost the same as the preventive Feststellungsklage with

\textsuperscript{113} discussed later under D) h)

\textsuperscript{114} W. Schmitt Glaeser, supra note 49, p. 209
the difference that the preventive Feststellungsklage can be used against any administrative agency action whereas the preventive Unterlassungsklage can be used only against administrative acts. Because of this the preventive Feststellungsklage can be subsidiary to the preventive Unterlassungsklage in cases dealing with administrative acts.\textsuperscript{115}

cc) The third possibility to use the preventive judicial review is the preventive allgemeine Leistungs-Unterlassungsklage. This lawsuit serves two purposes: (1) when an administrative agency already acted in an illegal way and the plaintiff now tries to prevent the agency from acting the same way in the future and (2) when it is certain that the administrative agency will act and the plaintiff tries to prevent this.\textsuperscript{116} Important is the plausible danger of reiteration\textsuperscript{117} or special reasons that justify not to wait for the administrative action.\textsuperscript{118}

\textsuperscript{115} Judgement of May 7th 1987, 3rd senate, BVerwGE 77, 207,211

\textsuperscript{116} this prevential judicial review has the same aim as the preventive Feststellungsklage, supra aa)

\textsuperscript{117} Judgement of February 8th 1974, 7th senate, BVerwGE 44, 351

\textsuperscript{118} Judgement of April 18th 1985, 3rd senate, BVerwGE 71, 183,188
4) admissibility of these lawsuits

The requirements for the recourse to the courts may differ a little bit from lawsuit to lawsuit. The requirements that are explained and described in this part are the main requirements that are needed for all lawsuits.

a) admissibility of the recourse

VwGO § 40 gives recourse to the administrative courts in all disputes concerning public law unless the dispute is ordered to a different court by federal law. The dispute has to be a matter of administrative law and may not be constitutional law. Plaintiffs often claim that constitutional rights are hurt through the administrative action. Object of the legal action though is the administrative action and its correspondence with its legal basis. Constitutional law in the sense of VwGO § 40 are constitutional claims between the government and the states or the Bundestag and the executive or members of the executive concerning disputes over constitutional rights and privileges of the respective "constitutional organ".

The purpose of VwGO § 40 is to define the administrative legal recourse and to show the difference to other legal recourses (especially to the constitutional).\textsuperscript{119}

\textsuperscript{119} W. Schmitt Glaeser, supra note 49, p. 34
The administrative court has to examine whether the recourse to the administrative court really is available in the respective case. If the court finds that the case is not mainly concerned with administrative law it has to dismiss the case. The plaintiff (respectively his/her lawyer) has to take care that the competent court deals with the lawsuit because otherwise the time-limit to sue (VwGO § 74) might be over.

b) infringement of a subjective right

In the german legal system the law can be divided into two different kinds of law: one type of law is enacted to rule, to regulate society and to establish order. The other type of law gives persons who are addressed by this certain statute legal rights. With this subjective public right the individual can demand a special action/inaction from the administrative agencies and from the sovereign in general. VwGO § 42 (2) rules that a lawsuit is admitted only if the

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120 F. Kopp, supra note 64, p. 101

121 these laws are not enacted to protect or favor a certain interest but e.g. to regulate administrative procedures or to specify the different traffic signs

122 called this way because this law was enacted to serve individuals/subjects. This right is not necessarily given to everybody but in most cases it protects certain groups, e.g. students, farmers, tenants; to establish this protection rights are given to these groups on which they can rely
plaintiff states in a plausible way that his/her rights are harmed through the action of the agency.\textsuperscript{123}

During the admissibility the plaintiff does not have to prove that his/her rights are harmed but he/she has to state facts which make this violation very possible.\textsuperscript{124}

The court may not examine whether the plaintiff really has the claimed subjective right or whether this legal right was hurt because these are questions concerning the success of the lawsuit.\textsuperscript{125}

c) pretrial review, VwGO § 68 (1)

The pretrial review is a review of an administrative act by the agency that enacted this act. Furthermore this pretrial review is necessary if a citizen applied for a certain

\textsuperscript{123} to receive e.g. a building permission certain formal requirements have to be fulfilled. But if these requirements are fulfilled the person has a legal right to receive the desired building permission. With fulfilling the requirements this person is an addressee of the subjective right given in this statute. If the agency nevertheless rejects to give this building permission his/her subjective right is violated. This elucidates the fact that a person can come in the favor of a subjective right if certain legal or factual requirements apply to that person; instructive to the necessity of the violation of the subjective right for the admissibility: Judgement of June 25th 1969, 4th senate, BVerwGE 32,222,223

\textsuperscript{124} Judgement of October 29th 1963, 4th senate, BVerwGE 17, 87,91; this can be a dubious system because there of course is always the danger that while examining the plausible possibility of the infringement of the subjective right the courts decision may be anticipated

\textsuperscript{125} W. Schmitt Glaeser, supra note 49, p. 94
administrative act but this request was rejected by the agency. The citizen then has to obtain a pretrial review against this rejection before taking legal action before a court. However, if the agency did not act within three months the citizen may take legal action before a court without waiting for an agency answer or decision, VwGO § 75.

The pretrial review serves many purposes: the citizen can obtain the pretrial review by himself without a lawyer and without going to court, the administrative agency has the possibility to review and control its own actions and the administrative courts can concentrate on the claims that did not settle themselves at the agency’s review.

This pretrial review is necessary and mandatory before taking legal action with an Anfechtungsklage or a Verpflichtungsklage, VwGO § 68 (1).

If the plaintiff did not take a pretrial review before taking legal action the judge has to suspend the trial.¹²⁶

A pretrial review is not necessary if the administrative act was enacted by one of the highest federal or state agencies, VwGO § 68 (1) No 1, or if a third person is incriminated with the agency decision for the first time¹²⁷ he/she does

¹²⁶ F. Kopp, supra note 64, p. 570

¹²⁷ if e.g. one person receives an administrative act against which this person takes a pretrial review; if the decision of the agency then incriminates a third person this person is incriminated for the first time
not have to start a pretrial review before taking legal action, VwGO § 68 (1) No 2.

The citizen has to take the pretrial review within one month after the administrative act was enacted or his/her request was rejected, VwGO § 68.

The citizen has the right and the duty to obtain this pretrial review. He/she furthermore has an entitlement to receive an agency decision. The citizen has to obtain this pretrial review without any procedural mistakes whereas mistakes of the agency do not matter because with fulfilling the formal requirements the citizen did all that is necessary to receive the legal protection that is available with this claim.\(^{128}\)

The pretrial review has to be applied for within one month after the announcement of the administrative act at the agency that enacted the act, VwGO § 70 (1) sentence 1.

This time limit will not start running though if the agency did not send legal instructions with the administrative act, VwGO § 58 (1). If the agency did not send these legal instructions this is a failure of the agency\(^{129}\) which may not burden the citizen if he/she does not react in the required

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\(^{128}\) F. Kopp, supra note 64, p. 562; if procedural mistakes of the agency could possibly diminish the citizens rights the whole system would be superfluous

\(^{129}\) the "normal" agency is not required by law to send legal instructions, see: W. Schmitt Glaeser, supra note 49, p. 118; only a federal agency has to submit a legal instruction by law, VwGO § 59
Therefore the addressee has one year to take legal action, VwGO § 58 (1), if these legal instructions are not send to him/her.

The pretrial review has a provisional effect in the sense that the agency may not execute the administrative act while the citizen is obtaining this pretrial review, VwGO § 80 (1).

The administrative agency will remedy the act if it thinks the act was either illegal or not suitable, VwGO § 72. If the agency thinks the act is correct it will not change the original act. The administrative act with the content it received through this decision will be object of the lawsuit, VwGO § 79 (1) No 1.

A quite controversial question is whether the agency may enact a "reformatio in peius". This possibility of an administrative agency to release a reformatio in peius

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130 there is a reason for the fact that these legal instructions should be send to the addressee: most of the citizens will not know how to react in the legally required and correct way because these procedural requirements can be very complicated; for relevance of mistakes of the agency see: W. Schmitt Glaeser, supra note 49, p.117

131 as explained supra under the possibilities of the provisional review

132 the administrative act may have been changed by the agency

133 in favor: Judgement of April 22nd 1971, 8th senate, BVerwGE 38,60,65; lat.: reviewing the action and making it "even worse"
nowadays is accepted in general. The existence of the reformatio in peius was controversial especially because the VwGO does not mention anything in favor or against it. As every legally relevant action of an agency has to have a legal foundation - basis for the reformatio in peius therefore is the "special" administrative law with which the respective pretrial is dealing.

d) VwGO § 74

Only the Anfechtungsklage, the FFK and the Verpflichtungsklage require that the citizen takes the legal action within a certain period of time, VwGO § 68 (1). This is necessary because these lawsuits are concerned with legally relevant orders of an agency that have to be obeyed by the addressee. Of course the addressee has to have legal protection against other burdens of the agency, too, like

134 see: W. Schmitt Glaeser, supra note 49, p. 126

135 what of course does not astonish keeping in mind that the VwGO is a federal code and the federal legislator does not have the right to enact rules for the administrative procedures of the states, GG art. 74 No.4; worth reading the whole problem and a legally correct and evident solution: Judgement of November 12th 1976, 4th senate, BVerwGE 51, 310,313

136 see: Judgement of November 12th 1976, 4th senate, BVerwGE 51,310,314; if the agency made a discretionary decision it can reverse its decision and make a new one

137 F. Kopp, supra note 63, p. 624
e.g. the provisional judicial review that makes the execution of the administrative act impossible. The addressee has one month to react against the act of the agency. During this month the agency may not enforce the administrative act. If the citizen does not react within this period of time though, the reliance in the proper administration overweighs and the citizen will have no remedies anymore.

Other administrative actions/inactions usually are not legally binding like the administrative act is so the addressee of these actions does not necessarily has to react within a certain period of time.

The time limit to sue can be one year instead of one month if the administrative agency did not send legal instructions with the administrative act, VwGO § 58 (1).

138 the agency can enforce the administrative act but when a court declares the act illegal the agency has to reverse the enforcement

139 Persons usually can react whenever they want though they have to take care (a) to avoid an irretrievable state and (b) to avoid the situation that they may forfeit a legal action. This might happen if the citizen does not respond to an action of the agency and thereby establishes the general conviction that he/she accepts the action. With this he/she builds up reliance in his inaction/acceptance that he/she lateron may not abuse.

140 though it is not legally required to give legal instructions (except if a federal agency was acting, VwGO § 59) it is a necessity of "real life" because most people will not know how to react, see supra c)
e) general need for legal protection

Though the "general need for legal protection" is not mentioned explicitly in the VwGO there is no doubt about the fact that the plaintiff has to have this need for legal protection.\(^{141}\)

Because an explicit statutory basis is missing there are difficulties to explicitly determine why this general need for legal protection is necessary. Most scholars believe that this necessity is a fundamental requirement to avoid an abuse of the judicial branch.\(^{142}\) The "need for legal protection" is mentioned in VwGO §§ 43, 113 (1), sentence 4 though which means that the plaintiff\(^{143}\) has to state his need for legal protection. Regarding the other lawsuits there is the belief that unless evident facts show the contrary there is a general need for legal protection because "abuse" of the judicial branch "is the exception".\(^{144}\)

Usually there is the common belief that always when the law gives a right/entitlement to a person and this person wants

\(^{141}\) Judgement of October 19th 1982, 1st senate, BVerfGE 61, 126, 135

\(^{142}\) W. Schmitt Glaeser, supra note 49, p. 75

\(^{143}\) in the Verpflichtungsklage and the Fortsetzungs-Feststellungsklage (FFK)

\(^{144}\) Judgement of January 17th 1989, 9th senate, BVerwGE 81, 164, 165
to protect his/her right/entitlement he/she has a generally accepted need for protection.

5) when are these lawsuits successful?

a) correct claimant and the right defendant
After the formal and procedural requirements of the respective lawsuits have been examined and accepted by the judge the question then is whether the claim of the plaintiff is legally justified. This part is concerned with the question if the correct claimant sued the correct defendant, if the claimant really has the claimed subjective right/entitlement and whether this right or entitlement is hurt in an inadmissible manner through an action/inaction of the agency.

(a) The question whether the plaintiff is the correct claimant is probably the most interesting part of the lawsuit. In this part the judge has to examine if the plaintiff really has the claimed subjective right/entitlement.\textsuperscript{145}

\textsuperscript{145} in the admissibility the plaintiff had to assert that there is the plausible possibility that his/her rights have been harmed and though this plausible statement will prove to be true in all probability (because the judge examined earlier if this statement really is plausible) his/her claim to a certain subjective right/entitlement nevertheless has to be examined and proved to be true
The rightful claimant is always the person that really has the stated subjective right/entitlement. Whether the person has the claimed legal right depends on two things: (i) if the claimed right can be a subjective right and (ii) whether this subjective right addresses the claimant. The judge examines the legal requirements and the facts and will find out whether the plaintiff really has the claimed subjective right. Though the other requirements are a little bit different the plaintiff who takes legal action with a Normenkontrollantrag, VwGO § 47, is the right claimant if he/she fulfills the in the VwGO § 42 (2) entitled requirements which means that he/she has to have had a disadvantage because of this regulation or that he/she soon will experience a disadvantage.

As the declaratory judgement of the Feststellungsklage aims at the declaration that a certain legal relationship exists or does not exist this is not a question concerning the fact if a subjective right exists or does not exist. Rather the plaintiff has to have an entitled interest to receive a declaratory judgement.

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146 except in the Feststellungsklage and the Normenkontrollverfahren

147 F. Kopp, supra note 64, p. 353

148 this entitled interest is already examined in the admissibility of the Feststellungsklage
The defendant is the agency with which the legal relationship is claimed to exist or is claimed not to exist.\textsuperscript{149}

(b) As administrative law deals with the relationship between the sovereign power and the citizen, VwGO § 78 (1) rules that the right defendant is the federal or state government or the agency that enacted or rejected the administrative act. If a special council of an administrative agency acted this council is the right claimant if the respective state law rules this, VwGO § 78 (2) No 2.

b) unlawful agency action?

The examination whether the correct claimant sued the administrative agency shows if the plaintiff really has the subjective right/legal entitlement he/she claims to have and claims to be hurt in through the agency action. The second question then is whether the action of the agency is lawful or illegal. The lawsuit of the plaintiff is successful if the action of the agency is illegal and through this his/her subjective rights are harmed, VwGO § 113 (1) sentence 1.

The action of the agency will be divided and examined in two parts: (aa) The first part that will be examined is the formal legitimacy of the administrative agency's action.

\textsuperscript{149} W. Schmitt Glaeser, supra note 49, p. 201
To establish reliance in the administrative agency representing the sovereign power the agencies have to observe certain formal and procedural requirements if they act. This is necessary to establish certain formal requirements applicable to everybody in the same way, corresponding to the rule of law and to control the way the agency found its decision. Formal requirements to be observed enacting an administrative act are e.g.
- that the agency that acted was the local and factual competent agency, VwVfG § 3;
- that the agency obeyed the necessary procedural requirements, VwVfG § 37 (2)-(4);
- that the agency observes the necessity to give reasons for its actions, VwVfG § 39150;
- if a federal agency enacts an administrative act it has to give legal instructions, VwGO § 59;
- that the administrative act is announced to the correct addressee, VwVfG §§ 41,43.

If the agency complies with all the required necessities the action of the administrative agency was enacted in a formal legitimate way and therefore this part of the act is legal.

(bb) The second part of the examination is the part that deals with the question whether the action itself was legal

150 this is legally required at least for the enactment of an administrative act, see: W. Schmitt Glaeser, supra note 49, p. 143; if the agency does not act in a legally relevant way there is not necessarily the duty to give reasons for the action
or illegal. First of all there has to be a law that serves as the "legal foundation" and basis and which allows the agency to enact administrative acts in this topic. An agency can only enact an administrative act legally if there is a law that allows the agency to act in this certain way. This can either be a law that regulates the general possibility for the agency to act concerning a certain topic or it can be a special law which gives the agency the right to act in a certain way on a certain occasion. The enacted act of the agency has to comply with the legal contents of its "legal foundation".

Furthermore general legal requirements have to be obeyed like e.g. the administrative act has to be specific regarding its content and the proportionality between aim, purpose and the used methods has to be weighed in the correct way.

If the agency used discretion it has to use this discretion without abusing its power, VwVfG § 40.

Finally the administrative act has to be compatible with "higher" law such as federal and state laws and regulations. Probably the most important and difficult task is the question whether the agency weighed the different interests

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151 see: F.Kopp, supra note 52, p.506

152 W. Schmitt Glaeser, supra note 49, p. 143
at stake - those of the individual and those of the administrative agency - in the correct manner. But if all these requirements are fulfilled and therefore the administrative act is legitimate not only in the formal but also in the objective part the administrative act is lawful. If the administrative act is lawful the lawsuit is without success. (cc) If the agency made a mistake in either the formal or in the substantive part the administrative act is illegal. As the existence of a subjective right was examined earlier this subjective right has to be injured through the illegality of the administrative act. If the subjective right of the plaintiff is not hurt through the illegal administrative act - the lawsuit is not successful.¹⁵³
c) unlawful agency inaction?
If the plaintiff wants the agency to act in a certain way but the agency rejects to act or does not act within three months the question the judge has to examine is if the

¹⁵³ The court may declare the administrative act illegal but nevertheless the lawsuit is not successful if the subjective rights of the plaintiff are not violated. This is important for the costs because in Germany the party that looses the lawsuit pays everything, the opponent's lawyer and the court's costs. In cases dealing with social welfare and veteran's benefits the plaintiff does not have to pay the costs of the court, VwGO § 187
plaintiff has a legal entitlement to demand this desired action.

The judge therefore has to examine if the statement of the plaintiff (that he/she has a legal entitlement to the desired action) corresponds with the legal reality. If the judge finds that the statement of the plaintiff does not correspond with the legal facts the lawsuit will be dismissed. If the judge finds that it does correspond with the legal reality there are two possibilities how the court’s decision can be depending on the legal requirements/possibilities for the administrative action.

(aa) The examination of the subjective right proved that the plaintiff has a legal entitlement to demand a certain administrative action/act. His/her entitlement respectively his/her subjective right has been hurt by the inaction of the agency but it will be violated furthermore if the court will not order the agency to act. The court will find a decision called Spruchreife if all legal and factual assumptions which have been claimed by the plaintiff are exactly the way he/she claimed them to be. If all these factual and legal requirements to enact the desired administrative act are present and the agency therefore has no discretion the court will order the administrative agency
to enact exactly the desired administrative act, VwGO § 113 (5) sentence 1.154

(bb) If the examination of the presence of a legal entitlement/subjective right of the plaintiff showed that he/she has such an entitlement/right the court will order the agency to act. Though the factual and legal necessities to enact the desired administrative act are present - making "only" a Bescheidungsurteil means that the agency still has discretion, VwGO § 113 (5) sentence 2. With a Bescheidungsurteil the agency will be ordered to enact an administrative act but it still has discretion in choosing the explicit content of the desired administrative act. The court can not substitute its own opinion for that of the agency. The discretion of the agency may concern all kinds of matters but not the legally required necessity to act.155 Important concerning a Bescheidungsurteil is the fact that the agency has to act and has to respect the legal interpretation the court found in its decision.156

154 W. Schmitt Glaeser, supra note 49, p. 177; a decision called Spruchreife will only be made if there are no doubts at all about the factual and legal assumptions because the court of course may not enforce the agency to make a certain decision with which the court would substitute its own decision for that of the agency

155 F. Kopp, supra note 64, p. 984

156 W. Schmitt Glaeser, supra note 49, p. 178; "to respect" does not necessarily mean the same as "to obey" because the agency still can make a discretionary decision within the legal boundaries
As the U.S. legal system is a common law system the degree
or the extent of the judicial review itself may change.\textsuperscript{164}
Congress can either provide the right to obtain judicial
review or it can withdraw an existing right to obtain
judicial review\textsuperscript{165} as long as it does not interfere with the
constitutionally guaranteed rights.\textsuperscript{166}

obtain judicial review if a person suffers a "legal wrong"
except for the regulation in APA § 701 (a) which rules that
persons do have the right to obtain judicial review "except
to the extent that (1) statutes preclude judicial review or
(2) agency action is committed to agency discretion by
law"; good representation: Cynthia Tripi, "Availability of
Judicial Review of Administrative Action", 53 Geo.Wash.Law
Rev. 729, 730, (1987)

\textsuperscript{164} as was demonstrated in Chevron U.S.A., Inc. v. Natural
Resource Defense Council, 467 U.S. 837, 104 S.Ct. 2778,
81 L.Ed. 2d 694, (1984); as well as the law itself may
change: "Ratio est legis anima; mutata legis rations mutatur
et lex", "The reason for the law is its soul; when the
reason for the law changes, the law changes as well", see:
A. Scalia, supra note 160, p. 515

\textsuperscript{165} Art III of the U.S. Constitution; a case where the
Supreme Court upheld a statute of Congress that withdrew
appellate jurisdiction of the Supreme Court even after the
case has been orally argued before the Supreme Court: Ex
parte McCardle, 74 U.S. 506, 19 L.Ed. 264 (1868)

\textsuperscript{166} Winfried Brugger, "Einfuehrung in das Oeffentliche Recht
der U.S.A.", pp. 185-188,(1993); with Goldberg v. Kelly
(397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970)) the
Supreme Court accepted the possibility to protect
entitlements or "privileges" whereas before this decision
there was a clear distinction between "rights" and
"privileges" and the possibility to obtain judicial review
to protect the "due process of law- requirements"; since the
decision in Board of Regents of State Colleges v. Roth
(408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)) the
Supreme Court attached importance to the question of the
individual affection and the interpretation of the meaning
of "life, liberty and property"
APA § 703 rules that if a "special statutory review proceeding relevant to the subject matter" was created by Congress the plaintiff has to bring his/her lawsuit in the court mentioned in the statute. Besides this "statutory review" there also is a "non-statutory review" enlisted in APA § 703. If no explicit court was mentioned in the statute the plaintiff may take "any applicable form of legal action" in a "court of competent jurisdiction".\footnote{167}

If there are no special rules that mention which court is the competent one the general rules for federal courts have to be contacted, like e.g. 28 U.S.C.A. § 1331.\footnote{168}

The statutes of the APA do apply if there is the possibility to obtain judicial review but they do not give jurisdiction to a special court or federal courts.\footnote{169}

b) presumption of reviewability

Before the APA was enacted in 1946 the courts had to find out whether Congress intended to authorize the courts to review the administrative action. Language, structure, purpose and legislative history of the respective statute

\footnote{167}{W. Brugger, supra note 166, p. 204}

\footnote{168}{"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treatise of the U.S.", 28 U.S.C.A. § 1331}

\footnote{169}{Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed. 2d 192, (1977)}
served as means to help the courts in evaluating Congress' intent.\textsuperscript{170}

After the APA was enacted it became easier for courts to find out whether they could review an administrative action or whether they could not. Two sections of the APA evidently favor a "presumption of review". APA § 703 rules that: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to review in civil or criminal proceedings for judicial enforcement". APA § 704 says that "Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review". This statutory "presumption of reviewability" was favored and strengthened by the Court's decision in Abbott Laboratories v. Gardner.\textsuperscript{171} In this decision the Supreme Court - researching the APA's legislative history\textsuperscript{172} - confirmed this "presumption of reviewability": "[The APA's] generous review provisions must be given a hospitable interpretation.... [and] only upon a showing of clear and convincing evidence of a contrary

\textsuperscript{170} see: C. Tripi, supra note 163, 729,731; a good historical overview over the administrative process and the APA: Pierce/Shapiro/Verkuil, supra note 24, pp. 27-33

\textsuperscript{171} 387 U.S. 136, 87 S.Ct 1507, 18 L.Ed.2d 681, (1967)

\textsuperscript{172} see: C.Tripi, supra note 163, 729,731
legislative intent should the courts restrict access to judicial review.\footnote{173}

APA § 701 (a) is an exception to the "presumption of reviewability" and it rules that "[T]his chapter applies, according to the provisions thereof, except to the extent that - (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law".

In its decision in Citizens to Preserve Overton Park, Inc. v. Volpe\footnote{174} the Supreme Court found and decided that the "committed to agency discretion" exception of APA § 701 (a) (2) of the general reviewability is a "very narrow exception"\footnote{175} that applies only "in those instances where statutes are drawn in such broad terms that in a given case there is no law to apply".\footnote{176}

Even though a decision may be "committed to agency discretion" it nevertheless may be reviewable.

In Doe v. Casey\footnote{177} the D.C. Circuit held that "(1) congressional intent to preclude review must be established by clear and convincing evidence; (2) that the existence of

\footnote{173} 387 U.S. 136, 141

\footnote{174} 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)

\footnote{175} 401 U.S. 402, 410

\footnote{176} 401 U.S. 402, 410

\footnote{177} 796 F 2d 1508, 254 U.S. App. D.C. 282 (D.C. Cir. 1986)
statutory standards is evidence of intent not to preclude review; and (3) that the structure of the statutory scheme may support a finding of congressional intent to preclude review only if the scheme is extremely complex or delicately balanced".\textsuperscript{178}

Though of course there have been changes in the law and in the statutory interpretation there still is the "presumption of reviewability".\textsuperscript{179} Cases dealing with reviewability or "unreviewability" do not oppose this "presumption of reviewability" but as there are statutes without a very clear congressional intent\textsuperscript{180} these cases help to develop and to apply a standard on how to "review" without explicit regulations of Congress.

c) presumption of unreviewability

APA § 701 (a) (1) (2) regulates the exceptions to the "presumption of reviewability". Very important are the words "to the extent" of APA § 701 (a).

\textsuperscript{178} C.Tripi, supra note 163, p.740; 796 F 2d 1508, 1514, 1515 - 1516

\textsuperscript{179} see especially P.Strauss, supra note 10, p. 221

\textsuperscript{180} Justice Scalia believes that in the "...vast majority of cases .... Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all", see supra note 160, p. 517
The meaning and the extent of the preclusion by law have been controversial and object of many Supreme Court decisions.\textsuperscript{181} This is a difficult problem and it is very important for the respective addressee. Congress' intent is not always expressed very clear in the statutes. Main problem for the courts therefore is to find out whether and to what extent Congress intended to preclude judicial review\textsuperscript{182} and to find the amount of discretionary power the agency was authorized to use by Congress without being judicial reviewable.\textsuperscript{183}

Figuring out to what extent Congress intended to preclude judicial review the Supreme Court followed congressional intention but nevertheless often upheld its authority to review constitutional questions.\textsuperscript{184}

\textsuperscript{181} a thorough analysis and discussion of "unreviewability": Ronald M. Levin, "Understanding Unreviewability in Administrative Law", in: 74 Minnesota Law Review 689, (1990)

\textsuperscript{182} APA § 701 (a) (1)

\textsuperscript{183} APA § 701 (a) (2)

\textsuperscript{184} "To avoid a constitutional confrontation, the Court assumes that Congress did not intend a preclusion of review provision to deny the Court the power of constitutional review", Paul R. Verkuil, "Congressional Limitation on Judicial Review of Rules", 57 Tulane L.Rev. 733, 737, (1983); see also the distinction between "constitutional review" and "statutory review" explained and presented by Paul Verkuil, id. ad 746-750
Even though in some cases Congress explicitly excluded judicial review entirely it is quite easy to understand that courts nonetheless still can review constitutional issues. It can be very difficult though if Congress limits judicial review because the borders or the amount of this limitation may not be very clear. If Congress did not clearly state whether there should be limits of judicial review and which limits there should be the courts mostly assume that Congress did intend to provide the possibility to obtain judicial review for the addressee.\textsuperscript{185} Problematic for the courts though can be the question whether the action of the agency was within the limits of its congressionally delegated discretion and whether this discretion is reviewable or whether it is not. The decision in Citizens to Preserve Overton Park v. Volpe\textsuperscript{186} stated that the "committed to agency discretion" exception of reviewability of agency action enacted in APA § 701 (a) (2) is a "very narrow exception" that precludes review "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply".\textsuperscript{187}

\textsuperscript{185} see: Pierce/Shapiro/Verkuil, supra note 24, p. 124

\textsuperscript{186} 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971)

\textsuperscript{187} 401 U.S. 402, 410
The decision was the "starting point"\textsuperscript{188} of the Supreme Court analyzing the reviewability of discretionary actions and because it was a very narrow interpretation of APA § 701 (a) (2) - but nevertheless contained a confirmation of the "presumption of reviewability" - this decision therefore can be seen as to grant courts the possibility to review "almost any agency action".\textsuperscript{189} A more recent decision of the Supreme Court with weighty influence on the "unreviewability" was Heckler v. Chaney.\textsuperscript{190} This case concerned the refusal of the Food and Drug Administration (FDA) to take a certain demanded action.\textsuperscript{191} The Supreme Court refused to order the FDA to perform the demanded action. In its decision the Court found that an agency's refusal to take action under its substantive statute was presumptively unreviewable\textsuperscript{192} and with that the Supreme Court broadened the meaning of APA § 701 (a) (2). In the Heckler v. Chaney decision the Supreme Court did not intend to remove the "no law to apply" - doctrine

\textsuperscript{188} Pierce/Shapiro/Verkuil, supra note 24, p.125

\textsuperscript{189} Pierce/Shapiro/Verkuil, supra note 24., p. 125

\textsuperscript{190} 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed. 2d 714 (1985)

\textsuperscript{191} as the definition of "agency action" includes the "failure to act", APA § 551 (13), courts generally may review inaction of agencies

\textsuperscript{192} 470 U.S. 821,831
established in the Overton Park - decision but more than that stated that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion". 193
So whenever the substantive statute at issue reveals a congressional intent to preclude review, whenever there is "no law to apply" or whenever the agency used its discretionary power there is no judicial review available.

d) committed to agency discretion?
A problem closely related to the reviewability or "unreviewability" of agency action is the question whether an action was "committed to agency discretion" 194 and whether - or: to what extent - a court can control decisions where an agency used discretionary power.
There of course are discretionary actions which are not reviewable at all because they have no legal impact. If there is no legal impact in most cases there is no necessity for the citizen to take any legal action. If the use of the discretionary power has a legal impact it is necessary to know if there are legal actions which can be used to control the discretionary action.

193 470 U.S. 821, 830

194 APA § 701 (a)(2)
If an agency used its congressionally delegated authority to make a discretionary decision the court can not substitute its opinion for the one of the agency. Quite often the amount of discretion Congress wanted to delegate to the agency is not stated explicitly and as there are no rules which regulate how to use the discretion - there may arise problems about how to control which actions.

Source of discretion used by an agency can be either the Constitution or a statute.\textsuperscript{195} Discretion provided by the Constitution is especially used by the executive.\textsuperscript{196} Usually the source of discretion\textsuperscript{197} used by administrative agencies are statutes enacted by Congress to delegate power to the agencies.

If Congress delegated discretionary power it can either give explicit standards on how to use this discretion or it can


\textsuperscript{196} though the administrative agencies are part of the executive the addressee of this kind of discretionary power more likely is the President than an administrative agency

\textsuperscript{197} some people divide discretion into different categories in which discretion can be used; see: Charles Koch, "Judicial Review of Administrative Discretion", 54 Geo. Wash. L.Rev.469, 470 ,(1986); surely discretion can be categorized but the question is whether this really is necessary and whether this is useful because discretion is treated as discretion by courts and not as discretion #1 or discretion #3
delegate this power without standards. If there is no explicit standard given by Congress a court may have difficulties finding out exactly to what extent Congress wanted to delegate discretionary power to the agency. Courts generally permit agencies a lot of discretion concerning the interpretation of statutes, to choose procedures and in all aspects of decision making and fact finding. Courts usually defer to the agencies decision if they are "convinced" that the respective topic has been "committed to agency discretion". Though courts defer to agency discretion they of course always can examine whether the agency exceeded its rights and they can overcome the "presumption of reviewability" by proving that there is "law to apply". This guideline established with the Overton Park decision is very helpful for the courts because if there is "law to apply" the court can find out whether the agency interpreted the statute in the correct way. The Overton Park - decision of the Supreme Court was very important for

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198 see Pierce/Shapiro/Verkuil, supra note 24. p.40

199 Pierce/Shapiro/Verkuil, supra note 24, p.116

200 P. Strauss, supra note 10, p.221; in cases of "high uncertainty, courts are likely to read congressional limitations into the statute", Martin Shapiro, "Administrative Discretion: The Next Stage", 92 Yale L.J. 1487, 1508, (1983)

201 see supra, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402
the development of the reviewability of administrative action.\textsuperscript{202} This decision strengthened the "presumption of reviewability" by finding out when a decision of the agency is within its delegated discretionary power and therefore can be reviewed by the courts. The decision in Heckler v. Chaney\textsuperscript{203} stated that an administrative agency's decision not to take action should be considered presumptively immune from judicial review. But even though discretionary actions of the agencies are presumptively unreviewable there are mistakes the agency can make finding its decision that are reviewable by a court.\textsuperscript{204}

As to procedural rules stated in the APA the Supreme Court's decision in Vermont Yankee\textsuperscript{205} made clear that the APA enacts a certain amount/number of procedural rules which is the maximum of procedural rules reviewable by the courts. If an agency wants to grant more and additional procedural rules it is free to do so. A court can not force an agency to grant more procedural rights or rules than those granted by

\textsuperscript{202} P.Strauss calls this decision the "Baedeker of judicial review", supra note 10, p. 261

\textsuperscript{203} 470 U.S. 821; this decision was very important as it invented a "new standard" of judicial review, see later pp. 89 - 91

\textsuperscript{204} see: M.Shapiro, supra note 200, p.1490

the APA though because courts are not "free to impose them". Evidently a court can review the agency decision if the agency made a decision "in excess of statutory ... authority" or "short of statutory rights".206

2) judicial review of which actions?

a) statutory review
After the question whether the action of the administrative agency is reviewable or whether it is unreviewable is solved the second question then is whether the possibility to obtain judicial review is (a) written down in the respective statute or (b) whether the agency’s action was made reviewable by the general provisions of the APA.207 The possibility mentioned under (a) is called "statutory review" and "occurs pursuant to a statute designating a particular court or courts to exercise review authority over described decisions of a particular agency".208 The second possibility mentioned above under (b) is called "non-statutory review" and "is available whenever the party seeking review can

206 APA § 706 (2)(c)

207 APA § 701 (a): judicial review is provided except "to the extent that (1) statutes preclude review; or (2) the agency action is committed to agency discretion by law"

208 P.Strauss, supra note 10, p.212
frame a complaint that meets the general requirements for
invoking the jurisdiction of the courts.\(^{209}\)

Usually the organic act that creates an agency provides that
the actions of the agency based on an evidential record are
reviewable by a court, mostly by a court of appeals.\(^{210}\)

If there is a statute providing judicial review in most
cases this respective statute will govern the time, venue
and form of review.\(^{211}\) The statute which served as an example
and was copied many times was the Federal Trade Commissions
Act.\(^{212}\)

APA § 702 rules that the United States shall be "an
indispensable party" except for suits for money damages.

The Abbott Laboratories v. Gardner\(^{213}\) decision showed that if
there should be doubts whether Congress intended to provide
the possibility to obtain judicial review the courts presume

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\(^{209}\) P. Strauss, supra note 10, p. 212

\(^{210}\) K. C. Davis, supra note 21, vol. 4, p. 131;
sometimes district courts are the right courts to obtain
statutory review, Davis, id. ad p. 133; to keep in
mind though is the fact that appellate jurisdiction of
federal appellate courts always and only is statutory
review, P. Strauss, supra note 10, p. 212

\(^{211}\) P. Strauss, supra note 10, p. 212

\(^{212}\) enacted 1914; 15 U.S.C. § 45 (c): "Any person,
partnership or corporation required by an order of the
commission ..... may obtain a review of such order in the
court of appeals of the United States...."

\(^{213}\) 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed. 2d 681, (1967)
that congressional intent was in favor of providing judicial review.\textsuperscript{214}

b) non-statutory review

As mentioned above there either can be a statutory guarantee of the possibility to obtain judicial review or the general rules of the APA (with the "presumption of reviewability") provide the possibility to obtain judicial review. APA § 703 rules that "[I]n the absence or inadequacy" of statutory review provisions "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus" can be taken "in a court of competent jurisdiction". Therefore there is the possibility to obtain judicial review even if this is not explicitly mentioned in the respective statute as long as the statute does not preclude review or the action was "committed to agency discretion by law".\textsuperscript{215}

\textsuperscript{214} 387 U.S. 136,141; of course this can help to distinct between "statutory" and "non-statutory" review but usually this should not be a question of whether there is "statutory review" or "non-statutory review" but instead of that it is useful and helpful to find out whether there is the possibility to obtain judicial review at all or whether this possibility does not exist

\textsuperscript{215} APA § 701 (a)(2)
c) administrative action - inaction

Some scholars/lawyers are convinced that there is the general reluctance to review administrative inaction but as the definition of "agency action" includes the failure to act courts sometimes may review agency inactions. The review of agency inaction therefore is possible even though it is not possible to the same extent as the review of action is. As with every lawsuit against an action a lawsuit against an inaction has to fulfill certain requirements. These requirements are (a) that the plaintiff has to have suffered a "legal wrong" through the inaction,

216 see: Paul Lehner, "Judicial Review of Administrative Inaction", 83 Col.L.Rev. 627 (1983); the reasons Lehner gives though are more than questionable: separation of powers, lack of constitutional authority to intervene or the fact that nonimplementation suits are not like common law suits, id. ad 631-633; especially dubious are his reasons in favor of a judicial review of agency inaction: "The general inability of the other branches to control agency action ... is particularly evident in the nonimplementation context", id.ad 638/639; this should not be a question about which branch has the most influence or power to control agency action; but besides this Congress or the executive could control agency inaction very easy through enacting certain rules limiting and directing the discretionary choice of the agency

217 APA § 551 (13)

218 as used in this thesis "inaction" means the refusal of an administrative agency to act in a certain way demanded or requested by a citizen

219 this is necessary as "Discretionary power not to enforce is the power to discriminate" K.C. Davis, Supra note 21, Vol.2, p. 218
(b) the agency action may not be totally "committed to agency discretion by law" and (c) the inaction must be a "final" agency action.220

One of the problems for the courts often is to find out whether the refusal to act is a "final" agency decision or whether the agency is still thinking about the request.221

Generally courts are allowed to control whether the agency's failure to take the requested action was arbitrary and capricious222 after the courts found whether the agency's decision was within the statutory boundaries.

An important decision concerning the reviewability of non-enforcement of an action was Dunlop v. Bachowski.223 The problem in this case was whether the rule of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 482 (b), which held that the Secretary of Labor "shall" investigate complaints and "shall ... bring a civil action"


221 see: R.Murphy, supra note 220, pp. 88,89

222 "Calculation of the arbitrary and capricious standard along a sliding scale of deference is appropriate only where the agency has some discretion", Lehner, supra note 216, p.665; a question is whether Lehner wants the "arbitrary and capricious standard" to be on a sliding scale, too, (diminishing or broadening the extent of the standard) which would be arbitrary and capricious itself

223 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed. 2d 377 (1975)
was judicial reviewable. The Supreme Court held that the Secretary's decision not to take action was reviewable for arbitrariness. The Court reasoned that the Secretary had failed to provide "clear and convincing evidence that Congress meant to prohibit all judicial review of his decision". The Secretary therefore "must provide the court and the complaining witnesses with copies of a statement of reasons supporting his determination".

Though the Secretary has discretion whether he wants to act or not the reasons for this decision he has to provide nevertheless make it possible to control whether he acted arbitrary.

d) discretionary actions

As mentioned above it can be very difficult for the courts to find out whether Congress intended to delegate discretionary power to the agencies. Until the decision in Heckler v. Chaney there has been the general "presumption of unreviewability" of discretionary

\[224\] 421 U.S. 567

\[225\] 421 U.S. 571, APA § 555 (e) rules that "[E]xcept in affirming a prior denial or when the denial is selfexplanatory, the notice shall be accompanied by a brief statement of the grounds for denial"

\[226\] see: PART III, A) c) /d)

\[227\] 470 U.S. 821
agency actions. First step to establish a standard to review discretionary actions of agencies was the Supreme Court's decision in Citizens to Preserve Overton Park v. Volpe. In this decision the Supreme Court stated that judicial review is precluded only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply". More than just to control whether the agency acted "arbitrary and capricious" or with "an abuse of discretion" with this decision the courts were given a standard to examine whether the reasons that led to the discretionary decision were within the statutory's boundaries. After the Overton Park decision the Heckler v. Chaney decision defined the established standard to review discretionary agency actions even more explicitly. The question in this case was whether an agencies discretionary decision not to take action was judicial reviewable. The Supreme Court found that a decision not to take action is presumptively committed to agency discretion. The Court reasoned that because the agency had to balance several factors which were within the area in which the agency had special expertise this decision therefore was a discretionary decision. Heckler v. Chaney established a "two

228 401 U.S. 402

229 401 U.S. 402,410

230 APA § 706 (2)(A)
step" standard: (a) the first question is whether there are certain "manageable standards"\textsuperscript{231} by which the agency's action may be judged. The answer to this question can be found within the respective statute's language.\textsuperscript{232} Very important concerning this first question is to keep in mind that even when an agency action may be presumed immune from judicial review this is only a presumption which can be rebutted if the respective statute provided certain guidelines for the agency.\textsuperscript{233} Consulting these "guidelines" the court can review the discretionary action and control whether the discretion was abused or used in an arbitrary and capricious way.

(b) The second step tries to distinguish the question of "reviewability" from balancing "pragmatic considerations".\textsuperscript{234} The Justices found that this was a question of the scope of review and therefore was inappropriate to determinations of reviewability. With this "Chevron - standard of review" the courts were given concrete measures how to review discretionary actions of an agency.

\textsuperscript{231} 105 S.Ct. 1655

\textsuperscript{232} R. Levin, supra note 181, 689,713,714

\textsuperscript{233} what leads to the question whether there is "law to apply"

e) rulemaking and adjudication

(aa) Agencies generally act through adjudication or through rulemaking.235 If an agency enacts rules it does so to develop policy standards and rules for future applications. To serve this purpose rules are abstract and affect not only one individual but as they establish general and abstract standards they affect many people.236 As rules have a great power and influence many people rulemaking often is called "quasi - legislative".237 As rules may have an enormous influence the organic act of the respective agency has to say whether the agency may enact rules or whether it may not.238 Some agencies may be allowed to use the power of rulemaking quite often whereas other agencies may not be allowed to use this "instrument" at all. The APA provides three different kinds of rules: (i) formal rules, (ii) informal rules, and (iii) interpretative rules. These three kinds of rules differ in their specific procedural requirements and in the aim they are used to or will be used to achieve. These procedural requirements are the main


236 Pierce/Shapiro/Verkuil, supra note 24, p. 292

237 Pierce/Shapiro/Verkuil, supra note 24, p. 184

238 Pierce/Shapiro/Verkuil, supra note 24, p.293
guidelines for the judicial review as the contents of these rules very often may be within the discretionary power of the agencies. Usually the agencies are free to choose in which of those ways they want to act unless the organic act of the respective agency orders the agency to act in a certain way. The definition of a rule is enacted in APA § 553.

(1) In general the APA rules that the informal procedures apply to all substantive rules unless a rule is "required by statute to be made on the record after opportunity for an agency hearing", 5 U.S.C. § 553 (c). As the name already suggests formal rulemaking involves broad and complicated guidelines of agency policy.\footnote{239} There are three procedural requirements that are necessary for a formal rule: (i) APA § 553 (b) rules that there has to be a notice\footnote{240} "published in the Federal Register"; (ii) APA § 556 says that an agency must hold an evidentiary hearing to give the participating parties the possibility to present oral and documentary evidence and to crossexamine witnesses; (iii) APA §§ 556 (e), 557 order that at the end of the hearings the agency must base its conclusions and findings just on the evident record produced during the course of the proceeding.

\footnote{239}{W. Andreen, supra note 235, 322,324}

\footnote{240}{this notice has to contain time, nature and place of the proceeding as well as the legal authority}
The most difficult task for reviewing courts is the question whether Congress wanted the agency to make a formal or an informal rule. Usually the statute must not only order a hearing but must also contain the phrase "on the record" or some "equivalent verbalization"\textsuperscript{241} that clearly states the congressional intent to require a formal rulemaking. Because congressional intent is not always very clear the Supreme Court established a questioning procedure to find out what kind of agency action was "at stake"\textsuperscript{242}: the examination begins at the lowest level with the question whether the agency's action was rulemaking or adjudication. If it is rulemaking, the next question is whether the organic statute of the respective agency mentions the "magic words"\textsuperscript{243} "on the record" or an equivalent. If it does it has to be a formal rule and if it does not the requirements for an informal rule have to be fulfilled.

(2) Though the name might indicate differently - informal rules are substantive law, binding on courts, agencies and of course private parties.\textsuperscript{244}

\textsuperscript{241} Pierce/Shapiro/Verkuil, supra note 24, p.294

\textsuperscript{242} United States v. Florida East Coast Railway Co., 410 U.S. 224, 241, 93 S.Ct. 810, 35 L.Ed. 2d 223, (1973)

\textsuperscript{243} Pierce/Shapiro/Verkuil, supra note 24, p. 294

\textsuperscript{244} United States v. Nixon, 418 U.S. 683, 695, 94 S.Ct. 3090, 41 L.Ed. 2d 1039 (1974)
Enacting an informal rule the agency is required to fulfill three procedural necessities: (i) the agency has to publish a notice of the proposed rulemaking in the Federal Register, APA § 553 (b); (ii) after publishing their intention of rulemaking the agency has to give interested persons an opportunity to participate in the rulemaking through submission of written data, views or arguments, APA § 553 (c) (the agency may give the opportunity for an oral hearing but it is not required to do so); (iii) the agency then has to publish both the final rule and a "concise and general statement" of the rule's basis and purpose, APA § 553 (c). The agency - though it is not required - may provide more procedural participation possibilities for interested persons, such as two rounds of notice or additional oral hearings.\(^{245}\) As the Supreme Court stated very clear though in Vermont Yankee\(^ {246}\) courts may not impose procedures other than those required by the APA. Very important for judicial review are the statements of the agencies accompanying the final rule about the basis and purpose of the final rule because this is the principal basis for judicial review of the substance of the rule.

(3) The third possibility for an agency to enact a rule is the interpretative rule which is defined as to "interpret or

\(^{245}\) P. Strauss, supra note 10, p.156

\(^{246}\) 453 U.S. 1030 (1973)
clarify the nature of the duties previously created by passage of a statute or promulgation of a legislative rule".\textsuperscript{247} Quite often the agency has the choice whether it enacts an interpretative rule or a legislative (informal) rule. The decision in favor of one of the rules often is important only concerning the procedural requirements that have to be obtained. Usually no procedures have to be fulfilled if an agency enacts an interpretative rule unless a specific statute or the organic act of the respective agency requires certain procedures.\textsuperscript{248} Although the nature of an interpretative rule implies that the rule states an opinion or the usual procedural requirements of the respective agency they nevertheless may have great impact on people dealing with the agency. This impact will even be manifested and strengthened if the agency publishes the interpretative rule because with this publication the rule achieves a "formal status that may entitle it to deference".\textsuperscript{249} There have been two important decisions dealing and clarifying the nature and status of interpretative rules. The first case, Joseph v. United

\footnotesize{247} Pierce/Shapiro/Verkuil, supra note 24, p. 285

\footnotesize{248} P.Strauss, supra note 10, p. 157

\footnotesize{249} P.Strauss, supra note 10, p.158
States Civil Service Commission\textsuperscript{250}, dealt with a rule of which the Commission thought it would be an interpretative rule and therefore not reviewable. The D.C. Circuit argued that (i) the statutory provision authorized the Commission to act by legislative rule and (ii) that more than that the Commission intended the rule to have the full force of law which an interpretative rule can not establish. Because of this the Commission was required to follow the APA rulemaking procedures and as it did not the rule was invalid. General Motors Corp. v. Ruckelshaus\textsuperscript{251} dealt with a rule enacted by the Environmental Protection Agency (E.P.A.) which the agency itself thought to be an interpretative rule. Nevertheless the E.P.A. tried to order G.M. to act in a certain way so that G.M. argued that if it had to follow the agency's order based on this rule the rule then would be a legislative rule and because the procedural necessities required for a legislative rule have not been obeyed when the rule was enacted this rule would be invalid. The D.C. Circuit found that the rule was an interpretative rule and therefore the rule could not have the force of law the agency wanted it to have. Besides the interpretative rule

\textsuperscript{250} 554 F. 2d 1140, 180 U.S. App. D.C. 281 (D.C.Cir. 1977)

\textsuperscript{251} 724 F.2d 979, 253 U.S. App. D.C. 95, (D.C. Cir. 1983)
there is another exempt from the APA rulemaking requirements, the general statements of policy.\textsuperscript{252}

(bb) The distinction between rulemaking and adjudication sometimes can be quite difficult.\textsuperscript{253} Usually there are certain procedural requirements that can be of help to make this distinction. Furthermore only a small number of persons should be affected by adjudications and many people by rulemaking. Nevertheless the agency itself may act with one type of these possibilities although it wants to have the benefits of one of the other possibilities with which it could have acted. This was demonstrated in two Supreme Court cases. In Londoner v. City & Council of Denver\textsuperscript{254} the agency enacted a quasi-legislative rule which affected only a few people. Because it affected only few people the agency gave notice and an opportunity to comment only in a written form, a request for an oral hearing was denied by the agency.\textsuperscript{255}

\textsuperscript{252} to the distinction between rules and general statements of policy: Pacific Gas & Electronic Co. v. Federal Power Commission, 506 F.2d 33, 164 U.S. App.D.C. 371 (D.C.Cir 1974); see also: Pierce/Shapiro/Verkuil, supra note 24, pp. 287 - 289

\textsuperscript{253} for a general and helpful distinction: K.C.Davis, supra note 21, vol.2, pp. 307 - 311

\textsuperscript{254} 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103 (1908)

\textsuperscript{255} 210 U.S. 373, 385 - 386
The Supreme Court held that this refusal violated the due process of law - clause because not quasi - legislative but adjudicative procedures were required to give the affected people the opportunity of an oral presentation.\textsuperscript{255}

The other case was Bi - Metallic Investment Co. v. State Board of Equalization\textsuperscript{257} which concerned a case where the city of Denver increased the value of all taxable property in Denver by 40 %. Here again the agency did not offer the possibility to obtain an oral hearing. The Court held that this case did not require an oral hearing as the Londoner v. Denver decision did because in Londoner only a small number of people were affected whereas the Bi - Metallic case affected a general number of persons in the same way. The Court argued that this was a policy oriented rule that had a "legislative" character and therefore no oral presentation was required.

To distinguish between rulemaking and adjudication though not only an examination of the procedural requirements that have been used by the agency are helpful and necessary but also the number of people affected as well as the purpose of the "action" are important, especially whether "new norms of

\textsuperscript{255} W.Andreen, supra note 235, 322,323;
Pierce/Shapiro/Verkuil, supra note 24, pp.229 - 236

\textsuperscript{257} 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915)
conduct shall be established. And even though an agency may make law through adjudication where the agency usually would have time to formulate new standards through enacting laws "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.".

(cc) Adjudication is defined as the "agency process for the formulation of" any "final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing", APA § 551 (6,7). Adjudications are used to decide and solve cases where only few individuals are concerned. There are two types of adjudication, the formal and the informal adjudication. Usually the agency is free to decide whether it will act through formal or informal adjudication unless there is a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing". So only when Congress directed the agency to act

258 P.Strauss, supra note 10, p.179

259 see: K.C.Davis, supra note 21, vol.2, pp.118,110; Davis argues that "Since courts may make rules by adjudication, agencies may", id.ad p.119


261 APA § 554 (a)
through formal adjudication the agency is required to do so.262

(1) If an agency acts through formal adjudication the persons affected must be given notice of a hearing. The notice of the hearing has to include "time, place and nature of the hearings"263, the "legal authority and jurisdiction under which the hearing is to be held"264 as well as "the matters of fact and law asserted".265 An employee or an Administrative Law Judge266 presides over the formal adjudication, APA § 556 (b).

After the hearing an initial decision will be issued which contains "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law or discretion presented on the record", APA § 557 (c).

Either this initial decision becomes the final decision or an appeal is taken to the agency where the agency may

262 see: Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1985); either there is explicit congressional indication in the statute or the legislative history has to be questioned, see: Pierce/Shapiro/Verkuil, supra note 24, p.277

263 APA § 554 (b)(1)

264 APA § 554 (b)(2)

265 APA § 554 (b)(3)

266 who is an employee of the agency but nevertheless is quite independent; very informative: Pierce/Shapiro/Verkuil, supra note 24, pp.441 - 445
undertake a de novo review of the Administrative Law Judge's initial decision.

(2) All agency decisions that are not rulemaking nor formal adjudication are informal adjudication. As the APA provides only the rulemaking and the formal adjudication with a procedural framework there is no procedural framework for the informal adjudication. As nevertheless most of the agency actions are made through informal adjudications there have to be certain guidelines for courts to control the agency action. Procedural safeguards have to be provided through the due process clause but only to the extent that life, liberty or property are affected. The question that is important though is especially what procedural safeguards are needed and have to be guaranteed in the respective case. A guideline to figure this out was established with the Matthews v. Eldridge decision of the Supreme Court.

Because there can not be a general standard for all informal adjudications (as the advantage of the informal adjudications is that they deal with individual cases) this guideline only figures out the procedural requirements ordered by the due process clause for each respective and individual case. The first question concerns the importance of the private interests at stake, the second question

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267 see: Pierce/Shapiro/Verkuil, supra note 24, p. 317

268 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976)
concerns the risk of an erroneous deprivation of the private interests through the used procedures and the last question is about the governmental or agency's interests. Through this inquiry several and different procedural requirements can be ordered for the respective formal adjudication. In P.B.G.C. v. L.T.C. Corp. the Supreme Court found that APA § 706 (2)(A) implicitly imposes on agencies a procedural requirement to provide an explanation for an action taken through the use of informal adjudication. These explanations of course can be reviewed on whether they are "arbitrary, capricious" or "an abuse of discretion", APA § 706 (2)(A).

(dd) The reviewing court shall review and decide all relevant questions of law, APA § 706. APA § 706 (2)(A) requires a court to decide whether the agency's decision was arbitrary and capricious. APA § 706 (2)(F) rules that a court shall review the agency's factfinding when new issues are raised or when the procedures of factfinding for an adjudicatory action are inadequate. The procedures the agency is obliged to obey are reviewable by the court as well as any inconsistency with statutory guidelines and whether the agency gave sufficient supply of reasoned analysis.

269 496 U.S. 633, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990)

3) scope of review

a) "findings of fact" and "conclusions of law"

APA § 706 regulates the extent of judicial review of administrative actions, the scope of review. It rules that the "reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action". As was mentioned before many decisions of the administrative agencies are unreviewable or reviewable only to a limited extent if the agencies use their discretionary power. Statutes authorizing agencies to act in a certain way often delegate broad power so that the agencies do have discretion in enforcing the statutory aim. Because of this courts often have to defer to agency's decisions and "ensure that agencies act only in ways that are consistent with the legislative policy decisions reflected in statutes that delegate power to agencies". The power of the judicial branch therefore is limited. In general there are three types of judicial review of facts, there is (i) de novo review, (ii) review with the substantial evidence test and (iii) there is the question

2856, 77 L.Ed.2d 443 (1983)

271 see supra PART III 1) c) p. 78; and PART III 1) d) p. 82

272 Pierce/Shapiro/Verkuil, supra note 24, p.331
whether the agency acted arbitrary and capricious or abused its discretion.\textsuperscript{273} The question which type of review has to be applied refers to the respective statute authorizing the agency to act and refers only to the extent of the judicial review. The review of the facts itself is made possible through APA § 557 (c) for formal rulemaking and formal adjudication as the complete statements of all findings and conclusions have to be stated on the record and therefore are reviewable. As this is not necessary in informal rulemaking courts only can review the general statement of the basis and the purpose of the rule stated in the agency’s record. Cases dealing with informal adjudication are more difficult as the authorizing statutes do not require the agencies to state findings and conclusions at all. As informal adjudications nevertheless may have severe impacts on individuals the Supreme Court found in its decision in Citizens to Preserve Overton Park v. Volpe\textsuperscript{274} that a reviewing court - to be able to review the agency’s action - must have "some basis"\textsuperscript{275} of the agency’s findings to engage in substantive review. In a later decision\textsuperscript{276} the Supreme

\textsuperscript{273} P.Strauss, supra note 10, p. 245

\textsuperscript{274} 401 U.S. 402 (1971)

\textsuperscript{275} Pierce/Shapiro/Verkuil, supra note 24, p. 335

Court strengthened its Overton Park decision. The Court found that a reviewing court had the right to demand a "brief explanation" if an agency acted through informal rulemaking. This decision was based on APA § 706 (2)(A) which the Supreme Court read as to order the agency to state an explanation for its action to make it possible for the reviewing court to find out whether the agency acted arbitrary and capricious. Not only concerning findings of facts but also concerning conclusions of law the courts very often defer to an agency’s construction of the statutes. Courts defer to the respective agency’s experience concerning the statutes they are dealing with because they very often find the agency’s interpretation of the statute’s corresponding with the legislative history and because they accept that the agencies do have greater expertise.

In N.L.R.B. v. Hearst Publ.Inc. the Supreme Court stated that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the

277 Pierce/Shapiro/Verkuil, supra note 24, p.336

278 P.Strauss, supra note 10, p. 250

279 see R. Nagareda, supra note 37, 591, 593

280 332 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944)
reviewing court's function is limited". The interpretation of a statute made by the agency should be accepted as long as it has "warrant in the record and a reasonable basis in law". The Supreme Court's decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council established a "new standard of review" which made it difficult for courts to overturn policy choices of agencies which were made upon legal interpretations of statutes administered by the respective agency.

First question of this "Chevron - test" is whether Congress has spoken to the issue at all. If it did (but not explicitly) the second question for the court is whether the agency's decision was based on a permissible construction of the statute. The Supreme Courts decision in Chevron combined with the Vermont Yankee decision "severely restricted the authority of federal courts to prescribe rules for agencies, to review agency legal analyses, to ensure consistency in agency interpretations, and, to some

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281 id.ad 131

282 id.ad 131

283 467 U.S. 837, 104 S Ct. 2778, 81 L.Ed.2d 694 (1984)

extent, to overturn agency policy choices". \(^{285}\) Though the decision makes it more difficult for a court to review an agency’s conclusions of law it still is not impossible. The respective statute may be narrow and order a strict judicial control or the statute may be broad and authorize broad discretionary power. Either way the statute shows legislators’ intent and the arbitrary and capricious test remains for further inquiries.

b) substantial evidence

APA § 706 (2)(E) rules that the "reviewing court shall- (2) held unlawful and set aside agency action ... found to be (E) unsupported by substantial evidence ....". As the APA does not define or explain what "substantial evidence" is - the Supreme Court evaluated and invented a standard in several decisions. In Consolidated Edison Co. v. N.L.R.B.\(^{286}\) the Court stated that "Substantial evidence .... means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".\(^{287}\) Another decision that helped to define the substantial evidence was Universal

\(^{285}\) K.Starr, supra note 284, p. 306

\(^{286}\) 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed.126 (1938)

\(^{287}\) id.ad 229
Camera Corp. v. N.L.R.B.. This decision stated that the evidence must be "sufficient to support the conclusion of a reasonable person after considering the evidentiary record as a whole, not just the evidence that is consistent with the agency's finding". Concerning the informal rulemaking and the informal adjudication procedures the APA does not rule that the findings of fact have to be reviewed under the substantial evidence test. Instead of the APA the respective organic act of the agency sometimes does and the notice, comments and statements of the agency's basis of the informal rule serve the courts to use the substantial evidence test.

c) de novo review

When "fundamental rights" or constitutional rights are at issue the court may expand its scope of review and grant de novo review. De novo review means that a new tribunal will

288 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951)

289 Pierce/Shapiro/Verkuil, supra note 24, p.337; in a case that might be seen as an "extreme" one the Court held that an agency can base its finding on a "reasonable prudent person"(Pierce/Shapiro/Verkuil, supra note 24, p.339) even if this hearsay evidence should be contradicted by a non-hearsay evidence, Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971)

290 Pierce/Shapiro/Verkuil, supra note 24, p. 339

291 a thorough article about de novo review: Judah A. Shechter, "De Novo Judicial Review of Administrative
examine the arguments and the evidence\textsuperscript{292} of the respective case anew. This so-called Ben Avon doctrine\textsuperscript{293} that ruled that a full judicial review is necessary if constitutional facts are at issue was established in Ohio Valley Water Co. v. Ben Avon Brough.\textsuperscript{294} An earlier case\textsuperscript{295} which is "clearly still law"\textsuperscript{296} ruled that a person has a right to de novo review when an agency action takes away "all that makes live worth living".\textsuperscript{297} De novo review therefore is necessary where constitutional fact review is at stake.\textsuperscript{298} The balancing test of the de novo review of constitutional facts most likely is


\textsuperscript{293} K.C.Davis, supra note 39, p.69

\textsuperscript{294} 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908 (1920); this Ben Avon doctrine "may not only be dead but forgotten" K.Davis, supra note 39, p.69

\textsuperscript{295} Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938 (1922)

\textsuperscript{296} K.C.Davis, supra note 39, p.69

\textsuperscript{297} 259 U.S. 276, 284

\textsuperscript{298} see: J.Shechter, supra note 291, 1483,1486
the one established in the Matthews v. Eldridge\textsuperscript{299} decision of the Supreme Court.

d) the "arbitrary and capricious" test
As the informal rulemaking and informal adjudication are not subjected to the substantial evidence test but nevertheless there has to be some form of review - the APA makes it possible for courts to review the agency's findings of facts under the arbitrary and capricious test.\textsuperscript{300} The arbitrary and capricious test therefore is the only standard of review that applies to certain agency actions.\textsuperscript{301} The extent as well as the precise meaning of the arbitrary and capricious test have undergone several changes. In Louisiana Pacific States Box & Basket Co. v. White\textsuperscript{302} the Supreme Court established a "loose rational relation" test. This loose rational relation test primarily was used in cases where no fundamental rights have been involved. In its Overton Park\textsuperscript{303} decision the Supreme Court turned away from this loose rational relation test and articulated that the arbitrary and capricious test

\textsuperscript{299} 424 U.S. 319 (1976)

\textsuperscript{300} APA § 706 (2)(A)

\textsuperscript{301} P.Strauss, supra note 10, p. 248

\textsuperscript{302} 296 U.S. 176, 56 S.Ct. 159, 82 L.Ed. 138 (1935)

\textsuperscript{303} 401 U.S. 402 (1971)
should be "searching and careful". The explicit extent of the judicial review of the arbitrary and capricious test is not quite clear though.\textsuperscript{304} Whereas some believe that there is an eminent difference between the substantial evidence test and the arbitrary and capricious test the D.C. Circuit stated that "there is no substantive difference between what" the arbitrary and capricious test "requires and what would be required by the substantial evidence test, since it is impossible to conceive a "nonarbitrary" factual judgement supported only by evidence that is not substantial in the APA sense...".\textsuperscript{305} Though this may be a "simplified statement"\textsuperscript{306} this decision makes clear that the arbitrary and capricious test can establish a certain level of judicial review that - applied to the agency's record - does not necessarily has to differ very much from the substantial evidence test.

e) excess of statutory jurisdiction?

The questions whether an agency acted "in excess of statutory jurisdiction, authority or limitation, or short of

\textsuperscript{304} see: P.Strauss, supra note 10, p.248


\textsuperscript{306} at least that is what P.Strauss thinks, see supra note 10, p. 249
statutory right"\(^{307}\) or "without observance of procedure required by law"\(^{308}\) will be examined implicitly by the reviewing court in most cases. As was mentioned\(^{309}\) if the action is reviewable and if there is "law to apply" a court can review the agency's decision even though courts have to defer to the agency's interpretation as long "as a reasonable mind might accept" the agency's decision "as adequate to support a conclusion".\(^{310}\) If therefore Congress expressed its intent and the agency chose a certain interpretation of the statute the reviewing court may not substitute its own decision for that of the agency.\(^{311}\) In the N.L.R.B. v. Hearst Publications\(^{312}\) decision the Supreme Court already stated in 1944 that "the Board's determination ... is to be accepted if it has warrant in the record and a reasonable basis in law". And though the Supreme Court found this decision it nevertheless used to decide different in

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\(^{307}\) APA § 706 (2)(C)

\(^{308}\) APA § 706 (2)(D)

\(^{309}\) see supra PART III, 1), pp. 77 - 83

\(^{310}\) Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 59 S.Ct. 206, 83 L.Ed. 126 (1938)

\(^{311}\) see: P.Strauss, supra note 10, pp. 249 - 256

\(^{312}\) 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944)
some cases\textsuperscript{313} until it found the Chevron\textsuperscript{314} decision. With the Chevron decision the Supreme Court established a two step inquiry in the agency's interpretation of statutes. In later decisions\textsuperscript{315} the Supreme Court Justices used "traditional tools of statutory construction"\textsuperscript{316} while "working" with the Chevron standard to find out whether Congress "spoke" to the question at issue and to review an agency's construction of a statute. Even if the Justices may disagree about the use of those traditional tools there is a basis with which the statutory interpretation of agency's can be controlled and reviewed by courts without substituting the statutory interpretation of the judges for the one of the agency.

f) "hard look" - review

Besides the substantial evidence test there also is the "hard look" review which has been established through

\textsuperscript{313} see: Pierce/Shapiro/Verkuil, supra note 24, p. 340

\textsuperscript{314} 467 U.S. 837 (1984)


\textsuperscript{316} Pierce/Shapiro/Verkuil, supra note 24, p.352
Supreme Court decisions.\textsuperscript{317} The idea of the "hard look" was to give courts the possibility to review whether an agency had found its decision through taking a hard look at the respective questions it was concerned with.\textsuperscript{318} Nowadays courts themselves take a "hard look" at the agency's decision.\textsuperscript{319} This "hard look" is used especially in subjects concerning important topics like health, safety and environment\textsuperscript{320} but of course the courts can take the "hard look" only to the extent to which the judges "understand"\textsuperscript{321} the respective topic. The scope of review used with the "hard look" review may have different names, e.g. "substantial inquiry" or "close scrutiny".\textsuperscript{322} The review itself shall look for a reasoned decisionmaking and should be narrow concerning the control whether the agencies stayed within their statutory

\textsuperscript{317} e.g. Motor Vehicle Manufacturers Ass. v. State Farm, 463 U.S. 29 (1983)

\textsuperscript{318} see: P.Strauss, supra note 10, p.268

\textsuperscript{319} see: William H. Rodgers, "A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny", 67 Georgetown L.J. 699,704 (1979): "In the courts,.... the most important expression of the movement to reassert systematic control over agency decisionmaking is called the hard look doctrine of judicial review"

\textsuperscript{320} P.Strauss, supra note 10, p.268

\textsuperscript{321} M.Shapiro, supra note 200, 1487, 1507

\textsuperscript{322} W.Rodgers, supra note 319, p. 704
authorization. The borders to the substantial evidence test may not be very clear but the hard look review may establish a more narrow view than the substantial evidence test. At least in cases concerning informal rulemaking and informal adjudication which are not made reviewable by the APA under the substantial evidence test, the hard look review establishes an additional standard of review besides the arbitrary and capricious test.

g) Chevron, U.S.A. v. N.R.D.C.
The decision in Chevron, U.S.A. Co. v. Natural Resources Defense Council dealt with a statutory interpretation of the E.P.A.. The agency interpreted the term "stationary source" which is a term used in the 1970 and 1977 Amendments of the Clean Air Act. The question was whether the interpretation of this term was correct or whether the agency acted contrary to the legislators intent. The Court of Appeals that decided the case first found that Congress did not explicitly express how it wanted the term "stationary source" to be interpreted. As Congress did not explicitly

\(^{323}\) W.Rodgers, supra note 319, 705

\(^{324}\) see supra PART III, 2) e)

\(^{325}\) see: K.Starr, supra note 284, p. 288

state how it wanted this term to be interpreted the Court of Appeals "felt free"\textsuperscript{327} to set the E.P.A.'s interpretation aside and substitute it with its own interpretation. The Court of Appeals found that the E.P.A.'s interpretation was "incompatible with Congress' remedial purpose".\textsuperscript{328} Justice Stevens wrote for an unanimous Court and overturned the D.C. Circuits decision. In this decision Justice Stevens mainly critizised that the D.C. Circuit substituted its own decision for the agency's decision even after finding that Congress did not explicitly express its intent.\textsuperscript{329} The Supreme Court did not just reverse the Court of Appeals decision and substituted the interpretation the Justices thought would be the correct one for that of the D.C. Circuit or the one of the E.P.A. but it deferred to the E.P.A.'s interpretation and with the Chevron decision gave up its "longstanding case - by - case approach".\textsuperscript{330} More than only critizising the Court of Appeals decision the Supreme Court gave a good example and established a new standard about how to approach an agency's interpretation of a

\textsuperscript{327} K.Starr, supra note 284, p. 287

\textsuperscript{328} 685 F.2d 718, 726 - 727

\textsuperscript{329} K.Starr, supra note 284, p.287

statute. This new standard of review contained a two step approach to the respective statutory question at issue. The first of the two steps concerns the question whether Congress has explicitly spoken to the matter at issue. This inquiry into legislative intent should be made regarding the statute's language as well as the legislative history.\textsuperscript{331} The second step of this Chevron approach is necessary only if Congress' intent is not clear because if it is the agency and the reviewing court have to defer to the legislators will.\textsuperscript{332} If Congress' intent should not be clear the second question the Supreme Court stated was: "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute".\textsuperscript{333} With this two step approach the Supreme Court established "one of the most important administrative law decisions in recent memory"\textsuperscript{334} though there are also scholars who criticise the decision.\textsuperscript{335} This criticism is directed at the use of the

\begin{itemize}
\item \textsuperscript{331} K.Starr, supra note 284, p.288
\item \textsuperscript{332} 467 U.S. 837, 841 - 843
\item \textsuperscript{333} 467 U.S. 837, 841
\item \textsuperscript{334} K.Starr, supra note 284, p.312
\item \textsuperscript{335} see: Pierce/Shapiro/Verkuil, supra note 24, p. 352
\end{itemize}
"traditional tools" because they can be used by the judges to direct the decision and to receive a desired result.

4) requirements

a) availability of judicial review

As was discussed earlier there is the presumption of reviewability which is favored especially by APA §§ 703, 704. Therefore if an agency takes a certain action this action should be reviewable unless "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law". This presumption of reviewability was strengthened by several Supreme Court decisions and other federal court decisions so that unless there is clear and convincing congressional intent expressed and visible in the statute to preclude judicial review or unless there is "no law to apply" there is the possibility to obtain judicial review. Judicial review therefore is available in most cases

336 see supra PART III, 1) b), pp. 75 - 78

337 APA § 701 (a)


339 Doe v. Casey, 796 F.2d 1508, (D.C. Cir.1986)
where the administrative agencies act towards individuals\textsuperscript{340}) unless otherwise stated in the statute.

b) standing
Main purpose of the law of standing is to avoid the misuse of the judicial branch. The requirement of standing is vaguely mentioned in APA § 702: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review". The law of standing therefore is necessary to distinguish between the people who really have suffered a "legal wrong" and those who just do not agree with the agency action or think that a different action would be better. As the law of standing is not enacted explicitly in a statute it has undergone several changes. Not only have there been many changes but there also have been different attitudes towards the requirements of standing at the same time.\textsuperscript{341}

\textsuperscript{340} this "general move" towards more protection of the individual was very much favored (if not "founded") by the Supreme Court’s decision in Goldberg v. Kelly [397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed 2d 287 (1970)] which refused to furtheron enforce the distinction between benefits and privileges concerning protection given by the due process clause

\textsuperscript{341} see: K.C.Davis, supra note 21, vol.4, p. 208: "...main failure of the law of standing is ... the inconsistency, unreliability, and inordinate complexity"
From the beginning on it was clear that the person who wanted to take legal action had to be "adversely affected".\textsuperscript{342} How this was to be defined though was not clear. One of the Supreme Court's approaches towards the requirements of standing was to demand that a legal right was injured.\textsuperscript{343} If a legal right of the plaintiff was violated he/she had standing. One of the problems of this approach was that the person hurt through the agency action had to show that the action was illegal. As there are not always statutes - being a common law system - explicitly authorizing and limiting agency actions the plaintiff had to prove that the action was illegal though this action might not have been held illegal before.\textsuperscript{344} Another approach was the so called "private attorney general" doctrine that gave standing to persons who wanted to assert a public interest.\textsuperscript{345}

\textsuperscript{342} A thorough and general chapter to the history and evolution of the law of standing: K.C. Davis, supra note 21, vol. 4, pp. 230 - 235


\textsuperscript{344} See: K.C. Davis, supra note 21, vol. 4, p.232

\textsuperscript{345} Pierce/Shapiro/Verkuil, supra note 24, p. 134/135; see e.g.: Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)
And though these two attempts to establish a useful law of standing probably have been the most important, they only have been two of several attempts. The law of standing used today was invented and established in the Supreme Court's decision in Association of Data Processing Service Organizations, Inc. v. Camp and to a certain degree can be seen as a mixture of these two earlier approaches towards standing.

In this decision the Supreme Court developed a two step approach to find out whether the plaintiff has standing or not. The Court required that a party has to have (i) an injury in fact which must be (ii) "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question". This two step approach is a clearly defined standard but there nevertheless still remain questions concerning the law of standing which are answered only slowly through following Supreme Court decisions.

The requirement of an "injury in fact" is of course necessary because without an injury there is no "case or


348 397 U.S. 150, 153
The injury in fact can be an economic, aesthetic, conservational or recreational injury. With this decision the Court therefore turned away from the requirement of the "legal injury" though of course the plaintiff still has to have a legal right to judicial enforcement of an asserted legal duty.\textsuperscript{350} The injury that is complained about has to be caused by the "illegal"\textsuperscript{351} action of the administrative agency which the plaintiff tries to have declared void. The judicial decision that is sought must be capable of remedying the injury\textsuperscript{352} and the plaintiff of course has to be among the individuals injured by the agency's action. This injury may even be a "procedural injury"\textsuperscript{353} what means that if procedural rights of the plaintiff are hurt and he/she receives an injury through this the requirements of the "injury in fact" are fulfilled. The second requirement is fulfilled if the injury is within the zone of interests of the respective statute or even


\textsuperscript{350} W. Fletcher, supra note 346, 221, 229

\textsuperscript{351} the action which is claimed to be illegal

\textsuperscript{352} Linda R. S. v. Richard D., 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed. 2d 536 (1973)

\textsuperscript{353} Nancy S. Grief, "Where Do We Stand Now?", 33 Nat. Resources J. 507, p.2 (1993)
within a constitutional guarantee. Statutory language as well as legislative intent have to be questioned to find out whether the respective statute's intent is to protect the certain issue\textsuperscript{354} which is questioned is the specific case. Though to find out whether the zone of interest does exist in the respective case is a "duty" after Data Processing the Supreme Court often only focused on the first step, the injury in fact.\textsuperscript{355} In cases where the Court only examined the injury in fact it has found that the proof of the injury was enough to establish standing.\textsuperscript{356}

When associations want to sue on behalf of their members they establish standing if "its members would otherwise have standing to sue in their own right", the interests at stake are interests that comply with the associations purpose and no individual participation is necessary.\textsuperscript{357}

\textsuperscript{354} "the test is not meant to be especially demanding", Clarke v. Securities industry Association, 479 U.S. 388, 107 S.Ct. 814, 28 L.Ed.2d 136 (1971)

\textsuperscript{355} W.Fletcher, supra note 346, 221,258


\textsuperscript{357} Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)
c) timing
To avoid the abuse of the judicial branch the plaintiffs do not only have to have standing and a "case"\textsuperscript{358} but other requirements also have to be fulfilled. The main purpose of these requirements is not to avoid an abuse of the judicial branch but to ensure that the dispute between the individual and the agency has not been settled after certain administrative procedures and requirements have been obtained and therefore can only be solved by the judicial branch. These requirements are fulfilled if the agency made a final decision, all administrative remedies have been exhausted and the court therefore can not interfere with the decisionmaking process of the agency.

(aa) One of the requirements that has to be fulfilled before the court reviews the action is that the case has to be "ripe". The law of ripeness is a judge - made law and may be seen as an outflow of the "case or controversy" requirement of art. III.\textsuperscript{359} The law of ripeness' aim is to avoid giving advisory opinions. This judge - made law has undergone several changes since its "creation".\textsuperscript{360} The requirement that a case has to be ripe before there can be a trial before a

\textsuperscript{358} Art III of the U.S. Constitution

\textsuperscript{359} K.C.Davis, supra note 39, p.82

\textsuperscript{360} a case reflecting the "ripeness - doctrine" in "earlier days": International Longshoremen's Union v. Boyd, 347 U.S. 222, 74 S.Ct. 447, 98 L.Ed. 650 (1954)
court is fulfilled if an official position of an administrative agency bears the danger to harm individuals severely. Therefore the "present law of ripeness is based on a proper balance between the need for concerning judicial resources and the need for relieving private parties from debilitating uncertainties". The change towards this understanding of the law of ripeness was made in Abbott Laboratories v. Gardner. In its general statement about ripeness the Court stated: "[I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties". In this decision the Supreme Court "invented" a two step test to find out whether a case is ripe or not. The controversial issue has to be "fit" for review and the "hardship to the parties withholding court consideration" has to be

361 K.C. Davis, supra note 39, p.82

362 K.C. Davis, supra note 21, vol. 4, p.410

363 387 U.S. 136 (1967)

364 387 U.S. 136, 149

365 387 U.S. 136, 149
considered. Though it might be difficult to determine when a case is "fit" - Justice Harlan writing for the Court found that the question at issue concerned a "purely legal question of statutory construction"\(^{366}\) where only research into Congress' intent was necessary and that the action at issue was final in the sense of APA § 704. Therefore "fitness of the issue" and the possible "hardship to the affected"\(^{367}\) contain the answer to the question whether a case is ripe or not.

(bb) A plaintiff seeking judicial review has to exhaust all administrative remedies that are available in the specific case before seeking relief in a federal court.\(^{368}\) An important case dealing with the exhaustion of administrative remedies was Myers v. Betlehem Shipbuilding Corp.\(^{369}\) In this case the Supreme Court held that a court may not enjoin administrative proceedings on a complaint before the


\(^{367}\) 387 U.S. 136, 149


\(^{369}\) 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938)
administrative remedies were exhausted even if the plaintiff claimed that the agency would lack jurisdiction to act. \(^{370}\)

Reasons for this exhaustion requirement are the separation of powers doctrine and to establish an independent administrative agency which is able to correct its own mistakes and will be oriented to have an efficient process as well as to preserve judicial economy. \(^{371}\)

In its decision in McKart v. United States\(^ {372}\) the Supreme Court stated several reasons for the requirement of exhaustion. \(^{373}\) In this decision the Court stated that if there is the possibility to use administrative remedies and these possibilities are not used by the plaintiff - he/she may not raise issues before a court that he/she could have discussed and possibly could have solved with the agency.

Though the exhaustion doctrine may be similar to the requirement of APA § 704 that a legal action can only be taken against a final agency action there are differences in purpose and proceeding.

\(^{370}\) 303 U.S. 41, 47


\(^{372}\) 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)

\(^{373}\) see: Pierce/Shapiro/Verkuil, supra note 24, pp. 177/178
(cc) According to APA § 704 the action against which the plaintiff seeks to take legal action must be a final agency action. Reason for this is to avoid interferences of the judicial branch with the administrative agencies. Though this is one of the reasons for the doctrine of the "exhaustion of administrative remedies" the damages that might occur when a court interferes with an agency's decisionmaking process are much more severe. The exhaustion doctrine gives agencies the possibility to review and to rethink their decisions and to change them if they think it is necessary or advisable. If a court interferes it will "only" control the legality of that action which it will do anyway sooner or later whereas if it decides instead of the agency it substitutes its opinion for that of a part of the executive branch. The determination whether an agency action is final or not usually is not difficult. Difficulties and problems may arise though when a "failure to act" or a "rejection to act" are concerned. In Environmental Defense Fund, Inc. v. Hardin the D.C. Circuit held that in very urgent and important cases or in cases where otherwise an irretrievable injury might be received judicial review can be available before a final agency action was issued. "When administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form

of inaction rather than an order denying relief".\footnote{375} In another "trendsetting" decision\footnote{376} in Environmental Defense Fund, Inc. v. Ruckelshaus\footnote{377} the D.C. Circuit ordered the agency to take a certain action instead of postponing the decision. This of course is a questionable intervention as it may interfere with certain constitutional and democratic requirements and guidelines but this intervention has been defended with the "public health hazards" that were at stake.\footnote{378}

d) primary jurisdiction

The doctrine of primary jurisdiction is a court made doctrine and concerns the question whether a court may decide about a certain topic or whether this question should

\footnote{375} D.C. Circuit, cited from Pierce/Shapiro/Verkuil, supra note 24, p.171

\footnote{376} though the decisions of the D.C. Circuit are favorable and "trendsetting" in this particular area of administrative law they nevertheless seem to be the only one putting much more weight on the danger of possible harm for individuals than on strict statutory obedience

\footnote{377} 439 F. 2d 584, 142 U.S. App. D.C. 74(D.C. Circuit 1971)

\footnote{378} as was mentioned supra in PART III B) c): "Discretionary power not to take action is power to discriminate", K.C.Davis, supra note 219; the problem that arises though is: once orders like this are allowed (even if the interests at stake may "justify" the action) - can this case be distinguished in an objective and neutral manner from other cases where this should not be allowed?
be dealt with by the agency. The primary jurisdiction is used especially "for withholding judicial power in order to make place for the agency". Therefore this concept is used by courts to "allocate initial decision making responsibility" between an agency and a court. If it is a whole dispute that is in question with the primary jurisdiction the court will dismiss the case whereas if it only is a certain issue the court will wait until the agency has spoken to the issue. Of course the primary jurisdiction is not concerned with final decisions but only with initial determinations. A court will dismiss the dispute because of primary jurisdiction because of the expertise of the agency and to achieve a uniform treatment of the specific issue. As different courts may make different decisions the agency dealing with the issue will establish a uniform standard. Main use of the primary jurisdiction is within the antitrust law. In the most important decision concerning

379 to primary jurisdiction in general: Pierce/Shapiro/Verkuil, supra note 24, pp. 190 - 194

380 K.C. Davis, supra note 21, vol.4, p.82

381 Pierce/Shapiro/Verkuil, supra note 24, p. 190

382 in a common law country the judge shall be a "generalist" and therefore he/she defers to the agency’s expertise and special knowledge, see supra PART I, introduction

383 K.C. Davis, supra note 21, vol.4, pp. 100 - 119
primary jurisdiction, in United States v. Western Pacific Railroad Co.\textsuperscript{384}, the Supreme Court stated that "[N]o fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reason for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation". As there is no "fixed formula" the judges must decide from case-to-case whether the agency shall decide the topic first or whether the court can decide.

\textsuperscript{384} 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956)
PART IV
HISTORIC AND CULTURAL INFLUENCES ON THE AMERICAN AND GERMAN LEGAL SYSTEMS AND THE JUDICIAL REVIEW

1) source of the law

History and the experiences with different political and legal systems have had a great influence on the establishment and realization of the American and German legal systems in general and especially concerning the judicial review of administrative action. Besides other reasons the war of independence was fought to get rid of a political system in which only a few non-elected persons ruled country and society. Instead of always having the duty to obey the "sovereign" the people wanted to establish a society/community in which the members could develop and express personal opinions of their own. To achieve personal freedom not only in verbal expressions was one of the main goals. Not a regulated and standardized system but the people's will was thought to be the most important content establishing a free society. As the people's will may change the framers of the Constitution adopted the common law system which was thought to reflect the people's will better than a civil law system.
As a result of this many requirements and necessities to obtain judicial review - and especially to obtain it successfully - have been developed and invented by the Supreme Court. As the Justices of the Court are appointed by the elected head of the executive branch they - at least to a certain extent - often resemble the majority of the people's opinions on certain issues. The judge-made-law (combined with the jury system) therefore often reflects the people's view. Of course this "reflection" does not reach the explicit words of the law but at least to the extent whether something should be viewed in a "liberal" and "broad" or "conservative" and "narrow" sense the people's opinion often is reflected to some extent in the Court's opinions.

Enacting the Grundgesetz the fathers of the Constitutions main aim was to establish a legal system which could not be abused in any way, either by an (possibly) influenced majority or through the government.\textsuperscript{385} Being a civil law country there is no judge-made-law but only law enacted by the German Bundestag\textsuperscript{386} and the German Bundesrat.\textsuperscript{387}

\textsuperscript{385} see esp.: E.Schmidt Assmann, supra note 2, pp.995 - 998; K.Stern, supra note 15, p.19

\textsuperscript{386} "House of Representatives"

\textsuperscript{387} "Senate"
Though the representatives of the Bundestag are elected persons the voters do not have a thorough influence on their representatives and the laws they will enact. When the Grundgesetz was enacted the "fathers" of the Constitution wanted that all state authority\textsuperscript{388} "shall be exercised by the people by means of elections and voting...".\textsuperscript{389} To give parties a constitutional right to participate in the political process\textsuperscript{390} they "shall participate in the forming of the political will of the people".\textsuperscript{391} The existence of parties was constitutionally guaranteed as forums to express and realize the people's will. Nowadays the people's influence on their representatives and on the law is less than just "vague" because there has been an evolutionary change from a liberal and representative democracy to a system where the representatives are elected because of their membership to a certain party and not because of their ideas and ideals. People vote for a certain party because

\textsuperscript{388} which of course is something different than and does not include the abstract purpose of the "rule of law"; the state authority can only be exercised within the legal (and moral) boundaries of the rule of law

\textsuperscript{389} GG art. 20 (2)

\textsuperscript{390} this is one of the lessons from the "third Reich" where the only party allowed was the NSDAP and therefore a different "political organ" to express political opinions was missing and the free expression of course did not exist

\textsuperscript{391} GG art. 21 (1)
they believe that this respective party reflects the same concepts of values on certain things\textsuperscript{392} as they do. The membership to a certain party then "orders" the elected representative to vote within the "party discipline"\textsuperscript{393} and not because he/she wants to represent the interests of his/her voters. This "party - discipline" is understandable and necessary at least to a certain extent: though the Chancellor is not an "officer" of the Bundestag the majority of the Bundestag nevertheless can withdraw their support from the Chancellor. As the Chancellor is elected by the members of the Bundestag the Bundestag also can make a vote of non - confidence and discharge the Chancellor. This means that the Chancellor (different than the U.S. President) does have to have the support of the majority of the Bundestag. To support the Chancellor\textsuperscript{394} the members of the respective party to a certain degree have to vote within the party - discipline. Though to a certain degree the source of the law can be seen as the people's will expressing their conservative or liberal preferences while voting for the Bundestag the main source or the law is the legislator's (or negative: the party's) will. This is a good reflection

\textsuperscript{392} which means that they vote "conservative", "liberal" or "social democratic" and not because one representative thinks different about a certain issue than another

\textsuperscript{393} see: supra p.3; H. Steinberger, supra note 4, p. 128

\textsuperscript{394} who in usually is the head of the respective party
though of the believe that in a civil law country not the majority of the people make the law but only the representatives\(^{395}\) because not a subjective opinion but an abstract principle of justice shall be the source of the law.

As a source of law the people's will therefore has a quite significant influence in the United States' legal system whereas in Germany the people's will is not important as a source of the law.

2) aim and purpose of the law

As was mentioned above one of the aims of the war of independence was to change the political system and the influence the people had on decisions concerning society. The answer and opposite political system to the British monarchy was the liberal democracy where the majority's will is the main order. "We the people..." therefore does not only mean that the people do establish the community but

\(^{395}\) this attitude towards the law changed during the years though; people now often believe that they should have more "rights" to determine the law and influence on how the law should be; in some state constitutions there is the possibility that if a certain percentage of the state inhabitants want a certain law the state legislator has to discuss and vote about this proposal; also in most of the states there is the possibility for plebiscites on certain issues; these two possibilities luckily do not exist on the federal level
also that the people's will is the main source of the law and the legal system.\textsuperscript{396}

As a response to the history the U.S. law shall serve the people and shall therefore represent and reflect the people's will. Though nobody will deny that to achieve justice in an abstract sense surely is \textit{one} purpose of the law it is not \textit{the} purpose of the legal system. The common law and the case by case system serves the individual consideration and not an abstract principle.

Though the Constitution of the Weimarer Republic was a democratic Constitution it was possible to transform the democratic republic into a totalitarian country ruled by a dictator. Enacting the "eternity clause" in GG art. 79 (3) the fathers of the Grundgesetz ensured that the democratic system as such could not be transformed or changed. To furthermore avoid the possibility of uncontrolled arbitrary decisions of sovereign acting agencies/civil servants the aim of the fathers of the Grundgesetz was to establish a legal system in which the rule of law should be the most important and most central constitutional demand.

\textsuperscript{396} Hamilton, Madison and Jay thought that the separation of powers and elections of the representatives would be enough to establish justice and freedom, see: W. Brugger, supra note 1., p.22/23; they did not intend to enact civil rights as they thought the people's will would be reasonable enough and the enactment of the Constitution would be a significant sign itself.
Therefore the enacted laws serve the abstract principle of the rule of law\textsuperscript{397} and is not necessarily enacted to respond to the people's will and demand.\textsuperscript{398} The law of course is not only enacted to serve the rule of law as an abstract principle but as the law should serve the community and the individual the Grundgesetz tries to protect the community and the individual living in it and not necessarily the subjective will of the individuals forming the community. As a part of the legal system the judicial review of administrative actions is primarily oriented to serve the abstract justice and not necessarily the individual justice.

\textsuperscript{397} Though there are several different opinions concerning the question which requirements constitute the "rule of law" principle the main features are established in several articles of the Grundgesetz (e.g. separation of powers, democracy); what is controversial nowadays only is the extent to which certain values represented by the rule of law can be or shall be stretched and expanded; this especially concerns "social obligations" and "guarantees of equality" of the government which some scholars think to be connected closely with the principle of the rule of law (but which should be a question concerning the extent of the "social state principle" which also is a requirement of the Constitution); GG art 20 (1): "The Federal Republic of Germany is a democratic and social federal state"; to the content and extent of the "social federal state" see: R. Herzog, "Die Verfassungsentscheidung fuer die Sozialstaatlichkeit", pp.295 - 326, in : Maunz/Duerig, supra note 17

\textsuperscript{398} As mentioned above the possibility that the proposal of an abstract principle may oppose or even harm individuals is accepted, see supra pp.1/2; E. Schmidt Assmann, supra note 2, p.1030
The differences between the purpose of the law therefore is quite significant between the American and the German legal systems.

3) Different attitudes towards the government and administrative agencies

The differences in the historical and cultural attitudes towards and the development of the source and aims and purpose of the law of the respective country also reflects a different attitude towards the government and the administrative agencies that represent the sovereign power. In the United States there is the common believe that the government should be "small" and without much influence and control over the daily routine and society. This is a response to the historic experiences with different political systems and expresses the established believe that "liberty" should be the main feature of this society. Liberty not only in a "negative" meaning and as a defense

"though the declaration of independence was made to establish a liberal democracy as a response to the British monarchy many "Americans" came to this continent after the war of independence was over; they wanted to evacuate from the respective country and political system which not necessarily had to be a monarchy but which in most cases surely had a severe influence on the "individual liberties" of their inhabitants; the "small government" on one side and the possibility of liberty and individualism on the other side therefore certainly have been very important reasons for many people to come to the United States.
against governmental regulation and "control" but also in a positive sense as a realization and proposal of the self-responsibility. When the influence and exercise of power of a government should be as small as possible it is necessary to have as few laws as possible.

In Germany it is to the contrary. It is thought that the government should have a strong influence upon the society. Throughout the last ten centuries Germany has always been a country in which there has been a strong sovereign authority in which people believed and where lots of laws regulated the society. Though the common believe in a strong sovereign authority still is quite widespread the sceptizism and awareness of its actions nevertheless increased because of the disasters in the recent history. As a response to this deprivation not subjective interests but an abstract justice should be guaranteed through the Constitution as well as the constitutional guarantee of an efficient judicial protection against sovereign actions. Though the government has a strong influence on society there is the possibility to take legal action against each action that may harm subjective rights of the individuals.

400 one of the first books where the law was codified was the "Sachsenspiegel", written ca. 1224 - 1233

401 the deprivation of the law, the genocide and the degeneration of the political system have been enforced by the "government" and within their authority (though of course this was not a legally and democratic confirmed authority)
This was thought to be a mixture of an organizing, providing and regulating government on one side and the ensurance of justice on the other side. To the same extent as it is much more difficult in a big country like the U.S. to have a thorough influence on all citizens in a small country like Germany with many inhabitants it is a necessity for the government to regulate and organize society and the life in the community. Also as an answer to the history the fathers of the German Constitution tried to ensure that the executive could not act just the way it wanted to. Therefore they invented a narrow "checks and balance" - system as the Chancellor is elected by the Bundestag and also can be discharged by the members of the Bundestag. Enacting this system the fathers of the Grundgesetz tried to avoid very strong and independent branches but as they are connected and dependent from each other the legislative and the executive branch should control each other and should be forced to find democratic compromises in difficult situations.

The American President as the head of the executive is widely uncontrolled and not responsible to Congress. He can only be discharged by impeachment and he is not dependable on any other branch. This very strict realization of the separation of powers is balanced by the system of "checks and balances" enacted in the Constitution. As the President is very independent in his decisions and attitudes towards the solution of certain problems he therefore is relatively
free on how he "executes the laws". The administrative agencies very often are enacted to solve certain problems and to help the President to execute the laws. As they shall help the President and not Congress to execute the laws they have to execute the laws the way the President thinks is the politically correct one. Though several agencies administrate the relationships between the sovereign and the citizens (like e.g. the Social Security Administration) most of the agencies are a part of the political process. As they are a part of the executive and the political process they of course have to have discretion dealing with the topics they are enacted to administrate and problems they shall solve. Therefore the enacting statutes delegate broad discretionary authority to the respective agency so that the executive can fulfill their tasks in the way they think is the correct one. Very significant is the fact that an organic act usually authorizes an agency to e.g. take care of a certain problem without stating that the agency shall take care that this certain problem should be solved.\footnote{as was mentioned above there is a big difference concerning this "authorization" between american and german agencies: the german agency's duty is stated in the respective statute so that a citizen may derive an entitlement from the respective statute against the agency to act in a certain desired way (if the legal and factual requirements are fulfilled)}

This is to the contrary in Germany where the agencies only execute the laws. Though they do have discretionary power this discretionary power exists only concerning factual
questions. As the agencies in Germany do not take part in the political process there is not the necessity to delegate broad discretionary authority.
PART V

COMPARISON OF THE POSSIBILITIES OF JUDICIAL REVIEW

A) Differences in the Judicial Review

1) review of which agency actions

a) agency actions

Almost all administrative actions are reviewable in the U.S. and Germany. In Germany GG art. 19 (4) ensures that there is an efficient protection against sovereign actions. Judicial review of administrative actions therefore may be obtained against adjudications, administrative acts and statutes. There is no judicial review against laws enacted by the German Bundestag but if there is an administrative act enacted because of this law and a person takes legal action against this administrative act the law as a basis for the agency's action will be controlled incidently. Excluded

403 but as laws are enacted by the German Bundestag and not by administrative agencies the specific review of laws is not a part of this thesis

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from judicial review\textsuperscript{404} are discretionary actions of the administrative agencies. As the German legal system primarily obeys the rule of law the only thing which is important concerning the availability of judicial review is whether a subjective right of the plaintiff may be harmed through the agency action and not which type of action the agency chose.

In the U.S. legal system there is a presumption of reviewability of administrative action.\textsuperscript{405} This presumption of reviewability of the APA was strengthened by several Supreme Court decisions - especially by the Abbott Lab. v. Gardner decision. The presumption of reviewability can be rebutted though if the review is precluded by statute\textsuperscript{406} or if the agency acted within its discretionary power.\textsuperscript{407} Though the Court found that the "committed to agency discretion" exception is a very narrow one\textsuperscript{408} the cases where the agency acts within its discretionary power and therefore these actions are not reviewable may occur quite often as Congress usually delegates broad discretionary authority to the

\textsuperscript{404} at least to some extent, see following pages A) c)

\textsuperscript{405} see supra p. 74

\textsuperscript{406} APA § 701 (a)(1)

\textsuperscript{407} APA § 701 (a)(2)

\textsuperscript{408} see supra p. 75; 401 U.S. 402, 410
agencies. Therefore though there is the "presumption of reviewability" in the U.S. nevertheless the percentage of the actions reviewable may differ between the two legal systems. This may be as more statutes in the U.S. authorize agencies to act with discretionary power than in Germany. The difference therefore is that though most administrative actions of the agencies in the U.S. are reviewable this is only a presumption which can be rebutted whereas the possibility to review all administrative actions is a constitutional demand and is guaranteed through GG art 19(4) in Germany.

b) agency inaction?
Concerning an agency's refusal to act the Supreme Court established a "presumption of unreviewability". This presumption of unreviewability has its main foundation in the respective statute which usually authorizes the agency to do certain things but which seldom requires the agency to do explicitly mentioned things. This, too, is a sign for the participation of the administrative agencies at the political process. If an agency would be required to fulfill

409 this is necessary as the agencies are a part of the political process; see supra pp. 15-18; M.Strobel, supra note 35, 1321

410 except those mentioned in APA § 701 (a)

411 470 U.S. 821,831
explicitly ordered things the political decision making process would be disturbed. This presumption of unreviewability can be rebutted if the respective statute demands a certain action of the agency and if the court therefore has a "meaningful standard" with which the action can be controled. An inaction is reviewable therefore if a person suffers a legal wrong through the inaction, if the inaction is not totally committed to agency discretion and if the refusal to act is a final agency action.\textsuperscript{412}

In Germany there is no such "presumption of unreviewability" of an agency's refusal to act. On the contrary there are several types of lawsuits which are used to enforce a certain desired but rejected administrative agency action: the Verpflichtungsklage and the allgemeine Leistungsklage (action for performance). With these two lawsuits courts can control whether the agency had a duty to act in the requested way. As all administrative agency actions are reviewable and as it is known that inaction may cause the same damage as an action the legislator had the constitutional obligation to ensure that there is a chance to review all agency actions and refusals to act, GG art. 19 (4).\textsuperscript{413} Most important is that the plaintiff

\textsuperscript{412} see supra p. 87

\textsuperscript{413} see supra p. 20; see: K.C.Davis, supra note 219
states in a plausible way that his/her subjective rights\textsuperscript{414} may be harmed through the agency’s refusal to act. Courts of course have to have a meaningful standard to review the agency inaction. This standard usually is provided by the enacting statute of the agency unless the agency has discretion to decide whether it will act or whether it will not act.

c) discretionary actions
VwGO § 114 empowers german courts to review the legality and the expediency of an agency action if the agency made a discretionary decision. A court will examine whether an agency made a decision based on facts that do not exist, whether an agency made a decision thinking that there are certain limits of the discretionary power while these limits do not exist, whether the agency made an arbitrary decision and whether the agency really used its discretion or whether the agency instead of that just followed the "usual routine".\textsuperscript{415} If none of these "mistakes" occurred and the agency’s action is within the statutory boundaries and statutory orders the court of course has to and will defer to the agency’s decision. Even if one of those "mistakes" was made and the agency therefore did not act within its

\textsuperscript{414} see supra p.55

\textsuperscript{415} see supra p.22
legal boundaries the lawsuit of the plaintiff will be successful only if a subjective right of the plaintiff is hurt through the illegal decision.\textsuperscript{416}

One of the differences is that the organic acts in the American system do delegate broad discretionary power to the agencies as they are not only executing the law but also fulfilling political aims, whereas in Germany discretionary power delegated to the administrative agencies is very limited because they only execute the law.

The American court has to review the discretionary actions and has to find out whether it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law".\textsuperscript{417} An abuse of discretion occurs if the agency considered an irrelevant factor, if the agency failed to consider a relevant factor, if the agency decided without sufficient evidence or if the agency had given improper weight to a relevant factor.\textsuperscript{418} These four factors are almost the same as those in the German law. There therefore is not a big difference in the possibility to review discretionary actions. In both legal systems the discretionary action itself is unreviewable except for arbitrariness and excess of statutory authorization. If constitutional rights are

\textsuperscript{416} see: W. Schmitt Glaeser, supra note 49, p. 99

\textsuperscript{417} APA § 701 (2)(A)

\textsuperscript{418} see: M. Shapiro, supra note 200, p. 1490
involved courts in the U.S. may review the discretionary action, too. Many plaintiffs in Germany claim that their constitutional rights have been hurt through the discretionary action. The reviewing court in Germany can and will examine whether the affected interests have been weighed and balanced in the correct manner. As long as there is a legal basis discretionary decision courts in Germany may not declare the law unconstitutional. If a court finds that there is a legal basis which authorizes the agency to make an unconstitutional decision the court has to pass the lawsuit to the Federal Constitutional Court because the privilege to declare a law unconstitutional is a right which is reserved solely to the Federal Constitutional Court.
The extent of judicial review differs as German courts may examine the expediency of the discretionary choice of the agency, VwGO § 114. What is different, too, is that there are more statutes delegating discretionary power to U.S. administrative agencies which is necessary to fulfill their tasks helping the President to execute the laws.

419 see: Pierce/Shapiro/Verkuil, supra note 24, p. 129

420 because of the separation of powers the courts of course will defer to the agency’s decision unless there occurred a severe misjudgment in weighing and balancing the situation and interests at stake
2) differences in the admissibility?

What is the same in both legal systems is the fact that courts may not require more or stricter procedural requirements than the legislator does. The APA establishes "maximum" procedural requirements which Congress was willing to have courts impose upon agencies in conducting rulemaking procedures". Agencies are free to grant more procedural participation - rights if they wish to but courts may not demand them. The VwVfG and the VwGO contain the procedural participation rights an agency has to offer. Courts have to control whether all of those procedural participation - rights have been offered and obeyed but they may not require different or more procedural participation rights.

a) distinction between admissibility and success

Both legal systems make a distinction between the admissibility and the examination of the merits of a case. The judge first has to examine whether the plaintiff has standing, whether the action is reviewable and whether the plaintiff exhausted the administrative remedies. There is a difference though deriving from the origins of the two legal systems: being a civil law system all requirements necessary to obtain judicial review are enacted in legislative laws whereas - being a common law country - some necessities in

421 Pierce/Shapiro/Verkuil, supra note 24, p. 175
the U.S. legal system are judge-made-law, like e.g. the law of ripeness and the primary jurisdiction doctrine. Though the origins of the requirements which have to be fulfilled to obtain judicial review differ in the two legal systems they do have the same purpose and try to achieve the same goal. These requirements serve to avoid the abuse of the legal system which would take place if the judges would have to examine the legal questions of cases where the plaintiffs would not be the addressees of the action and had no standing and would not be affected by the action at all. These requirements therefore are necessary to protect the judicial branch against "improper plaintiffs".

b) standing and subjective rights
In the U.S. the plaintiff has to have standing where the judge examines whether the plaintiff is affected by the administrative action and suffered a "legal wrong" through that action. In the german legal system the plaintiff has to be the addressee of (or at least: has to be affected by) the administrative action and he/she has to state in a plausible way that his/her subjective rights have been harmed through the agency action.

The Supreme Court stated that a plaintiff has to have (i) an injury in fact which must be (ii) "within the zone of interests to be protected or regulated by the statute or
constitutional guarantee in question". The subjective right as it is understood in Germany is almost the same as the two step inquiry of the Supreme Court. In both requirements there has to be a legal basis which gives certain rights not only to the community but also to the individuals. The plaintiff then has to be among those persons whom this statute wishes to protect or to whom it wants to attach a right. Whereas the examination whether the plaintiff has a subjective right is quite strict in Germany the examination in the American system "is not meant to be especially demanding".

c) exhaustion of administrative remedies

As the plaintiffs in Germany in certain lawsuits have to obtain a pretrial review within the administrative agency the same is true concerning the exhaustion of administrative remedies in the U.S. legal system. In Germany a lawsuit will

422 397 U.S. 150, 153

possibly because the question whether the plaintiff has a subjective right is more important concerning the protection of interests: if there is a subjective right which may be hurt the individual is more important than the agency decision, if there is no subjective right a lawsuit will not be successful even if the action of the agency should be illegal

424 479 U.S. 388; this may be as in most cases the agency has discretion so that the main restriction of review will be in the examination whether the action is reviewable or unreviewable
not be admitted if a pretrial proceeding is required but has not been obtained by the plaintiff.\textsuperscript{425} In the U.S. a lawsuit will be admitted even if the administrative remedies have not been exhausted but issues which could have been discussed and examined during the procedure of administrative remedies will not be examined and accepted by the court.\textsuperscript{426} The exhaustion of administrative remedies and the pretrial review are necessities to maintain the separation of powers as courts should not interfere with the decisionmaking process of the agencies and they furthermore shall unburden the judicial branch of all those lawsuits that can be solved between the affected parties through negotiations and additional participation.

d) the competent court

A necessity which is not required in the american legal system is the question whether the respective lawsuit is admissible to recourse to the administrative courts, VwGO § 40 (1). This is not necessary in the U.S. as the judicial branch is not divided and concerned with different legal topics. As the judicial branch is divided\textsuperscript{427} in Germany each "branch" has to examine whether it has jurisdiction or

\textsuperscript{425} see supra p.56

\textsuperscript{426} see supra p. 127

\textsuperscript{427} see supra pp. 6 - 10
whether a different court is competent. If a lawsuit is concerned mainly with criminal or labor law (with certain administrative law impacts) an administrative law court may not admit this lawsuit but instead has to dismiss it. An american court will send the lawsuit to another court if the plaintiff took legal action before the wrong court while a german court simply will dismiss the lawsuit. Either the attorney takes the legal action before the competent court or there will be no legal action.

e) final agency actions?
APA § 704 requires that the action brought before a court is a final agency action. A final agency action is required to avoid interferences with the decisionmaking process of the executive branch and to maintain the separation of powers. Agency actions and decisions have to be final in Germany, too, to be reviewable by an administrative court. In contrast to the U.S. legal system there are exceptions from that rule: if (i) an agency has not acted yet but has acted in an illegal way before and will act in the same way soon again and an irretrievable situation may occur through this action and if (ii) the agency takes three months or longer to make a decision or to answer a request. In these cases the plaintiff may take legal actions respectively the court may examine the lawsuits before a final agency action.

428 see supra pp. 127 - 129
has been made. Final agency action is not required in these cases as it is quite evident that the agency will act in a harmful and illegal way or that it is not fulfilling their tasks. With these two possibilities courts may "interfere" with the agency decisionmaking process (though they only either prevent an illegal action or help citizens to their rights enacted in the VwGO). Concerning the requirement of finality the german legal system avoids its strict and abstract system and instead of that puts more weight on the individual case.

f) time limit to take legal action?
Obtaining judicial review in Germany the plaintiff has to take care that he/she takes the legal action within one month after the administrative agency acted, VwGO § 74. Though this is not a requirement necessary for all lawsuits it is a presupposition for some of the legal actions429, especially for those where the agency and the addressee are confronted with legally binding actions. There is no rule concerning a certain period of time within which a legal action must have been taken in the U.S.. The addressee therefore may wait as long as he/she wishes but there of course is the risk that the action will

429 for the Anfechtungsklage, the Verpflichtungsklage and the Fortsetzungsfeststellungsklage, see supra pp. 59/60
be executed and irretrievable if the legal action will be obtained too late.

3) differences in the success?

a) different judicial branches

Though there is a big difference between the U.S. and German legal systems considering the fact that there is a judicial branch dealing only with administrative law in Germany - the fact that there is this difference is the only fact which can be mentioned here.

First of all this difference in the legal systems serves the purpose of the law of the respective country and second the there is no empirical data available concerning the advantage, efficiency or success of the judicial review of cases dealing with administrative law. As the U.S. law shall serve the people it may not be too complex to serve this purpose whereas the German law with the amount of different things it tries to regulate is too complex to be judged in an efficient way by one judge dealing with all legal topics. All that can be said here therefore is that each judicial branch serves the purpose of the legal system.

Another important difference is that the citizen in Germany has a legal entitlement to have his/her lawsuit reviewed by the Federal Constitutional Court if his/her constitutional

430 see supra pp. 7-9
guaranteed rights possibly could be harmed through the decision of the Federal Administrative Court which is the court of last resort concerning administrative law. In the U.S. there is no such legal entitlement to go to the Supreme Court but this does not mean that there is less protection or review available but only that the structure of the court system is different and demands different tasks from the "court of the last resort".

b) scope of review
Whereas in Germany all actions of an administrative agency are judicial reviewable to the same extent no matter what kind of action is involved there is a distinction in the U.S. concerning the extent of judicial review and the kind of action under review. As mentioned and explained a german administrative court examines the formal and objective legitimacy of the administrative actions to the same extent concerning factual and legal questions regardless whether the action is an administrative act or an order or a rule. The extent of the judicial review of course differs concerning the procedural requirements which can be examined by a court as the different kind of actions have varying procedural demands. This is not the same concerning the review of administrative actions in the U.S. In the american legal system courts make two distinctions:

"...

431 see supra pp. 64 - 67
(i) courts have a different attitude examining the extent of formal rulemaking and adjudication on one and informal rulemaking on the other side and (ii) courts make a thorough distinction between the factual and the legal control of the agency action.\textsuperscript{432}

to (i): Whereas the formal rulemaking and formal adjudication are examined by the substantial evidence test the APA does not require that the informal rulemaking has to be examined by the substantial evidence test but only whether it is arbitrary and capricious.\textsuperscript{433} The organic act of the respective agency sometimes requires that the informal rulemaking has to be examined by the substantial evidence test.\textsuperscript{434} Though enacting an informal rule the agency has to obey certain procedural requirements\textsuperscript{435} the APA nevertheless makes a distinction to the formal rulemaking where procedural requirements are also required and puts the informal rulemaking and the informal adjudication on one side.

\textsuperscript{432} see supra p. 104

\textsuperscript{433} supra p. 110; R. Dolzer, supra note 27, p.589

\textsuperscript{434} Pierce/Shapiro/Verkuil, supra note 24, p. 339

\textsuperscript{435} see supra pp. 94/95
As there is only a "brief explanation" required\textsuperscript{436} making an informal adjudication there is no substantial standard upon which a court could review.

to (ii): What is quite significant is the difference between the two legal systems concerning the review of the procedural requirements and the content of the respective action.\textsuperscript{437} Because the main focus of the administrative courts in Germany is the "subjective right" which might be harmed they examine the legal and the factual issues. As in the U.S. "due process of law" is a constitutional demand courts primarily examine whether the procedural requirements have been observed. Reviewing an agency decision courts often defer to the special knowledge of the respective agency not only concerning factual but sometimes also legal questions.\textsuperscript{438} Therefore the american courts reviewing administrative actions put more weight on their examination of the observance of the procedural requirements whereas the german courts examine the factual issues, too.

\textsuperscript{436} supra p. 105

\textsuperscript{437} see: R. Dolzer, supra note 27, p. 580; H. Jarass, supra note 38, p. 383

\textsuperscript{438} H. Jarass, supra note 38, p. 386
B) Reasons for those Differences

As has been mentioned and explained there are several differences concerning the judicial review of administrative actions deriving from the historical developments and cultural attitudes towards the political and legal systems. The reasons for constructing the respective political system are very much reflected in the realization of the possibilities of judicial review of individuals against actions of a sovereign acting authority. From what was represented so far it is quite clear that the german legal system tries to ensure an abstract justice for the community of citizens whereas in the United States more weight is put upon justice for the individual.\footnote{This does not necessarily cover all requirements concerning the judicial review of administrative actions/inactions but this is true concerning the aim and purpose of the legal system as such} 

A very thorough and important influence on the system of judicial review of both countries are the different purposes and aims of the administrative agencies. Though the names and sometimes even the assignments are quite similar the purposes, aims and understanding of the tasks of administrative agencies are quite different in the United States and in Germany. 

Whereas in both countries the administrative agencies execute the laws agencies in Germany are "politically
neutral" and agencies in the United States are "political tools" of the executive branch. This is a very important difference concerning the understanding and the realization of the judicial review of administrative actions in both countries. Helping the President to execute the laws agencies have to have broad discretionary authority in deciding how they will reach certain goals and fulfill certain tasks. "This participation in the political process very often makes an administrative agency's action unreviewable as the agencies have this very broad discretionary power. In Germany administrative agencies do not have discretionary power to the same extent which - as a result - leads to a narrow and strict judicial review. This "close" or "strict" judicial review is not only a result of the fact that the agencies do not have very much discretionary power but this is also an answer to historic experiences to ensure that actions of an agency acting for the sovereign power can be supervised.

The review of agency decisions, actions and inactions is more extensive in Germany as all actions and inactions are judicial reviewable and the agencies do not have very much discretionary power.

Though there is the presumption of reviewability in the United States this is only a presumption which can be

"without broad discretionary power agencies would execute the laws for Congress and not for the President"
rebutted so that there is not necessarily the possibility to review an agency action. The same is true concerning the judicial review of administrative inaction. While all inactions can be reviewed in Germany there is the presumption of unreviewability of inactions in the United States. Concerning the reviewability or unreviewability of agency inaction the organic statute of the agencies seem to be the reason for the different attitudes towards the review. While the organic act in Germany lists and defines the respective agency’s powers and especially the tasks it has to fulfill the organic statutes in the United States grant broad discretionary power to the agencies while authorizing them to execute the laws without explicitly ordering to do certain tasks.

In Germany an administrative agency has to fulfill explicit orders of the legislator which can be enforced by individuals if the respective statute the agency is dealing with gives the individuals a subjective right while the american agencies usually are enacted to solve a certain national problem or to achieve a certain goal without explicit standards about how the goal should be achieved. Reason for these different attitudes is the fact that the american administrative agencies are a part of the political process whereas the german agencies are not a part of the political process. Furthermore an extensive possibility to obtain judicial review is guaranteed in Germany to
correspond to the rule of law as the main principle of the legal system. As agency decision in the United States may contain political contents courts are very likely to defer to agency actions where the agency used discretion. Concerning discretionary decisions the American courts very much are "bound to legislative policy decisions". A significant problem for the courts in the United States can be the difficulty to find out to what extent Congress intended to delegate discretionary power to an agency. While the use of discretionary power may be the exception in Germany the search for the "law to apply" and a "meaningful standard" can be main problems for an American court. Regarding the differences between the two legal systems concerning the timing of judicial review the historic experiences and attitudes are very clear. Whereas in the U.S. the strict obedience of the separation of powers is most important in this situation the individual is the

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441 Pierce/Shapiro/Verkuil, supra note 24, p. 115

442 see supra p. 81

443 as a response to the mingling of powers and the very closely connected possibility of arbitrariness and injustice as experienced with a monarchy and the various other political systems from which the people fled
most important object in the legal system in Germany.444
To avoid the possible interference with a different branch
courts in the U.S. review only final agency decisions
whereas German courts (responding to the constitutional
demand of an efficient protection445) do interfere with
administrative agencies to maintain certain conditions and
rights of the individuals.
The historical development and cultural attitudes towards
the judicial review are very clear, too, concerning the
scope of review. Whereas in Germany courts may review the
factual and the legal issues courts in the U.S. review the
legal questions. As the "due process of law" is a
constitutional demand courts examine whether the individual
has had the legally required procedures. The factual issues
are facts to which the courts in most cases defer to the
agencies special knowledge. The individual is responsible
for his actions and for the government the majority chose
and the judicial branch is responsible to guarantee a fair
procedure but not the contents of decisions having political
contents.

444 to avoid the possibility that unjust or illegal sovereign
actions may cause an irretrievable situation; as a response
to the 3rd Reich there has to be the possibility to obtain
judicial review before it might be too late; see:
P. Kirchhoff, supra note 102

445 guaranteed through GG art 19 (4)
As very many mistakes can be made because of wrong judgements of factual issues courts in Germany do control the factual issues and with that the sovereign power and its obedience to the constitutional demands.

C) Conclusion

As was to be expected there are not only differences but there are also similarities concerning the judicial review of administrative actions in the american and the german legal systems.

The differences correspond to the countries' historic experiences and the different attitudes towards the political system whereas the similarities correspond to the general aim of the judicial review: the protection of the individual and the democratic values.

What is very obvious is that the different attitudes towards the respective political system are reflected in the administrative agencies and the review of their actions. "Learning by experience" seems to be what constitutes the eminent differences between the two legal systems. The different historic experiences cultivate the attitudes towards the purpose of the political and legal systems.
These systems are built to especially manifest the certainty to avoid certain mistakes in the future that have been made or experienced in the past.

One society establishes a political and legal system where the individual is the main focus whereas the other establishes a legal system to protect the democratic system. While in Germany the main weight is put upon the strict and correct application of the law the most important object in the American legal system is the individual and his/her personal freedom. The very strict use of the legal system in Germany does not offer many possibilities to judge and respect cases on an individual basis whereas in the U.S. the consideration of the individual problem is very important. Laws in Germany are enacted to serve the system while in the U.S. the laws are enacted to serve the individual.

Also as a historical experience there is a very strict obedience to the separation of powers in the United States whereas the executive and legislative branches are closely connected in Germany. As a result of this and because they are a part of the executive administrative agencies in the United States fulfill different tasks than the German agencies. Because of these different tasks individuals in both countries are in different positions as addressee’s of administrative agencies actions. Whereas in Germany the main focus of the agencies is the individual in the United States
the addressee of agency actions very often is the general public. This leads to different attitudes and necessities to control the agency actions which are reflected in some of the different requirements and possibilities of the judicial control of the administrative agencies actions.

Though there are differences not only concerning the judicial review but also the purpose of the administrative agencies there nevertheless are similarities in the way the legal systems try to achieve the main goals of the judicial review: the protection of the individual and the control of the powers.
APPENDIX:

1) Explanation of some German legal terms:

GG = german constitution (Grundgesetz)
the name Grundgestz and its formally correct translation
"Basic Law" aims at the intent of the "fathers" of the
constitution that this constitution should be preliminary
until the country would be reunified and when the german
nation as a whole could enact a constitution. Therefore
they hesitated to name it "German Constitution" to
respect the feelings of the people who were not able to
enact a democratic constitution. Though "Basic Law" may
be the formal correct translation it does not reflect the
intent of the word "Grundgesetz". This name means that
this law will be the fundamental law, the foundation of a
new constitutional beginning.
After the reunification of Germany on October, 3rd 1990,
there was a commission of members of Parliament and
Senate evaluating whether new articles or changes on the
Grundgesetz would be necessary. This commission was
required by Art. 5 of the reunification - treaty of the
18.05.1990 between East- and West - Germany signed. This
commission - ending its work on July 1st, 1992 - came to
the conclusion that no new constitution or great changes
would have to be made (see the discussion of the result
of the commission: J.Isensee "Mit blauem Auge
davongekommen - das Grundgesetz" in: Neue Juristische
Wochenschrift 1993,2583)
**VwGO** = rules of the administrative courts / legal proceedings (Verwaltungsgerichtsordnung)

**VwVfG** = general rules of the different possibilities in which the administrative agency can act

**BVerfG** = Federal Constitutional Court [F.C.C.]
(Bundesverfassungsgericht) - the only court in Germany whose decisions can be law, sec. 31 II BVerfGG; this Court consists of two chambers, in each chamber there are eight Justices; the Justices do not have life tenure but are appointed for 12 years and can not be appointed again

**BVerfGE** = collection of the decisions of the BVerfG

**BVerfGG** = act that sets up the procedural rules, requirements and structure for the Fed.Con.Court (Bundesverfassungsgerichtsgesetz)

**BVerwG** = Federal Administrative Court (Bundesverwaltungsgericht); this is the only federal administrative court and the highest court deciding on administrative law

**BVerwGE** = collection of the decisions of the BVerwG

**VGH** = higher administrative court, (Verwaltungsgerichtshof); in some states the higher administrative court is called Oberlandesgericht (OLG)

**Verwaltungsgericht** = administrative court (VG); the "lowest" court dealing with administrative law

**ZPO** = code of civil procedures (Zivilprozessordnung)
admissibility = whether a lawsuit is successful depends on two questions: the first part is a formal examination where the judges examine whether a legal right of the plaintiff could be hurt, whether standing, timing and exhaustion are fulfilled, in short, whether the plaintiff has the right to sue; in the second step the merits of the case are examined; the first step is called admissibility (Zulaessigkeit)

success = legally justified claim; a lawsuit is successful if the examination of the merits of the case prove that either the agency hurt a legally guaranteed right of the plaintiff or if the plaintiff has a legal right to demand a certain action of the administrative agency

provisional judicial review = especially because of the rule of law - GG art 20 (3) - and the principle of the efficiency of the protection by law - GG art 19 (4) - the german parliament enacted rules - sec. VwGO 80, 80a, 123, 47 (8) - which make it possible for plaintiffs to achieve a quick provisional / interlocutory judgement if it is necessary to prevent a severe damage when the "usual" judicial relief would take too long to guarantee an efficient protection of the endangered guaranteed right.

preventive judicial review = this remedy is not explicitly written down in the VwGO but is a requirement of GG art 19 (4) and the principle of the efficient protection by law and tries to protect a special legal interest [BVerfGE 40, 323, 326] which is endangered if an agency would enact a certain impending act or rule

Vorverfahren = (pretrial review) most remedies (except those that explicitly require an instant judicial
relief or where the statute does not require a pretrial review) require that the citizen who wants to take legal action files a complaint at the administrative agency against which the citizen plans to take legal action, VwGO § 68 (1).

Different than in the US administrative agencies there is no Administrative Law Judge but the "ordinary" civil servants try to solve or reject the complaint.

During this pretrial review of the administrative agency the act, order or rule may not be implemented or enforced, VwGO sec. 80,80a.

Allgemeines Rechtsschutzbuduerfnis = legitimate interest to take legal action; necessary as a prohibition of the misuse of procedural rights (derived from the principle of good faith ("Treu und Glauben" sec 242 BGB[=Civil Code])

As everybody has the legal right to go to court people nevertheless have to show that they are affected by the act or that they have legal interests which can be damaged if they are not taking legal actions

subjektive Rechtsverletzung = infringement of a right; VwGO sec 42 (2) demands that there has to be the plausible possibility of an injury of a subjective legal right / norm which is guaranteed to the individual. Because the subj. Rechtsverletzung is examined in the first part (admissibility) of the judges examination he has to look whether there is the likely chance and plausible possibility that the individual is hurt through the act/order of the agency. The question whether he really is hurt is a question of the second part (success of the lawsuit)

Klageart suis generis = developed out of the guarantee of legal protection of GG art 19 (4) and VwGO sec. 40
therefore there is the possibility to take legal action before an administrative court if the subject/act/rule is one of public law (without being constitutional law) and if the other requirements are fulfilled even if a certain lawsuit is not explicitly guaranteed.

**formal/objective legitimacy (of the order/act)** = there are certain forms and procedures that have to be respected by the agency before it acts in a certain way which are required by law to ensure equal treatment and reliance in the procedure in which the agency decides to act and in the sovereign in general. If there have been mistakes in this formal part the order/act is void. If these formal procedures have been used in the correct way by the agency the second question is whether the legal rights of the addressee of the act/orde have been hurt without a justification.

**subjektives oeffentliches Recht** = subjective public right; there is a classification of legal rights in Germany:
(a) the subjective public right is a public legal right given to the individual written down in statutes; with this subjective public right he/she can demand a special action/inaction from the government or the agencies acting for it. It has to be made plausible that a subjective public right may be harmed through the administrative agency action, VwGO § 42 (2), as one of the requirements to be admitted to court. Not everybody has the same subj. public rights because these rights protect different things like e.g. property, a certain living area, entitlement to a special building permission etc.
(b) an objective legal right is not something an individual can demand a certain action or protection from. Objective legal rights just describe or regulate certain things which are necessary to obtain in a society but which give no
legal title to anybody to demand a certain action from an agency or the government

administrative act = a special legal term in Germany; the administrative act is the type of action the agencies choose to use in most cases; an administrative act (defined in VwVfG § 35) is directed at an individual or a small group of people (which still can be individualized) and either orders the individual/group to do something or benefits the adresse. An administrative act is legally binding.
2) Selected Articles from the Grundgesetz:

Art 19 (Restriction of basic rights):

(1) In so far as a basic right may, under this Basic Law, be restricted by or pursuant to a law, such law must apply generally and not solely to an individual case. Furthermore, such law must name the basic right, indicating the Article concerned.

(2) In no case may the essential content of a basic right be encroached upon.

(3) The basic rights shall apply also to domestic juristic persons to the extent that the nature of such rights permits.

(4) Should any person's right be violated by public authority, recourse to the court shall be open to him. If jurisdiction is not specified, recourse shall be to the ordinary courts."

Art 20 (Basic principles of the constitution - Right to resist):

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs.

(3) Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice.
(4) All Germans shall have the right to resist any person or persons seeking to abolish that constitutional order, should no other remedy be possible.

Art 79 (3) = Amendments of this Basic Law affecting the division of the Federation into states, the participation on principle of states in legislation, or the basic principles laid down in Articles 1 and 20, shall be inadmissible.

Art 1 (Protection of human dignity)

(1) the dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basic of every community, of peace and justice in the world.
(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.
3) Bibliography:


Mashaw/Merrill/Shane:


Murphy, R.:


Nagareda, R.:


Pierce, R/Shapiro, S/

Verkuil, P.:


Powell, R.:


Robinson, G.:


Rodgers, W.:


