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The Use of Discovery Sanctions in Administrative Agency Adjudication

Present federal administrative adjudication closely resembles the complete adversary process of the federal judiciary created by the promulgation of the Federal Rules of Civil Procedure (FRCP) in 1938. In the 1960's, administrative agencies began to adopt more liberal discovery rules for the post-complaint period of the agency proceeding. For example, the Federal Trade Commission (FTC) adopted a continuous hearing policy in 1961 providing that agency hearings be held without interruption until their completion. Prior to the adoption of that policy, FTC adjudicative proceedings were held at intervals in various locations across the country, providing the litigants with sufficient time to prepare their cases for the next segments based on what had occurred at previous hearings. Thus, there was no practical need to provide for pre-trial discovery before the continuous hearing policy was adopted. Also, support was growing for the proposition that administrative proceedings, like judicial proceedings, should be as efficient as due process and fairness allow. To accomplish this, agency proceedings must be conducted with "free access to relevant evidence, or to information which may lead to the development of such evidence."

Since the development of more liberal discovery policies for agency adjudication, several commentators have urged that administrative agencies adopt the entire discovery provisions of the Federal Rules. Many agencies have incorporated much of the Federal Rules for discovery, including discovery sanctions similar to FRCP 37(b)(2), under the authorization of provisions of their

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1. The "post-complaint period of the agency proceeding" refers to the time period after an official complaint is issued and before the administrative adjudication process reaches the "proceeding" or trial stage.
3. Id.
4. Id. at 443-44. See generally Goldberg v. Kelly, 397 U.S. 254 (1970). In that case the Court held that due process required that recipients of financial aid under the Aid to Families with Dependent Children program, like welfare recipients, be given a full evidentiary hearing before the termination of benefits. Goldberg, 397 U.S. at 261. More liberal agency discovery rules soon followed to help facilitate the full evidentiary hearing process and to meet the requirements of due process.
6. The possible sanctions a district court judge may impose upon a recalcitrant civil litigant include, but are not limited to the following:
   (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action.
enabling acts. However, the use of discovery sanctions in administrative adjudication has received mixed rulings from the federal courts. The Ninth Circuit has held that administrative law judges (ALJ's) cannot constitutionally use discovery sanctions, while at least three other circuits have allowed ALJ's to employ discovery sanctions similar to FRCP 37(b)(2). This Note examines whether ALJ's should have authority to impose discovery sanctions against civil litigants for refusal to comply with an ALJ's discovery order; whether Congress may constitutionally grant administrative adjudicative bodies this power; and whether Congress actually has enacted a statutory scheme empowering ALJ's to utilize discovery sanctions. The analysis of the issues will show that discovery sanctions are an important adjudicative tool for ALJ's to possess, and that their use survives constitutional and statutory challenge.

**Policy Considerations**

Prior to promulgation of the Federal Rules in 1938, pleadings were basically the only basis for trial preparation in federal courts. The new rules allowed much greater preparation for trial through various discovery devices including depositions, written interrogatories, production of documents, in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; (E) Where a party has failed to comply with an order under Rule 35(a) [order to submit to a physical or mental examination] requiring him to produce another for examination; such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

8. The three circuits are the First, Fifth, and the District of Columbia. _See infra_ notes 70-74 and accompanying text.  
11. _Id._ R. 33.  
12. _Id._ R. 34.
and requests for admissions. In 1946, FRCP 26 was amended to clarify that proper pre-trial discovery includes any relevant inquiry "calculated to lead to admissible evidence," not just inquiries limited to evidence admissible at trial; and in 1970, FRCP 34 was amended to eliminate the requirements that a party show good cause why discovery should take place, and that a party obtain a court order for the production of documents. Discovery in the federal courts is thus designed to function without court intervention. If court participation is required, disobedience of discovery orders of a federal judge by a civil litigant subjects that party to possible sanctions under the provisions of FRCP 37(b)(2). These sanctions allow the court to "make such orders in regard to the failure [to obey a discover order] as are just." In contrast to litigation conducted in the federal courts, the discovery procedures of administrative agencies often mandate "the direct involvement of the administrative law judge at each step in the discovery process." Also, until the recent enactment of agency rule changes, another major difference between the federal courts and administrative adjudicative proceedings was the use of sanctions against civil litigants by federal courts for unjustified failure to comply with discovery orders. Since 1975, however, several agencies have assumed the power to utilize discovery sanctions patterned after the FRCP 37(b)(2) sanctions. Agency regulations do not allow contempt findings or fines as sanctions, but the ALJ is empowered to "take such action . . . as is just" and is given sanctions to be at his disposal. The use of

13. Id. R. 36.
16. Bennett, supra note 5, at 331.
18. Bennett, supra note 5, at 331.
20. Id.
21. For example, FTC Rule 3.38 provides in part:
   (b) If a party or an officer or agent of a party fails to comply with a subpoena or with an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions; or an order of the Administrative Law Judge or the Commission issued as, or in accordance with, a ruling upon a motion concerning such an order or subpoena or upon an appeal from such a ruling, the Administrative Law Judge or the Commission, or both, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:
      (1) Infer that the admission, testimony, documents or other evidence would have been adverse to the party;
      (2) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;
      (3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent,
discovery sanctions by an ALJ could be a valuable and indispensable tool for conducting a fair and efficient proceeding. As one commentator put it, "[i]n these times of increasingly protracted and complex administrative adjudicatory proceedings, the proper and efficient use of pre-trial discovery to develop relevant evidence becomes a critical factor in minimizing delay both in the pre-trial and trial stages of a proceeding." Just as the federal judiciary utilizes FRCP 37(b)(2) to ensure the fairness and efficiency of the discovery process and the actual trial, it may be desirable for ALJ's to acquire this control of administrative proceedings and discovery processes to ensure fairness and efficiency.

To some extent Congress has created administrative tribunals to supply governmental supervision over various types of economic enterprise such as transportation, communication, labor, and commerce. This type of administrative regulation cannot be accomplished through self-executing legislation or by judicial bodies because of the detailed expertise necessary to regulate these complex areas. Agencies, therefore, "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."

Through pre-trial conferences, issuance of discovery orders and subpoenas, and the use of discovery sanctions, federal judges have the ability to move cases along the adjudicative path. Since an ALJ has the authority to conduct pre-trial conferences and issue discovery orders and subpoenas, as is conceded by most critics of the use of discovery sanctions by ALJ's, the ALJ should also have immediate authority to force compliance of his discovery orders and subpoenas to protect the integrity of the hearing process. The First Circuit recognized this interest in NLRB v. C.H. Sprague & Son Co.. There the court allowed the ALJ to rule that the company, by refusing to produce subpoenaed material, forfeited its right to cross-examine witnesses with respect to any matter that could have been shown by the company's compliance with the subpoena because any other result would have jeopardized the "integrity of the hearing process" itself.
If ALJ’s are given some but not all the essential authority of a federal judge during the discovery process, administrative decisions will be plagued by problems of delay, and there will remain a loophole for dilatory trial tactics that could be closed by the use of discovery sanctions.28 One commentator recommends that “agencies establish procedures . . . whereby control of proceedings is placed squarely in the agency . . . with appropriate sanctions against parties who fail to comply.”29 Administrative agencies have experienced difficulty during the pre-trial stage of an adjudicative process when one party refuses to cooperate with discovery orders by not exchanging information.30 The ALJ needs to have the ability to control the proceeding to guarantee that all parties exchange discovery and obey all the necessary discovery orders made during the pre-trial stage.

One commentator opposed to an ALJ’s authority to impose discovery sanctions points out that the ALJ already has indirect control of the administrative adjudicatory proceedings because he can ask a federal district court to issue an order compelling the discovery.31 Seeking district court enforcement every time a party ignores a discovery order, however, is more expensive, cumbersome, and time-consuming than the administrative procedure.32 It also undercuts the efficiency and fairness of the administrative adjudicatory process, especially if the agency is faced with a particularly recalcitrant party whose major litigation strategy is delay. Such delay is inimical to the public interest and should not be tolerated within the administrative adjudicatory structure.33 As the District of Columbia Circuit noted in UAW v. NLRB34 “delay is especially troubling because it allows the party charged with committing an unfair labor practice to harass or injure the charging party with relative impunity by prolonging adjudication. . . . [T]he willful violator who acts in bad faith has the power to postpone any relief for four or five years.”35 In UAW v. NLRB, the party refusing to comply with discovery had successfully delayed the administrative process for seven years.36

Moreover, an ALJ becomes very familiar with the case, and can better determine the propriety of an objection to a discovery order than can a federal judge, who is initially faced with a complex matter when the ALJ seeks en-

29. Id. at 327.
31. See generally Williams, supra note 25, at 755-56. (Williams discusses how Congress has provided for the FTC to seek district court enforcement of its orders to obtain compliance.)
32. See Uniroyal, 482 F. Supp. at 373. See also UAW, 459 F.2d at 1339.
33. Tomlinson, supra note 5, at 106.
34. 459 F.2d 1329 (D.C. Cir. 1972).
35. Id. at 1347.
36. Id. at 1332.
forcement of the discovery order in district court. Utilizing a federal district court every time a discovery order is contested burdens the administrative process by undermining its intended simplicity, fairness, and efficiency.

A final factor militating in favor of allowing ALJ's to employ discovery sanctions is the low standard of review a federal judge uses in determining whether to grant an agency's request for enforcement of a subpoena. For example, the Second Circuit, in \textit{NLRB v. Frederick Cowan and Co., Inc.}, held that a district judge ruling on a request for enforcement of an NLRB subpoena should "undertake only an extremely limited inquiry. No defense relating to the administrative proceeding can be raised, and the agency need not even show probable cause to believe that the law has been violated." The Seventh Circuit also has established the same standard:

Duly issued subpoenas are to be enforced if the agency is seeking information "not plainly incompetent or irrelevant to any lawful purpose." And, the essential requirement [in] both the issuance and enforcement of . . . [an agency] subpoena is that the production of the evidence or the giving of the testimony called for by the subpoena must relate to a "matter under investigation or question.''

This enforcement mechanism is merely superficial, routine in nature, and performed by a judge unfamiliar with the administrative proceeding. Thus, to ensure the integrity of the administrative adjudicatory process, fairness to private parties, and administrative efficiency, ALJ's should have the authority to utilize discovery sanctions patterned after FRCP 37(b)(2).

\section*{The Constitutional Obstacles}

Although there are strong practical reasons for empowering an ALJ with the authority to use discovery sanctions, two constitutional obstacles must be addressed. The first is a due process argument that private parties are deprived of their right to a fair and full adjudicatory proceeding if an ALJ can impose discovery sanctions without the private party having the benefit of a hearing before a federal district court to air objections to the ALJ's discovery order. The other constitutional argument, based on the doctrine of separation of powers, is that discovery sanctions are judicial in nature and, consequently, cannot be vested in administrative adjudicative bodies. While forceful, these constitutional arguments fail to prove that administrative

\begin{thebibliography}{43}
\bibitem{Uniroyal} \textit{Uniroyal}, 482 F. Supp. at 373 n.19.
\bibitem{Frederick Cowan} 522 F.2d 26 (2d Cir. 1975).
\bibitem{C.C.C.} \textit{Id.} at 28. \textit{See also} \textit{NLRB v. C.C.C. Associates, Inc.}, 306 F.2d 534, 538 (2d Cir. 1962).
\bibitem{Williams} \textit{NLRB v. Williams}, 396 F.2d 247, 249 (7th Cir. 1968).
\bibitem{International Medication Systems} \textit{NLRB v. International Medication Systems}, 640 F.2d 1110 (9th Cir. 1981); \textit{Williams, supra} note 25; \textit{see generally} Kintner, \textit{Discovery In Administrative Adjudicative Proceedings}, 16 \textit{Ad. L. Rev.} 233 (1964).
\bibitem{Williams 25} \textit{Williams, supra} note 25, at 744.
\end{thebibliography}
tribunals may not be empowered with discovery sanctions similar to FRCP 37(b)(2).

**Due Process**

Under the Federal Rules, a party desiring discovery in a federal district court proceeding merely files his intent. Judicial intervention occurs only if the party against whom the discovery is sought refuses to respond to the discovery request. If a party does not comply with a discovery request, the resisting party must show good cause why discovery should not take place.

On the other hand, under most agency rules, application must be made to the ALJ each time discovery is sought, and the party seeking a subpoena for discovery has the burden of showing the general relevance and reasonableness of the scope of the discovery sought. If the party against whom the discovery is sought then refuses to comply, the requesting party may petition the ALJ to compel discovery; the burden is on the objecting party to show why discovery should not take place.

This type of agency adjudicatory scheme is not identical to the procedure in federal district courts outlined above; but where it is different, the administrative process seems to give greater procedural protection to the party opposing discovery than does the federal judiciary practice. Not only does the objecting party have the opportunity to challenge the discovery request once it has been made, but also, the requesting party must initially go before the ALJ to show good cause why discovery should take place. This type of administrative adjudicatory scheme is, at least on its face, completely consistent with the full and fair adjudicatory process of the federal courts.

Since the discovery process of administrative bodies at the very least meets the procedural safeguards of the discovery process in the federal courts, and since the ALJ is very familiar with the controversy and the refusing party’s objection, the imposition of discovery sanctions by an ALJ does not offend

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44. Fed. R. Civ. P. 26. FRCP 35 is one exception to this process. “When the mental or physical condition . . . of a party . . . is in controversy, the court . . . may order the party to submit to a . . . examination by a physician. [However,] [t]he order may be made only on a motion for good cause made by the party requesting the examination.” Fed. R. Civ. P. 35(a).
45. Fed. R. Civ. P. 26(c). The court will look to see if a party or person needs to be protected from annoyance, embarrassment, oppression, or undue burden or expense. Id.
47. FTC Rule 3.38, 16 C.F.R. § 3.38 (1983); FCC Rule 323, 47 C.F.R. § 1.323 (1981). For example, FTC Rule 3.38(a) provides in part:

A party who has requested admissions or who has served interrogatories may move to determine the sufficiency of the answers or objections thereto. Unless the objecting party sustains his burden of showing that the objection is justified, the Administrative Law Judge shall order that an answer be served. If the Administrative Law Judge determines that an answer does not comply with the requirements of these rules, he may order either that the matter is admitted or that an amended answer be served.
due process requirements. A district court judge is not very familiar with the controversy, and will only be able to make a limited inquiry to ensure that the order is relevant to the administrative proceeding before compelling discovery. Not only is the ALJ more cognizant of the overall situation and considerations involved, but also his authority would be undercut without the accompanying power to compel the production of documents, the answering of interrogatories, and other discovery orders.\footnote{48

The final link in the due process chain is that judicial review ultimately inheres in every agency adjudicative proceeding. Agency adjudicative proceedings must conform with the due process requirements of the fifth amendment,\footnote{49} and whether an agency satisfies the demands of due process is an appropriate question for judicial review.\footnote{50} On such review, the court may correct any errors of law that occurred during the agency proceeding.\footnote{51}

A party who has had discovery sanctions imposed against it and loses the administrative proceeding may still appeal to the federal courts. There is no violation of due process by not having a district court determination of a party's duty to comply with a discovery order prior to the finish of a proceeding if two considerations are met. First, before imposing sanctions, the ALJ must conduct a hearing on the objections to a discovery order in a manner consistent with due process requirements. As previously discussed, this requirement is satisfied. Second, the party must be able to appeal the final result of the administrative proceeding to a federal court.

There is some question as to the adequacy of judicial review of discovery sanctions already imposed by an ALJ.\footnote{52} According to one commentator, "[t]he trouble with review of [agency] sanctions is that the adverse rulings are likely to be buried in a massive agency record, resulting in a final order reviewable under the liberal substantial evidence test."\footnote{53} Still, this scheme for review of discovery orders and sanctions is not unlike the type of review an appellate court would undertake in hearing an appeal of the final decision of a federal district court. An ALJ should not be denied the ability and discretion to use discovery sanctions to protect the integrity of the administrative process, which

\footnotesize{\begin{itemize}
\item 49. P.S.C. Resources, Inc. v. NLRB, 576 F.2d 380, 386 (1st Cir. 1978).
\item 51. Id. at 145.
\item 52. At least one commentator, Williams \textit{supra} note 25, at 755, believes that it is not enough that the discovery sanction imposed by an ALJ will be subject to judicial review. "Exercise of [discovery sanctions] against a party resisting an agency inquiry in good faith deprives it of due process, of the right to judicial determination of the duty prior to the deprivation of life or of property for the failure to respond." However, federal court determination of a duty to comply with discovery orders is not a constitutional mandate of due process. The important question in terms of due process is whether the process and procedures of administrative adjudication ensure a full and fair hearing for a party objecting to discovery orders, and give the objecting party access to judicial review at the close of the proceeding. \textit{See supra} text accompanying notes 48-52.
\item 53. Williams, \textit{supra} note 25, at 757. The substantial evidence test allows a reviewing court to affirm the final outcome of an administrative adjudicatory proceeding if it is substantially supported by the weight of the evidence.
\end{itemize}}
otherwise conforms with the requirements of due process, merely because a reviewing court does not rigorously examine each and every discovery order. While "it is well settled that Congress may not authorize any enforcement scheme that denies a right to judicial review," this administrative scheme does not deny a right to review. In fact, it may be even more review than a party objecting to a discovery order would have received by having a federal court make a limited inquiry into the propriety of a discovery order before a final determination. The use of discovery sanctions, then, should survive a due process challenge. Even if a court finds some defect in the procedural scheme of some administrative agency, that defect could easily be resolved by further agency rule promulgation or by statutory action by Congress.

Separation of Powers

In addition to the due process issue, there exist two other constitutional problems based on the separation of powers doctrine. The first consideration involves the Supreme Court's holding in ICC v. Brimson. Brimson raises questions about the use of any type of discovery sanction in administrative adjudicatory proceedings. The second problem involves the Supreme Court's interpretation of article III of the Constitution.

In Brimson, the Court held that Congress could authorize and require circuit courts to use their process in aid of inquiries before the Interstate Commerce Commission. The Court reasoned that use of the federal judiciary

54. See supra note 49.
55. Williams, supra note 25, at 757. The Ninth Circuit in NLRB v. International Medication Sys., 640 F.2d at 1110, 1115 (9th Cir. 1981) used Williams' article as authority when it wrote: Although courts can only impose Rule 37(b)(2) sanctions after ruling on all objections, and then only for disobedience of a judicial order compelling discovery, an agency imposing such sanctions asserts that for disobedience of its orders directing discovery, it can impose the sanctions first and let the judicial questions be asked later. Again, this ignores the fact that agencies such as the FTC, FCC, and NLRB employ procedural schemes that allow the party opposing discovery orders to present its objections to an ALJ. See, e.g., FCC Rule 323, 47 C.F.R. § 1.323 (1981). Thus, these "judicial questions" are answered first and are also reviewed later by a court.
57. Obviously there are many administrative agencies which conduct hearings. This Note does not purport to accomplish a comprehensive review of all agency procedural rules. The emphasis in this Note is on the FTC, FCC, and NLRB, three agencies that have been in the forefront of agency adjudication.
58. See, e.g., Federal Maritime Commission v. Anglo-Canadian Shipping, 335 F.2d 255 (9th Cir. 1964). In that case the court held that the Federal Maritime Commission did not have the authority to order the production and copying of documents based on its general rulemaking statutory enabling act. Id. at 261. Shortly thereafter, Congress enacted legislation specifically providing the Federal Maritime Commission with that power. Tomlinson, supra note 5, at 94.
59. 154 U.S. 447 (1894).
60. In Brimson the Court had before it the question of the constitutionality of a portion of the Interstate Commerce Act which required the circuit courts to help enforce the Commission's proceedings upon application of the ICC. Id. at 449. The circuit court refused to issue an order compelling the production of evidence pursuant to the Commission's request. Id.
was permissible because an agency "could not, under our system of government, and consistent with due process of law, be invested with the authority to compel obedience to its orders by a judgment of fine or imprisonment." At least one court and one commentator interpret such reasoning to mean that "challenges to agency subpoenas must be resolved by the judiciary before compliance can be compelled" because "[i]mplicit in the Court's holding is the concept that the power to enforce the agency's subpoena [is] an exclusively judicial function." Arguably, Brimson not only precludes administrative fines or imprisonment, it denies the existence of any inherent power in the federal agencies to enforce their own processes. This rationale is based on the premise that discovery sanctions are an inseparable part of the judicial power, and that to "vest this power in agency officials, who are a part of the executive and legislative branches, presents a serious threat to our system of checks and balances."

Stretching Brimson beyond its specific holding that barred the sanctions of imprisonment and fine, however, is much too broad a reading. Brimson is over eighty-five years old, and to expand its meaning would be to disregard the changes in administrative structure and procedure that have occurred in this century. During the past two decades congressionally-sanctioned and Court-approved growth of administrative adjudication and procedure has taken place. Administrative courts and their presiding officers conduct civil-type trials, issue subpoenas, and adjudicate the rights and liabilities of parties. Additionally, neither contempt nor an award of expenses is an available agency sanction, and during the past decade several circuits have endorsed the ALJ's use of other discovery sanctions such as the use of adverse inferences, striking a recalcitrant party's defense, a default-like judgment, precluding the introduction of secondary evidence by a recalcitrant party, and barring the rights to cross-examine on matters related to the contested discovery or to object to the use of secondary evidence by the party who requested discovery. Supreme Court reversed and held that a civil enforcement proceeding was a matter to which judicial power extended and a matter to which Congress could authorize the courts to act. Id. at 485.

61. Brimson, 154 U.S. at 485.
63. Williams, supra note 25.
64. International Medication Sys., 640 F.2d at 1115-16.
65. Williams, supra note 25, at 754.
66. Id.
67. Id. at 768. The premise of this line of argument is that the power to impose discovery sanctions is directly derived from the contempt power of courts and their inherent power to protect their own authority and process. See Williams, supra note 25, at 744-52 (historical argument of the judicial nature and origin of all discovery sanctions).
69. See supra note 21.
70. UAW v. NLRB, 459 F.2d 1329 (D.C. Cir. 1972).
71. Id. Actually the court itself imposed the sanction of striking the recalcitrant party's defense, but only because the agency itself had failed to take this appropriate action against a party who had failed to respond to discovery orders for seven years. Id. at 1347.
73. NLRB v. American Art Industr., Inc., 415 F.2d 1223 (5th Cir. 1969).
The Court's holding in Brimson and the fact that administrative adjudicative bodies are not within the judicial branch raise legal obstacles that prevent ALJ's from having at their disposal the powerful judicial sanction tools of contempt and fines. As one commentator suggested, however, the use of inferences and other similar sanctions against a party for failure to obey discovery orders would be appropriate. Sanctions such as striking defenses related to the requested discovery, drawing adverse inferences, and barring or allowing the introduction of secondary evidence relate directly to the proceeding and go to the essence of the needed discovery. These sanctions ensure fairness in the gathering of evidence, are a natural extension of the administrative adjudicatory process during discovery, and are consistent with the other congressionally-authorized and Court-approved judicial-like powers an ALJ possesses.

On the other hand, the federal contempt power is used not only as a discovery sanction, but also as a device to punish disrespectful parties; it is employed by judges in all areas of a federal civil proceeding, not just in terms of FRCP 37(b)(2) and discovery. Thus, administrative discovery sanctions are modeled after FRCP 37(b)(2) to protect the integrity of the adversary hearing process, but they are not the equivalent of fines and imprisonment reserved to the federal judiciary by Brimson.

The second separation of powers problem involves article III of the Constitution. This problem must be examined by looking at the Supreme Court's interpretation of article III through a line of cases culminating with Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

The Constitution provides for national governmental power to be distributed to the three branches of government and for this power to be checked and balanced between the branches. One such check is "the requirement that courts empowered to adjudicate private rights will consist of judges who are protected in tenure and salary against legislative and executive reactions." The

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75. Kintner, supra note 42, at 237. See generally Charles of the Ritz v. FTC, 143 F.2d 676 (2d Cir. 1944).

76. See supra note 68 and accompanying text.

77. While Brimson can be distinguished on the basis that administrative discovery sanctions are not the same as fine and contempt orders, an argument could be made that Brimson should be deemed overruled sub silentio. The premise of this argument is that, over the passage of time since Brimson, administrative agencies have been granted the judicial powers of conducting discovery and adjudicating the rights of parties, and that several circuits have allowed ALJ's to utilize other discovery sanctions. See supra notes 68-74 and accompanying text. Thus, since agencies are already exercising some judicial powers and utilizing some discovery sanctions, Brimson has no practical value any more. However, this Note does not explore this argument in depth since Brimson can be distinguished.

78. 458 U.S. 50 (1982). Northern Pipeline Constr. Co. is a plurality opinion written by Justice Brennan with three other justices joining in the opinion.

79. Address by Deputy Attorney General Edward Schmults, Federal Bar Association Meeting (Sept. 10, 1982). Article III § 1 of the Constitution provides that:

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at Stated Times, receive for their Ser-
Court in *Northern Pipeline* emphasized the significance of this feature of the Constitution by declaring that "a judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." Article III serves as a guarantee of judicial impartiality, defines the power of the judiciary, and protects the independence of the judicial branch. The Court in *Northern Pipeline* stated that the judicial power of the United States must be exercised by courts having the attributes prescribed in article III. These attributes are that the salaries of the judges must be immune from diminution by Congress, and that the judges must be able to serve for life, subject only to their continued good behavior.

The Court used its article III analysis and the doctrine of separation of powers to emphasize that normally the judicial power of the United States cannot be exercised by a non-article III judge. The Court struck down the bankruptcy court scheme established by Congress as unconstitutional precisely because article III judicial power was being exercised by bankruptcy judges whose salaries could be lowered by Congress and whose terms would only be fourteen years. After declaring the bankruptcy scheme unconstitutional, however, the plurality further elaborated on article III and set out three historically recognized exceptions to article III where non-article III tribunals may exercise judicial power. Therefore, if administrative adjudicatory proceedings come under one of these exceptions, the use of discovery sanctions by ALJ’s would be consistent with the doctrine of separation of powers even assuming *arguendo* that the use of discovery sanctions is inherently a judicial power.

One exception is that the Court has upheld the constitutionality of

vices, a Compensation, which shall not be diminished during their Continuance in Office.

81. Id.
82. Id.
84. In *Northern Pipeline Constr. Co.*, the Northern Pipeline Construction Co. had filed for reorganization in a bankruptcy court and later filed suit against Marathon Pipe Line Co. in the bankruptcy court seeking damages for breach of contract, misrepresentation, and duress. *Northern Pipeline*, 458 U.S. at 56. Thus, all of Northern’s claims were traditional common law claims. Marathon contended that these claims could not be heard by non-article III judges and moved for dismissal. Id. The Supreme Court agreed, declaring that the bankruptcy courts had too broad a grant of power to hear those type of claims and were thus unconstitutional. Id. at 87.
85. The Court held, however, that the bankruptcy courts were not one of these exceptions, and that "Article III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws." Id. at 76.
86. The other two exceptions are the Courts Martial, and the non-article III courts of the United States Territories and the District of Columbia. Id. at 64-66. Also in U.S. v. Raddatz, 447 U.S. 667 (1980), the Court upheld the constitutionality of the 1978 Federal Magistrates Act. That act allowed district court judges to refer certain pre-trial motions to a magistrate for initial determination. *Raddatz*, 447 U.S. at 676. In upholding this scheme, the Court noted that the magistrate’s proposed findings and recommendations were subject to *de novo* review by the district court. Id. at 681-82.
legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights." The Court found the public rights doctrine to be based upon the principle of separation of powers in conjunction with an historical understanding that certain areas are reserved to the political branches of government. In Crowell v. Benson, the Court held that "public rights" means matters arising between the government and persons subject to its authority such as with economic regulation. Many areas exist concerning public rights and their congressional regulations including such matters as interstate commerce, federal communications, national labor relations, and federal trade. The Court in Northern Pipeline stated:

The understanding . . . is that the framers [of the Constitution] expected that Congress would be free to commit such matters completely to non-judicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.

When Congress creates a statutory right, it has the discretion to define the right, create presumptions, assign burdens of proof, prescribe remedies, and assign the matter to a congressionally created tribunal to perform the adjudicative tasks related to the right. These tasks, such as deciding the rights of parties and conducting discovery, are normally performed only by judges. The Court also noted that these adjudicative tasks "affect the exercise of judicial power, but [that] they are also incidental to Congress' power to define the right that it has created." Certainly, the administrative adjudicatory processes of the FTC, FCC, ICC, and NLRB fall under this exception, and these agencies are allowed to exercise judicial functions in carrying out their mandates. The utilization of discovery sanctions to effectuate Congress' intent and to protect the integrity of the process follows from the ALJ's exercise

87. The public rights doctrine was first set forth in Murray's Lessee v. Holboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).
88. Northern Pipeline, 458 U.S. at 67. "Congress' power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose, and to provide for review of those agency decisions in Article III courts." Id. at 67 n.18. See generally Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 450 (1977).
89. Northern Pipeline, 458 U.S. at 67:
90. 285 U.S. 22 (1932).
91. Id. at 50.
92. Northern Pipeline, 458 U.S. at 69 n.22.
93. Id. at 68.
94. Naturally that discretion must be exercised within the bounds of procedural due process.
95. Northern Pipeline, 458 U.S. at 83.
96. Id. See also supra note 68 and accompanying text.
97. Northern Pipeline, 458 U.S. at 83. The Court qualified that by stating that no justification exists if the right being adjudicated is not of congressional creation such as the common-law claims and rights being adjudicated in the bankruptcy courts. Id. at 84. The dissent, on the other hand, suggests that article III and the doctrine of separation of powers is satisfied simply if there is review by an article III court. Id. at 100 (White, J. dissenting).
98. See supra note 68 and accompanying text.
of other judicial functions, and is consistent with article III of the Constitution and the exception for administrative adjudicatory bodies created by the Supreme Court.

"Drawing the line between permissible extensions of legislative power and impermissible incursions into judicial power is a delicate undertaking, for the powers of the judicial and legislative branches are often overlapping."99 However, empowering ALJ's with the authority to impose discovery sanctions should survive constitutional challenge on due process grounds and on separation of powers grounds under article III of the Constitution.

THE STATUTORY AUTHORITY TO IMPOSE SANCTIONS AND A BRIEF CASE HISTORY

Although the Constitution does not prohibit empowering ALJ's with the authority to use discovery sanctions patterned after FRCP 37(b)(2), the question still exists whether Congress has statutorily provided for ALJ's to be vested with that authority. Congress has not enacted a statute specifically empowering ALJ's to use certain types of discovery sanctions, but it has enacted agency enabling acts100 upon which certain agencies, such as the FTC, have predicated their discovery and procedural rules.101 Congress, however, has also statutorily provided that an agency can seek the aid of a federal judicial court to enforce an agency subpoena.102 Therefore, the key issue is the extent to which that statutory enforcement scheme bars an ALJ from using discovery sanctions.

At least one court and one commentator have argued that the negative implication of Congress' enactment of this subpoena enforcement plan is that ALJ's do not have a statutory basis for employing discovery sanctions.103 The Ninth Circuit held that since Congress made elaborate provisions for enforcing NLRB subpoenas, Congress' intent is that the enforcement mechanism be used.104 "We may not infer that Congress intended to authorize agencies to bypass district court enforcement proceedings. An efficient and fair enforcement mechanism105 has been provided and was meant to be used."106

99. Northern Pipeline, 458 U.S. at 83 n.35.
100. See supra note 7.
101. See supra note 19.
103. See Williams, supra note 25, at 756-59; NLRB v. International Medication Sys., 640 F.2d 1110, 1116 (9th Cir. 1981).
104. International Medication, 640 F.2d at 1116.
105. Whether or not it actually is an efficient and fair mechanism is open to some debate. See supra notes 31-40 and accompanying text. In fact, even the Ninth Circuit noted that once an enforcement matter finally gets to the district court, the district court judge may only make a limited inquiry to decide whether to enforce the subpoena. International Medication, 640 F.2d at 1114 n.2.
106. International Medication, 640 F.2d at 1116.
The appellate court concluded that Congress granted to the district courts the exclusive authority to compel compliance with the agency subpoenas. The critics relied upon FMC v. Anglo-Canadian Shipping as a basis for this reasoning. In Anglo-Canadian Shipping, the Federal Maritime Commission brought an action in federal court for enforcement of a Commission order concerning discovery. The issue raised by the respondent was whether the Commission had the authority to promulgate rules for discovery and production of documents. The Ninth Circuit held that “the regulations of an agency of the United States must be issued within the powers conferred by Congress.” The court also held that general rule-making statutes, such as statutory enabling acts, do not grant to the agency a sufficient basis upon which to predicate discovery rules. The court concluded:

> [I]t seems fair to say that there inheres in discovery procedure involving the prehearing production and copying of documents, a potential impact upon litigants so much greater than that associated with ordinary procedural rules, that the failure of Congress to affirmatively authorize the same should be taken as a deliberate choice.

The effect of Anglo-Canadian Shipping, however, has been severely undercut by FCC v. Schreiber and subsequent cases that have allowed ALJ’s to use discovery sanctions patterned after FRCP 37(b)(2). The conclusion that Congress precluded the utilization of discovery sanctions by authorizing an agency to seek enforcement of discovery in a district court is also undermined.

In Schreiber, the Supreme Court held that a statute authorizing the FCC to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice” was proper and gave the FCC discretion to conduct its proceedings as it saw fit. The court reasoned that the statute “explicitly and by implication” allowed the FCC to resolve questions of agency procedure.

107. Id.
108. 335 F.2d 255 (9th Cir. 1964).
109. Williams, supra note 25, relied on Anglo-Canadian Shipping as did the Ninth Circuit which also quoted Williams as authority.
110. FMC, 335 F.2d at 256.
111. Id. FMC Rule of Practice 12(k), 46 C.F.R. § 201.211 (Supp. 1963) authorized hearing examiners (administrative law judges) to order the production of documents in a party’s possession for copying. Id. at 257.
112. FMC, 335 F.2d at 258.
113. Id. at 259. Section 204(b) of the Merchant Marine Act, 46 U.S.C. § 1114(b) (1958) provided that “[t]he Federal Maritime Board and the Secretary of Commerce are authorized to adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it or him by this Chapter.”
114. FMC, 335 F.2d at 260.
115. Tomlinson, supra note 5, at 94.
117. See supra notes 70-74.
119. Id.
120. FCC, 381 U.S. at 289.
121. Id.
122. Id.
The statute does not merely confer power to promulgate rules . . . it also delegates broad discretion to prescribe rules for specific investigations. Congress has "left largely to [the agency's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate" the proper dispatch of its business and the end of justice.\textsuperscript{123}

Cases subsequent to Schrieber suggest that the use of discovery sanctions can be justified on the basis of a general rule-making statute despite the fact Congress has enacted statutes allowing agencies to go to federal court for enforcement of subpoenas. The courts in these cases\textsuperscript{124} have not found that the statutory scheme enacted by Congress precludes an ALJ's use of discovery sanctions. Rather, the courts have looked to the important policy considerations involved\textsuperscript{125} and have approved the use of discovery sanctions by ALJ's. The first two cases involve the Department of Labor and Uniroyal, Inc.\textsuperscript{126} Uniroyal brought both cases, challenging the pre-trial discovery regulations issued by the Secretary of Labor, pursuant to an executive order,\textsuperscript{127} as an impermissible exercise of power.

The first case resulted from an administrative proceeding concerning allegations against Uniroyal of discriminatory employment practices against women and minorities.\textsuperscript{128} Uniroyal had not been cooperative with several government discovery requests, and had refused to supply certain information, contending that such information was either "irrelevant, confidential, beyond the scope of the proceeding or physically unavailable."\textsuperscript{129} Upon Uniroyal's refusal to comply, the government petitioned the ALJ to issue an order compelling discovery. After the ALJ issued the order, Uniroyal again refused to comply.\textsuperscript{130} Finally, the ALJ ruled that if Uniroyal did not comply before the hearing, he would impose a discovery sanction such that the "requests to admit and interrogatories . . . would be deemed admitted."\textsuperscript{131} The Seventh Circuit reasoned that the executive order gave the Secretary of Labor broad rule-making authority to engage in investigations and to hold enforcement hearings. Consequently, it was proper for the Secretary "to adopt discovery rules in the gap between an investigation and a hearing."\textsuperscript{132} The court, although only specifically holding that Uniroyal's action was premature because it had

\textsuperscript{123} \textit{Id.}
\textsuperscript{124} See supra note 8 and accompanying text.
\textsuperscript{125} See supra text accompanying notes 22-41.
\textsuperscript{128} \textit{Uniroyal}, 579 F.2d at 1062.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.} at 1063.
\textsuperscript{132} \textit{Id.} at 1067. The court also pointed out that "the courts are divided on the scope of [the] powers conferred by general rulemaking authority." \textit{Id.}
not exhausted administrative review, did suggest that there was nothing novel or objectionable about the use of pre-hearing discovery regulations.\textsuperscript{133}

The issues in the second \textit{Uniroyal}\textsuperscript{134} case were similar to those in the first: whether a party may be required to submit to discovery; and whether an ALJ can impose sanctions for non-compliance.\textsuperscript{135} The district court did not question the ALJ's authority to permit discovery\textsuperscript{136} and held that "[o]bviously that hearing authority would be largely meaningless without the concomitant power to compel the production of evidence both from the government and from [Uniroyal] who is a party to the hearing."\textsuperscript{137} Recognizing the need to protect the integrity of the administrative process, the court assumed that in issuing the executive order, the President intended to empower the Secretary of Labor and his designees (administrative law judges) "with the necessary ancillary authority to compel discovery."\textsuperscript{138}

The reasoning of the \textit{Uniroyal} court supports the proposition that ALJ's in other agency adjudicatory proceedings need and should have the authority to compel discovery without an explicit grant of power. This authority is based upon the same general statutory enabling acts upon which agency adjudicative bodies have relied to implement other discovery regulations. The authority for an ALJ to issue discovery orders and impose sanctions, derived from the executive order by the court in \textit{Uniroyal}, is analogous to the Supreme Court's holding in \textit{Schreiber} that a general agency rulemaking statute implicitly gave the administrative agency broad rulemaking authority to resolve questions of agency procedure.\textsuperscript{139} In both areas the same interests are determinative: fairness, efficiency, and the assurance of the integrity of the administrative process. Additionally, cases dealing with the NLRB have found these policy considerations compelling, and have allowed ALJ's to compel discovery by utilizing discovery sanctions without having to resort to federal courts for enforcement of these orders.

In \textit{NLRB v. American Art Industries, Inc.}\textsuperscript{140} the NLRB petitioned the Fifth Circuit to enforce the Board's order directing American Art Industries to cease and desist from unfair labor practices, to bargain collectively with the union,
and to offer to reinstate unlawfully fired employees. American Art challenged the order on the basis that during the hearing, the ALJ erred by not allowing the company to introduce secondary evidence to prove the total number of employees on the company’s payroll. The company had refused to produce employee earnings’ records, as required by subpoena, which would have conclusively determined the proper size of the bargaining unit. During the hearing, the company attempted to introduce secondary evidence to prove the size of the bargaining unit and to rebut the secondary evidence introduced by the Government. Even though the ALJ had not sought enforcement by the district court under 29 U.S.C. § 161(2), the Fifth Circuit approved the ALJ’s action barring the introduction of the company’s secondary evidence on the basis that “it would have been inequitable to allow the company to contradict [the Government’s secondary evidence] with more secondary evidence while the company . . . had in its possession the subpoenaed earning records which would have been conclusive.” The appellate court held that the ALJ acted properly in imposing this sanction because of the need to maintain the fairness and integrity of the hearing process.

The First Circuit followed a similar line of reasoning in *NLRB v. C.H. Sprague & Son Co.* which dealt with charges against a company for unlawful labor practices in regard to an employees’ vote on whether to unionize. During the administrative proceeding a subpoena was issued ordering the production of some of the company’s documents and records. The company objected to this administrative order and refused to produce the requested material. Without seeking enforcement in district court, the ALJ ruled that the company, by refusing to comply with the discovery order, had “forfeited its right to cross-examine witnesses with reference to any matter which could have been produced by complying with the subpoena.” Although the company argued that 29 U.S.C § 161(2) was the exclusive mechanism for the enforcement of agency subpoenas, the appellate court held that the imposition of the sanction by the ALJ was proper. The court recognized that since the ALJ was faced with such a recalcitrant party, he was justified in making his ruling “in the interest of maintaining the integrity of the hearing process.”

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141. *Id.* at 1225.
142. *Id.* at 1229.
143. *Id.*
144. The company attempted to introduce what it alleged to be the time cards punched by its employees during a week of work. *Id.*
145. *Id.*
146. See *supra* note 102 and accompanying text.
147. 415 F.2d at 1230.
148. *Id.*
149. 428 F.2d 938 (1st Cir. 1970).
150. *Id.* at 939.
151. *Id.* at 942.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* The court did recognize that Congress probably intended for the enforcement mechanism to be used, but did not find that it had to be used, especially when dealing with a particularly
In another unfair labor practices case involving an organizational campaign for unionization, *UAW v. NLRB*, the District of Columbia Circuit reversed the decisions of the Board since the ALJ failed to impose discovery sanctions based on a company's seven year failure to produce relevant documents within its control pursuant to a discovery order. The court held that imposing an adverse inference against a party ignoring a subpoena is a proper sanction to protect the integrity of the administrative process, and that in some circumstances refusal to comply with a subpoena would even justify "striking a defense, or completely barring introduction of evidence on the point in question."

The major factor that influenced the appellate court's judgment on the use of these types of sanctions was that enforcement is such an awkward, time-consuming, and costly process. The court noted that these sanctions permit "vindication of the tribunal's authority" without having to go through the delay of district court enforcement which is "of necessity collateral to the main case." The court also suggested that the judicial courts have actually discouraged this path of collateral enforcement because it already adds to the delays inherent in agency procedures. In overturning the NLRB the court concluded, "rather than allowing the Board to choose . . . whether or not to [utilize sanctions] . . . we have decided to specify precisely the disposition which the Board must now make of this case. We are therefore ordering the Board to strike Gyrodyne's . . . defense unless . . . [Gyrodyne complies with discovery].

This series of NLRB cases highlights the types of sanctions that several judicial circuits have allowed ALJs to impose on parties refusing to comply with discovery orders. These courts have not found that the availability of seeking enforcement in federal court is the exclusive means intended by Congress for the enforcement of discovery orders. In fact, these opinions strongly suggest that an ALJ's use of discovery sanctions is necessary in terms of fairness, efficiency, and protection of the integrity of the administrative ad-

recalcitrant party. *Id.* The court also suggested that it might have viewed the situation differently had the party made a good faith objection. *Id.* However, that was just dictum.

156. 459 F.2d 1329 (D.C. Cir. 1972). The parties in the administrative proceeding were the UAW and Gyrodyne Company. The ALJ ruled in favor of the defendant, Gyrodyne Company, and thus the UAW brought this action against the NLRB seeking a reversal of the ALJ's ruling.

157. *Id.* at 1332.
158. *Id.* at 1338.
159. *Id.* at 1339.
160. *Id.* Gyrodyne suggested that the adverse inference rule can only be used by a party after that party has made a prima facie case. *Id.* at 1344. See also Williams, *supra* note 25, at 759-67. However, the court rejected and pointed out that "although counsel confidently states this rule as if it were part of the organic law of the land, there is in fact substantial authority to the contrary." *UAW*, 459 F.2d at 1344.

161. *UAW*, 459 F.2d at 1344.
162. *Id.* at 1347. While the court acknowledged that Gyrodyne could prove its case by secondary evidence if it chose to do so, this was because the court chose not to deny the use of secondary evidence as a discovery sanction.

163. See *supra* notes 70-74 and accompanying text.
164. See *supra* text accompanying notes 138, 147, 154 & 161.
judicatory process. Schreiber and the NLRB cases indicate that an ALJ’s use of discovery sanctions may be founded on general rule-making statutes, and do not have to be explicitly provided for by Congress. Moreover, this conclusion is supported by the need for the ALJ to be firmly in control of discovery to ensure the fairness and integrity of the process.

CONCLUSION

As federal court dockets become more crowded and federal regulation becomes more complex, administrative agency adjudication will play an increasingly important role in the federal litigation scheme. Consequently, it is essential that ALJ’s be given the necessary power to move cases smoothly along the adjudicative path and to protect the integrity of the administrative process. The judicial-type powers which ALJ’s have in conducting discovery during the pre-trial stage of an administrative proceeding should extend to the use of discovery sanctions. Compelling policy reasons, such as avoidance of purposeful delay by recalcitrant parties, fairness to parties seeking discovery, and efficiency in the administrative process, support this extension of the ALJ’s authority.

No constitutional or statutory obstacles preclude an ALJ’s use of discovery sanctions. The administrative adjudicatory process guarantees that the demands of due process, article III, and the separation of powers doctrine are met. Careful analysis of Supreme Court adjudication in these constitutional areas reveals that the use of discovery sanctions in administrative proceedings is permissible. In addition, even though Congress has enacted a federal court scheme which ALJ’s may use to seek enforcement of discovery orders, policy considerations and recent cases indicate that this congressional scheme should not be the exclusive method for enforcing administrative discovery orders. Authority granted by general rule-making statutes and the need to ensure a fair hearing permit ALJ’s to use an array of discovery sanctions.

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165. See supra text accompanying notes 137, 148, 155 & 159.

166. Since the use of discovery sanctions is important to maintain control of evidence exchange during discovery and to ensure a fair adjudicatory process, discovery sanctions should be derived from general rule-making statutes. Discovery sanctions may be justified as being statutorily permissible since (1) they are not explicitly prohibited by Congress, (2) courts have allowed their use without forcing the agency to seek district court enforcement, and (3) their use is mandated by the policy considerations of fairness, efficiency, and protecting the integrity of the process.