# General Orientation

## Background

Agencies are governed by:

* Constitution: Due process / 4th A
* Organic act / the statutory creation of a particular agency (note: EPA doesn’t have such an act, instead there are a collection of substantives acts—CAA, CWA—which assign responsibilities to “Head of EPA.”)
* General procedural statutes (APA, NEPA, Reg. Flexibility Act, Paperwork Reduction Act, FOIA etc.)
* Executive Orders (these are not judicially reviewable)
* Agency’s own regulations (can change them, but not ignore them)
* Agency’s own adjudicatory precedents
* Court decisions reviewing agency actions:
  + Statutory interpretation of the regulation at issue
  + Did agency exercise authority in an appropriate manner?
  + Agency procedures

Key question: “is what the Agency has done lawful?”

Agency may be more likely to err on the side of considering itself subject to a court’s jurisdiction because it can always change its mind later, and if it errs in the other direction and is wrong, there are a host of legal problems.

Agencies act by:

* Rulemaking (legislative)
* Adjudication (judicial)
* Investigative (executive)

Suits usually involve 3 interests: private party, regulated entities, and governmental agencies

Departments: important, overarching agencies; headed by “Secretary of x”

Independent agencies: Not part of a department; enjoy slightly more freedom from control of the President

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| --- | --- |
| **Executive Agencies** | **Independent Agencies** |
| Single head | Multi-member head |
| Part of a department | Not part of a department |
| Can be fired at will | Fired for cause |
| Serve until resign or fired | Serve for a term of years |
| Usually members of President’s party | Only simple majority from single party |

Agencies:

* Regulate private (and sometimes public) conduct
* Administer entitlement programs
* Regulate economic activity
* Regulate health & safety
* **Overall:** execute the laws of the US

## APA

§ 551 “Agency” is defined

Generally, it’s each authority of the US government **except** Congress, the courts and the President (last is excluded by Court decision, not by APA itself. Includes:

§ 553 Rulemaking

§ 554 Adjudication (detailed in §§ 556, 557)

#### 702 Right of Review (Cause of Action provision)

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 thereof.…

* APA effectively creates a private right of action within most statutes (“within the meaning of a relevant statute”) provided that the suit is against a federal agency and can establish that you are within the zone of interests of the relevant statute.
* APA waives US sovereign immunity to a significant degree.

#### 704 Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

#### § 706 Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

## Government Legal Ethics

Who does the government lawyer represent?

1. The “Agency” approach: government lawyer’s employing agency is the client (emphasizes loyalty, zeal and confidentiality). Generally the same approach as in mainstream/private practice.
2. The “Public Interest” approach: attorney’s primary duty is serving the public good (greater weight on duties of the lawyer to the courts and to innocent 3rd parties)

In practice, if you are the litigator in DOJ you call the agency your “client” but DOJ is “really” your client. DOJ determines if case will be defended or settled, not the “client” agency.

# Rulemaking (§ 553)

§ 553: does not apply to military or foreign affairs; matters of agency management/personnel; public property, loans, grants, benefits (this is a biggie) or contracts.

No legally enforceable standard for agency bias in rule making.

## Initiating a Rule Making

Can submit a petition (administrative graveyard)

Lobbying: meet with agency staff; get a public interest or trade association group interested in your issue; drop topic in the media or trade press; employ a lobbyist; get some scientists work with you; connect with congressperson on a relevant committee (esp. an agency’s budget committee), give them basis to do so based on norms they must answer to. (issues with big corporations having far more money & capital)

### Review of Agency’s Delay (§ 706)

Applies generally, not just in delay in a rulemaking

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall: compel agency action unlawfully withheld or unreasonably delayed. (§ 706 (1), *Scope of review*).

No formal standard of judicial review but there are some factors summarized in “TRAC” (*Telecoms Research & Action Ctr v FCC*, DC Cir. 1984):

1. The time agencies take to make decisions must be governed by a “rule of reason”
2. Where Congress has provided a timetable or other indication of the speed in the enabling statute, that statutory scheme may supply content for “rule of reason”
3. Delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake
4. The court should consider the effect of expediting delayed action on agency activities of a higher or competing priority
5. The court should also take into account the nature and extent of the interests prejudiced by delay
6. The court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed’”

### Review of an Agency’s Denial of a Rulemaking Petition (§ 706)

*Arkansas Power & Light Co v. Interstate Commerce Commission* (DC Cir., 1984): very rare for a court to compel an agency to institute rulemaking. Review of agency denial of a rulemaking petition under APA “is limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record.” – main question is if the agency’s explanation is reasonable

*Mass v. EPA* (SCOTUS 2007, Stevens): Agency has discretion to refrain from enforcement actions, but that it is different from “discretion” to refuse to engage in rulemaking. Statute required EPA to form a “judgment” about whether auto emissions contributed to climate change, and if it found so, to regulate them (“a clear statutory command”). The “judgment” allowed by the statute “was not a roving license to ignore the statutory text.” Because EPA offered no reasoned explanation of its decision not to engage in rulemaking (agency said to do so would conflict with other priorities of the Bush administration), it was arbitrary and capricious. EPA ordered to ground its reasons for action or inaction in the statute. [Remand.] **Note: public health & welfare at stake here**

*Heckler v. Chaney* (SCOTUS, 1985, Rehnquist): [This portion included in the “agency action” portion of class, but seems relevant here.] “Refusals to institute rulemaking proceedings are distinguishable from other sorts of non-enforcement decisions insofar as they are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.” So the cases allowing review of agency refusals to initiate rulemakings are not overturned by that case.

## Informal/Notice and Comment

§ 553: notice and comment is not required (unless another statute requires it) if

* Agency is writing a certain kind of rule (“non-legislative rules”)
  + interpretive rules
  + policy statements (prospective, leaves discretion to agency)
  + rules of agency org, procedure or practice (rules use canons of construction)
* Agency has “good cause” that notice and comment is “impracticable, unnecessary, or contrary to public interest” [must explain its reasons why]

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| Procedural Rules | Substantive Rules |
| *American Hospital Assn v Bowen*, DC Circuit, 1987  Medicare cost control review by Peer Review Organizations passed by Congress “with a broad brush.” Details of how it would work were “procedural” b/c they established a “frequency and focus of PRO review” to help enforcement agents focus their limited resources.  *JEM Broadcasting v. FCC*, DC Circuit 1994 (Edwards, same as *Air Transport*)  FCC “hard look rule”: if application was on-time but found to be incomplete, it would be summarily tossed. No opportunity to amend. Enhanced agency efficiency, but did not change the content/substance of info that applicant had to provide, so was procedural. Cited the *Air Transport* dissent approvingly.  In DC Circuit, a procedural rule’s “**critical feature**” is that it “does not alter the rights or interest of the parties although it may alter the manner in which parties present themselves or their view points to the agency.” (86)  *Air Transport* no longer binding precedent. | *Air Transport Association of America v. DOT*, DC Circuit 1990 (Edwards, same as *JEM*)  New rule changed administrative penalties and remedies. Adopted w/o N&C.  DC Cir takes “functional analysis” approach to separate procedural from substantive rules. Substantive rules: “encode a substantive value judgment OR substantially alters the rights or interest of regulated parties.”  Here, imposition of penalties looked a lot like impacting substantive right.  Dissent: substantive rules are those which most closely regulate “primary conduct”; **just because a rule has a substantial impact doesn’t make it substantial**—otherwise the difference btw them would be obliterated. |
| Biggest concern of the courts: that the procedural exception does not swallow the requirement for notice and comment rule making. | |

Encoding a value judgement: asking whether an agency's rule ''encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.''

- *Air Transport*: amount of DP v. efficiency, which is valued more

### Adequate Notice

Notice of proposed rulemaking does need to be specific enough to give interested parties fair notice of the issues in the rulemaking. Courts struggle with: if final rule is substantially changed from the proposed rule, to what extent is another round of N&C required?

*Chocolate Manufacturers Assn v. Block*, 4th Cir, 1985: USDA published proposed rule about reducing amount of sugar in cereals that WIC would cover; got lots of comments from WIC field administrators about chocolate milk, and in final rule, banned WIC from paying for chocolate milk. Court found Chocolate folks didn’t have adequate notice.

Tests for Adequate Notice (from courts over the years)

1. Fairly apprised (won’t be surprised)
2. Had to know their interests were at stake
3. Rule is a “logical outgrowth” of the proceeding
4. Have to know the issue they are interested in is on the table
5. How well the notice agency gave serves the policies underlying the notice requirement
6. Final rule can’t substantively depart from terms and substance of proposed rule
7. Final rule can’t materially alter the issues involved in the rulemaking
8. If changes in original plan are in character with the original scheme
9. Notice can’t be too general
10. Sufficiently restrictive to allow interested parties the opportunity to comment

\*\*need to explain “why” (i.e. what makes an alteration “material” or the departure “substantial”

### Opportunity to Comment

##### **Name Case**: *Home Box Office v. FCC*, DC Cir. 1977

A case involving informal rulemaking (early FCC rules to prevent cable from overwhelming networks). Events occurred shortly after Watergate, which likely informed lower court’s reactions. During the informal notice and comment period, there were lots of contacts from industry with the FCC (32 times, v. 0 meetings with public interest groups). Suggests possibility of two admin records: one for the court and public, and another for the agency and “those in the know.” Court calls this intolerable.

Court’s direction: “Once a notice of proposed rulemaking has been issued… any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should refuse to discuss matters relating to the disposition of a rulemaking proceeding with any interested private party, or an attorney or agent for any such party, prior to the agency’s decision. If ex parte contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon.”

NOT GOOD LAW (One year before Vermont Yankee) Not good law because APA makes no statement at all regarding ex-parte communications (let alone ban them) for informal rulemaking. (Bars it for formal rulemaking and adjudications.) However, this case was never specifically overruled. Almost every agency does what it calls for anyway, in its own interests (optics). Helps agency justify that its decision is based on what is in the record.

*Sierra Club v. Costle* (DC Cir, 1981): EPA received comments after the comment period had ended for rule. Docketed most of them into the record. Did not docket an intra-executive branch meeting which included the President which occurred during the post-comment period. Court did not think that was a problem because of both separation of powers issues, and Vermont Yankee (court can’t impose new procedures).

Note: Courts have routinely held that even if a statutory deadline is too short, this is not a good reason for skipping notice & comment

* Congress wouldn’t have set it that way if it were impossible
* Congress wants notice & comment unless explicitly stated
* Notice and comment is more important than the statutory time requirement

## Formal Rulemaking and Procedures

Like a mini-trial

§ 553 requires formal rulemaking when a statute requires rules to be made “on the record after an opportunity for agency hearing” or if a statute invokes APA §§ 556, 557 (procedures for formal hearings).

##### **Name Case:** *United States v. Florida East Coast Railway* SCOTUS, 1973 (Rehnquist)

Interpreted what a “hearing” was—whether it meant a formal rulemaking under APA. “Hearing” is not enough to mean a formal rulemaking. Instead the “magic language” is “agency hearing.” Without that phrase in a statute (or a reference to APA § 556/557), there is no right to present oral evidence, cross examine witnesses or make an oral argument to the decision maker. “Hearing” does not necessarily include right to present oral evidence, cross-examine opposing witnesses, or present an oral argument to the agency decision maker. Factual determination for the amount of process due.

##### **Name Case:** *Vermont Yankee Nuclear Power Corp. v. NRDC* (SCOTUS, Rehnquist, 1978)

Courts may not impose additional rulemaking requirements on agencies beyond those in APA. The APA is the “ceiling and the floor” of rulemaking—APA doesn’t allow judges to create a common-law approach to rulemaking. (Courts can intervene in cases of constitutional violations during rulemaking. Agencies can voluntarily do more than APA requires.)

1. Agencies would not be able to predict what standards they should meet in rulemaking, so general pressure to use the “best” procedures (most thorough, least efficient) every time to avoid reversal.
2. Courts would review agency’s choice of procedures based on information placed into the record before it at the hearing, not what the agency actually had available to it when it made its decision (“Monday morning quarterbacking”).
3. Misconceives the standard for judicial review of an agency rule—it is not to review the adequacy of the record about the rule, as lower court thought—but to review if agency followed its obligations under APA or other statutes, if applicable.

Facts: Vermont Yankee had used a point system to determine environmental impacts/ mitigations (ultimately decided to issue a permit to Vermont Yankee). NRDC wanted to cross-examine the experts who made the point system. Lower courts allowed. Appeal to SCOTUS.

## Other Approaches to Rulemaking

“Interim final rule”: agency adopts rule w/o N&C for good cause (like a time-sensitive need to do something) but invites public to comment on the rule. If receives comments will respond to/incorporate them. If no comments, will just adopt the rule that it has been applying in the interim.

“Direct final rulemaking”: invented by EPA. Agency publishes a final rule in the Fed Register with note that it will become effective X date if no negative comments received.

### Hybrid Rulemaking

Congress has imposed additional procedures, or substituted different procedures, beyond those required by APA. Can sue for agency “not being in accordance with the law.” Arbitrary and capricious review. Examples:

* NEPA (do an EIS before engaging in action, including rule-making, which may have significant impact)
* Regulatory Flexibility Act (do a regulatory flexibility analysis whenever a rule may have significant economic effect on a substantial number of small entities which are subject to the rule, including governments of jurisdictions less than 50K). Initial analysis accompanies the proposed rule. Final analysis published with the final rule. Biggest outcome if challenged is for remand to agency.
* Paperwork Reduction Act (engage in N&C rulemaking prior to imposing record-keeping or reporting requirements on 10+ people)
* Exec. Order 12866 (or other EO’s): Creates OIRA (Office of Info and Regulatory Affairs) review/oversight of “major” rules—promulgating, or anything likely to lead to promulgating. Also: 1) do a cost-benefit calculus as part of rulemaking (to extent allowed by law); 2) centralized oversight from White House/OMB/Office of Information and Regulatory Affairs).
* Unfunded Mandates Reform Act 1995: before promulgating proposed or final rule that would include a “mandate” resulting in costs to state, local or tribal governments or the private sector of $100M annually, must prepare an assessment of the effect of the regulation. Must select the least-costly alternative unless another law requires otherwise or head of agency explains why not.
* Information Quality Act (formerly Data Quality Act): agencies required to issue guidelines that ensure/maximize the “quality” “objectivity” “utility” and “integrity” of the information they disseminate. OMB regulations told agencies to use independent peer review before publishing scientific information.
* Generally, lots of statutes require that informal rulemaking also be supported by substantial evidence (not required by the APA for informal rulemaking).

### Regulatory Negotiation (Negotiated Rulemaking)

• Attempt to bring ADR into rulemaking.

• Negotiation is all done before the rule is formally proposed (formalities of APA are followed, but all the real work done first).

• Agency participates with other interested parties (or representative group of them) in determining the proposed rule. Agency agrees to propose whatever the consensus outcome is.

• Agencies don’t like it (loss of control, so presidents don’t like it much either, although they may talk differently). Because agency is just one voice at the table, it seems to give up its role as the party responsible to the public for the agency’s own policy decisions and actions.)

• Won’t work if there is only a binary choice in outcomes (the tree frog is on the endangered species list or it isn’t), since there’s no opportunity to give and take. Also, won’t work if there isn’t consensus, since an unsatisfied participant in the negotiation process can still comment and oppose during N&C.

## Judicial Review (§ 706)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections [556](http://biotech.law.lsu.edu/Courses/study_aids/adlaw/556.htm) and [557](http://biotech.law.lsu.edu/Courses/study_aids/adlaw/557.htm) of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. [NO ONE KNOWS WHAT THIS WAS SUPPOSED TO DO; GENERALLY IGNORED]

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Per Funk: Substantial evidence technically applies only in formal adjudications and formal rulemakings.  Technically, it should only apply to questions of basic fact, but it has been used equally as often to mixed questions of law and fact and applications of law to fact (as to which there is no difference).  By the terms of § 706, arbitrary and capricious review applies to all agency actions, but as a practical matter it only applies to informal adjudications and rulemakings, because substantial evidence review is used instead for the formal proceedings.  Questions of law aren’t under either substantial evidence or arbitrary and capricious, we just call it review of an agency’s interpretation of the law.  And then that raises the whole *Chevron* thing.

### Statutory Interpretation

Reminder: *Chevron* deals with agency interpretation of a statute (high deference); *Seminole Rock/Auer* with agency interpretation of its own rule (highest deference – hardly distinguishable from *Chevron*); *Skidmore* with agency interpretation of an interpretive rule or policy statement which interprets a statute (light deference).

Deference is given to an agency which is responsible to administer/enforce a particular statute. Some statutes are applicable to all agencies (FOIA, NEPA) so there isn’t deference there (can’t have deference to agencies’ conflicting interpretations).

##### **Name Case:** *Chevron v. NRDC* (SCOTUS, 1984, Stevens)

Facts: NRDC challenged EPA’s construction of “stationary source” on the ground that the rule improperly interpreted the statute (exceeded statutory authority).

Finding: in ambiguous language, Congress is indicating a delegation of authority to the agency (the technical experts). Some policy determinations are best made by legislators or administrators, not judges. “The regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashioned, and the decision involves reconciling conflicting policies.”

Note: Congress can delegate decision-making authority; agency must act “within the limits of that delegation.” Agency may—within those limits— “properly rely upon the incumbent administration’s view of wise policy to inform its judgments.” (This was the issue in Massachusetts v. EPA)

**The “Chevron Two Step”**

1. Did Congress intend to grant interpretive (that is, lawmaking) authority to the agency? No: STOP (court determines what statute means and applies it). YES: go to Step 1.
   * Step 0 is rarely applied, per Funk, just in “big picture” cases
2. Is the statute ambiguous? No: STOP (court applies plain meaning, determines meaning and applies it—this could be the same as the agency rule). Yes: go to Step 2.
   * Court may apply plain meaning rule here (simplest line of inquiry)
   * But court may also look at legislative history (“establishing congressional intent using traditional tools of statutory construction.”) (Chevron court looked at legislative history but found it unhelpful.)
3. Is the agency’s interpretation “reasonable”? Yes: agency interpretation stands (deference kicks in). No: court sets it aside, generally remands for a more appropriate interpretation.
   * Agency’s interpretation does *not* need to be the only possible one
   * Agency can later change its interpretation, provided it explains its reasoning
   * No neatly defined standard for “reasonable” by the courts—could be same as “arbitrary and capricious”, or not.

Agencies win about 2/3 of the cases brought about statutory interpretation. Win 89% of time if agency can get to step 2.

Policy reasons for deference:

* Congress has delegated authority to the agency, not to the courts
* Expertise resides in the agency, not the court
* Agency is a more democratic tool than the courts, in that it is accountable to an elected executive
* National uniformity is fostered by national rulemaking, as opposed to by appellate jurisdiction

What if court interprets a statute that an agency has not yet interpreted?

* If the statute was unambiguous (applying the term as it is used since *Chevron*), then the court’s interpretation stands.
* If the statute was ambiguous, then the agency is free to change the interpretation by going through N&C rulemaking.

### Review of Substance (the factual record underlying rulemaking)

• All agency rule making is subject to arbitrary and capricious reviewabout the reasonableness of the rules and their application.

• Formal rule making is additionally subject to substantial evidence review.

• In essence: Was the agency’s decision reasonable based on the information available to it at the time it did the rulemaking?

• Scalia (while on DC Circuit) said that “substantial evidence” review (which pre-dates the APA) and “arbitrary and capricious” review (created by the APA) mean the same thing – many appellate courts agree

Deferential standard, but not super-deferential. Examples: agency didn’t give adequate attention to X; decision doesn’t align with the evidence…

* More deference in technically complex matters
* Less deferential when action is politically inspired than when it is routine (might mean that decision wasn’t driven by what is in the record)
* Judges may also ask what the economic and social impacts of the decision are. (Import of that question varies by judge… some worry about small business, other about employees….)

**Adequate Explanations**

When agency lacks “adequate explanations,” its decisions are arbitrary and capricious

Since Congress gave the responsibility for making the rule to the agency, not the court, the court can only review the justification for the decision, not the decision itself.

* During the rulemaking, the role of the agency attorney is to explain why various interests are more/less important.
* During the court challenge to the rulemaking, the role of the agency attorney is to explain why the decision is reasonable, based on the record.
* If the explanations aren’t good enough, the court will find its action was arbitrary and capricious
* Reamand to the agency for further explanation

##### **Name Case:** *SEC v. Chenery Corp I* (1943; SCOTUS)

“When the agency has not provided an adequate explanation [of its rulemaking], even if the court itself could discern an adequate explanation from the record, the court should remand the case by to the agency.”

Agency has to make its explanation when it adopts the rule; inadequate to have its lawyers explain the reasoning later to the court. Key word: explanation must be *contemporaneous.*

Examples of arbitrary and capricious actions:

* Agency relying on factors Congress did not intend it to
* Failure to consider an important aspect of the problem
* Offering an explanation of its decision that runs counter to the evidence
* Decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

##### **Name Case:** *Citizens to Preserve Overton Park v. Volpe* (SCOTUS 1971)

* Arbitrary and capricious standard is based on consideration of relevant factors and whether or not, based on these factors, there was a clear error in judgment.
* “Review of the whole record” for informal rulemaking = information the agency actually used in making its final decision/rule.

# Adjudication

Definition in the APA: “'adjudication' means agency process for the formulation of an order”

## Background Stuff

Applies to everything that is not rulemaking:

* “mass justice”: workers comp, unemployment benefits, immigration – essentially how to handle millions of cases to ensure justice, but also in an efficient, cost-effective, and timely manner
* “order”: final disposition of any agency in a matter other than rulemaking, but including licensing
* enforcement cases: adjudicative orders to tell people to do or not to do things – sometimes issue penalties
* agency bars: agency can bar entity from future contracts with the government

### **Formal and Informal**

* If the language says, “on the record after opportunity for agency hearing” = formal adjudication
* When statute doesn’t indicate clearly… Circuits take different views about when a formal adjudication is required. Starting to coalesce around view that agency’s originating statute gets Chevron deference when agency interprets the issue of what type of adjudicatory procedure is required. This gets sticky, though, because agencies don’t get Chevron deference on the APA.
* 9th Cir hasn’t looked at this issue in a long time… Presumption in its old case (pre-Chevron) is that if the statute is ambiguous, presume formal adjudication.
* OR: contested v. non-contested (contested whenever DP is required)

APA says almost nothing about informal adjudications, though there are lots and lots of them in our lives (a letter allowing Federal student loans is the result of an informal adjudication).

Note that even “informal” adjudications can have a lot of process so the labels can be misleading. Say “APA-regulated” [formal] adjudications and “non-APA regulated” [informal] adjudications.

Agencies always prefer to have informal adjudications without an ALJ.

After adjudication, can almost always appeal to the courts.

### Procedures

* Notice
* Parties appear in court, interested parties can make an appearance without becoming a party (grounds not clear), option for settlement (ADR etc.)
* ALJ makes preliminary decision based on the preponderance of the evidence
  + “Initial Decision”: decision unless someone in the agency does something (most common)
  + “Recommended Decision”: someone in the agency must do something to make it final
  + Varies depending on agency
* This decision is brought to the agency/board – not bound by ALJ’s decision, but it is considered part of the “whole record” for purposes of review for final decision
* Private party upset by agency outcome can appeal to the courts, the agency itself cannot
  + Substantial Evidence Review

### Legal standards

* Burden of proof is on the proponent of the order (Agency)
* Preponderance of the evidence standard
* When the law is ambiguous, ALJ defers to agency’s own interpretation
* Appeal from ALJ to the Agency (either board or administrator)
* There used to be a rule (“residuum”) that prohibited hearsay being the only evidence admitted (some non-hearsay had to be admitted too), but that is no longer true.
  + Federal standards allow hearsay, OR does not

### Administrative Law Judges

ALJs are employees of the agency but insulated by the Office of Personnel Management.

* Hired by the agency
* Agency controls office perks (parking spaces, secretarial support, computer upgrades, etc.). There can be lots of disputes about this stuff.
* OPM: Rating, firing, sanctioning, pay raises/cuts
* Some States have central panels (Oregon Office of Administrative Hearings) but Feds don’t

Separation of Functions:

* ALJ may not consult with anyone on a fact in issue, except as required by statute for an ex parte proceeding (can talk about the law)
* ALJ may not be subordinate to an inspector or prosecutor, but may be subject to the agency generally
* Prosecutor/inspector may not participate in this decision (or a factually related one) except in public proceeding. That is, no backdoor communications, except for:
  + Applications for initial license (no prosecutor, really, just the private applicant)
  + Proceedings for ratemakings (no adversarial position)
  + Talking to the agency (administrator) or members of the board

Federal v. Oregon ALJs

* Typically, ALJs cannot rule on the constitutionality or lawfulness of an agency’s rule
* OR: ALJs can rule on the lawfulness of a regulation/constitutionality

## **Ex Parte Communication**

During a formal adjudication, ex parte communication is prohibited between the Agency/Board, the ALJ or any agency who is reasonably expected to be involved in the decision-making and any interested person outside the agency. Also, agency staff who investigate or prosecute are also prohibited from talking to ALJ (not under ex parte provision but under separation of powers provision).

Remedies:

1) disclosure of communication and its content

2) require violating party to show cause why claim/interest should not be dismissed.

But DC Cir found that Congress did not intend the show cause remedy after every violation (or that dismissal would be more than “rare”). *PATCO v. FLRA*, 1982. Instead

3) agency proceedings “blemished by ex parte communications” may be voidable. *Id.* Factors to assess that:

* Gravity of the communication
* Whether contacts may have influenced the final decision
* Whether party making the contacts benefited from the agency decision
* Whether the contents of the communication were unknown to the other party, so they couldn’t respond to them
* Whether vacating the decision and remanding for a new proceeding would serve a useful purpose

APA v. Due Process

* APA is violated by ex parte communication; whether case gets overturned depends on rule of prejudicial error; burden is on agency to prove no effect (harmless error question).
* Due Process is not violated by ex parte communication, unless it is prejudicial; burden is on plaintiff to show prejudicial impact

Since informal adjudications are not covered by the APA, there is no ex parte issue for them.

## **Procedural Due Process**

Due process protects life, liberty and property (nothing else)

Questions to ask about due process:

1. There must be a government action
2. Based on individualized facts and an individualized determination (not a policy-based deprivation of a class of individuals)
3. Liberty or property interest must be affected. (Life interest are not dealt with in administrative law)
4. What process is due? (Is what they (government) did adequate to provide due process?)

### Individualized Facts/Determination

##### *Londoner v. Denver* (SCOTUS, 1908): Colorado delegated taxation authority to the City of Denver which passed a property tax to pay for local improvements and assess the cost on the “property specially benefitted” (i.e., the street Londoner lived on). Londoner believed tax was unfair because it was based on the width of the lot on the sidewalk side (regardless of total acreage). Colorado courts determined tax was consistent with state law—Supreme Court fully bows to that determination but says Londoner was entitled to due process.

* Assessment was made without notice and the opportunity to be heard
* It was individualized in that it was based on the number of linear feet on the sidewalk edge of the property
* If the State had made the tax, there would have been no DP issue because of the power of states to tax

##### *Bi-Metallic Investment Co v. Colorado* (SCOTUS, 1915, Holmes) “General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”

Broad property tax rate increase throughout all of Denver did not require due process because it was so generalized. Key difference from *Londoner* is that there individualized factual determinations were in play, but not in the generalized rate increase here.

### Property Interest

##### **Name Case:** *Goldberg v. Kelly* (SCOTUS, 1970)

This is a case about PROPERTY INTEREST. Welfare termination by NYS. In modern society (with our expectations of and reliance on benefits), when you lose public benefits, it’s like losing private property. Therefore, due process attaches to lose of public benefits. (For which you have a legitimate expectation.)

* Upshot was that Goldberg got a lot of due process—pre-termination hearing, advance notice of reasons for termination, ability to cross-examine adverse witnesses, present own evidence, right to be represented by counsel (but not provided), decision based only on the evidence presented, impartial decision-maker who explained the decision and the evidence relied upon.
* Although never overruled, later cases essentially limited this case to its facts (welfare “the last safety net”), especially on the amount of due process allowed.

*Board of Regents v. Roth* (SCOTUS, 1972): non-renewal of a teaching contract at a state university did not trigger due process because he did not have a property interest in the successor contract (need more than just a one-sided expectation of it, need to have a “legitimate claim of entitlement to it.”). Also, liberty interest (ability to find work) was not impacted because there was no statement by the university that would damage professor’s standing in the community.

*Sniderman*: unwritten common law may also provide for a “legitimate claim of entitlement”

### Liberty Interest

*Paul v. Davis* (SCOTUS, 1976, Rehnquist): This was a case about liberty interest. Although plaintiff was defamed by the police department including his photo on a flyer of “known shoplifters” distributed to the stores in town, it did not rise to a constitutional due process claim because “reputation alone, apart from more tangible interests such as employment” is not a *liberty interest.*  Brennan/Marshall dissented.

**Stigma-plus Test:** need something tangible in addition to reputational harm to claim liberty interest that is unrelated to the reputational harm. (Naturally, bad things will flow from the reputational harm. The plus cannot be something that flows from the prejudice)

*Codd v. Velger:* cop with attempted suicide case – claimed it posed a stigma and effected employment opportunities – majority said because there was no factual dispute that any information was substantially false, there was no requirement for a hearing – dissent disagrees: guilty as well as innocent are entitles to a fair trial, just because allegations are true we shouldn’t bypass constitutional safeguards

*Cleveland Board of Ed. v. Loudermill*: “lied” on application about previous felony and wasn’t given a chance to respond before being dismissed – majority says “’the root requirement’ of the DP clause: ‘an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.’ This principle requires ‘some kind of a hearing’ prior to the discharge of any employee who has a constitutionally protected interest in his employment” – noted here was the fact that he was fired for lying, not for having the felony – he doesn’t believe he lied because he was unaware of the charge, deserves a chance to be heard for that claim.

*Shands v. City of Kennett*: firemen fired for interfering with hiring process, council released a statement to dispel information; “accusations must be ‘so damaging as to make it difficult or impossible for the employee to escape the stigma of the charges.’”

### What Procedures Must be Used?

*Goldberg* got a lot of due process—including a pre-termination hearing – limited to facts for practical reasons

##### **Name Case:** *Mathews v. Eldridge* (SCOTUS, 1976, Powell)

Disability benefits are not based on financial need, like welfare is, so can distinguish from *Goldberg*. Notified with 1 months’ notice that benefits would be terminated; could appeal decision within six months. Sued, citing *Goldberg*. Court found no DP requirement for a pre-deprivation hearing.

Court identified a **three-factor balancing test** to assess the extent of due process based on the specific facts.

1. The private interest affected by the official action
2. Risk of an erroneous deprivation under the procedures used (how likely is it to happen? Not, how bad will it be?) and the value, if any, of additional or different procedures
3. The Government’s interest, including the function involves and the fiscal/administrative burdens of adding or changing procedural requirements (Should be assessed in the public interest)

Judicial model is not required, or even the most effective, method of making a decision in all circumstances…. Procedures should be tailored, in light of the decision made and the “capacities and circumstances of those who will be heard” to ensure a meaningful opportunity to present their case.

### Neutral Decision-maker

Entitled to a neutral decision maker. But how neutral is neutral?

Constitutional problems (probability of actual bias is too high)

* If decision-maker has financial stake in the outcome
* If she decision-maker been on the receiving end of personal abuse from the party before her
* Where decision-maker has indicated that she has already reached a decision such that “a disinterested person could hardly fail to conclude that she had in some measure decided” the case before her

(Constitution not concerned with perceived bias, but that’s important too.)

*Withrow v. Larkin* (SCOTUS, 1975, White): a single board (Medical Examining Board) could perform both the investigatory and adjudicatory functions. No showing of bias in how the procedures were applied.

* “Without a showing to the contrary, state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”
* Need evidence of the bias, not just the fact that it was the same people

Pre-disposition to the law is fine, judges are expected to have/know this

Pre-disposition to the facts is not ok

## Judicial Review

### Substantial Evidence Review

Only applies to formal agency action (adjudications or rulemaking). Generally, should only be applied to factual determinations, but in practice is applied to mixed questions of law and fact also. Scalia (when on the DC Cir) said that, as a practical matter, there was no difference between substantial evidence and arbitrary and capricious review. It’s a highly deferential standard (more deferential than “clearly erroneous” which is used in an appellate court’s review of a trial court).

##### **Name Case:** *Universal Camera Corp v. NLRB* (SCOTUS, 1951, Frankfurter)

Known for defining the “substantial evidence” standard: “considering the whole record, including **both the evidence for an against the agency decision**, substantial evidence is the equivalent of the evidence necessary to withstand a motion for a directed verdict.”

Is there factual evidence to support the factfinder/agency determination?

When an agency hears an appeal of an ALJ decision it “has all the powers which it would have in making the initial decision.” §557. Since this sounds *de novo¸* courts had assumed that the agency review could ignore the ALJ’s decision as irrelevant. Under Universal Camera, Supreme Court, said that the ALJ’s findings are part of the record as a whole and need to be considered (especially important for credibility findings). They should be given particular weight. (276).

Testimonial Evidence:

1. Demeanor: how the witness says things – ALJ gets deference
2. Testimonial inference: decision made based on demeanor – ALJ doesn’t necessarily get deference
3. Derivative inference: decision derived from the substance of what the witness said/the contents of the statements – ALJ does not necessarily get deference
4. Documentary evidence: cold record/physical evidence of the case – ALJ does not get deference

9th Cir: “it should be noted that the ALJ’s opportunity to observe the witness’ demeanor does not, by itself, require deference with regard to his or her derivative inferences. Observation of demeanor makes weighty only the observer’s testimonial inferences.” Penaquitos Village, Inc. v. NLRB (1977).

### Mixed Questions of Law and Fact

Some cases present a mixture of law and fact. Ex: park ranger who is found dead of CO in his car, in state of semi-undress, with a woman not his wife. Salaried employee, no fixed hours of work. Was he “at work” for purposes of a death benefit?

##### **Name Case:** *NLRB v. Hearst* (SCOTUS, 1944)

* Issue: are newsboys “employees” who can be unionized (or independent contractors)?
* Legal issue: did Congress intend common-law definition of “employee” to be applied to NLRA?
* Factual issue: did the newsboys meet the definition?
* NLRA was “ambiguous” on this point, Court found, and Congress had given the NRLA to the agency to administer. Deference to agency was appropriate – NLRB said yes they were employees. Court found the “record sustained the board’s findings and there is ample basis in the law for its conclusion.” Court looked at both the factual matter (substantial evidence) and the legal matter. (*Chevron* 40 years before)

### Arbitrary and Capricious Review

If substantial evidence is the standard in review of formal agency adjudications, then arbitrary and capricious is the standard in informal adjudications (which do not have any APA- proscribed procedures).

A couple of minor points:

“Adequate Reasons”: just as rules are reviewed for “adequate reasons” (§706(2)(a)), so are adjudications. Rarely comes up in case law, but it can help a litigant argue that a court should order a remand to an agency to provide a more elaborate or fuller justification.

“Consistency”: like cases should be decided alike. If agency makes inconsistent decisions, courts may take that as evidence of arbitrary and capricious decision-making. Courts require agencies to explain inconsistent decisions. (Agency can change its rule or policy, and then change the direction its decisions take going forward—precedential decisions have no power to stop that.)

##### **Name Case:** *Citizens to Preserve Overton Park v. Volpe* (SCOTUS 1971)

It used to be that in the absence of a factual record (that is, after an informal adjudication) courts would hear testimony from witnesses in court when the adjudicatory process was appealed (the agency head explaining why they made the decision they made — “merely a post hoc rationalization.” Since this case, that stopped. Instead, a court may order remand to the agency for to find out why it made the decision it did.

Arbitrary and capricious review is a “substantial inquiry” based on the record that was before the agency when it made its decision. If there is no clear record (as in an informal adjudication), remand to the agency to determine why it came to that conclusion.

**Rule:** when reviewing an agency decision, the court must review:

1. Did secretary act within scope his authority?
2. Was the decision arbitrary and capricious, an abuse of discretion, or otherwise unlawful?  
   • This is a NARROW inquiry, court may not substitute its own judgment for the agency’s.
3. Did they follow the necessary procedures?

The decision must be based on “consideration of all the relevant factors” and whether there has been “a clear error in judgement.”

A lesser element of this case is §701 (a)(2) (where judicial review is not applicable). The agency argued that this provision applied. On the facts, the Court found the provision did not apply (ie, the decision was subject to judicial review). But Court determined that it could be possible, in some cases, that a statute grants discretion to an agency but does not establish a standard against which to evaluate the discretion (such as “shall exercise reasonable discretion”), then it’s been committed to agency discretion by law (no standard for court to apply in reviewing it).

# Choice of Procedure

Just as common law court rulings can make law, so too can an agency adjudication. Previous decisions are precedents—not “rules” (just as court precedents are not statutes).

Agencies may be able to choose between adjudication or rulemaking, or may not have that choice. Depends on the originating statute. For example, EEOC doesn’t have authority to make rules about discrimination. But agency culture matters, too. EPA is all about rulemaking (not familiar with developing rules by adjudication, but uses adjudication in enforcement actions). NLRB has rulemaking authority, but for years only did things by adjudication. Agency’s choice is related to its culture as well as its statutory authority.

## Adjudication

Adjudication generally gets less attention (only the parties are very interested). It’s cheaper than informal rulemaking (or formal), since there are fewer parties. Agency can pick its test case. Agency can avoid all the burdens of rulemaking (OIRA and the rest of it) which may not be useful for the matter being adjudicated.

Adjudication can have a retroactive effect, if Congress empowered the agency to do so.

##### **Name Case:** *SEC v. Chenery Corp II* (1947; SCOTUS)

* Rulemaking is generally better (prospective, quasi-legislative), but there should not be rigid requirement that agencies use rulemaking and never adjudication.
* “Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule.”
  + Sometimes principles have to shift to meet “particular, unforeseeable situations” where a case-specific order (adjudication) is more applicable than a general rule.
  + Where agency couldn’t reasonably foresee issues/problems—so it didn’t make a rule—there is still a need to solve/resolve an issue which presents itself.
  + Or a problem may be known, but so new that agency doesn’t have experience enough with it to reasonably write a hard and fast rule. (Agency needs to learn more before writing a rule.)
  + Or a problem may be so “specialized and varying in nature” that a comprehensive rule won’t cut it.
* Decision between ad-hoc and general approach to rulemaking may be made (primarily) by the agency in its “informed discretion.”
* Just because an adjudication may have retroactive effect, this sole reason does not preclude an agency from using it

NLRB v. Bell Aerospace (SCOTUS, 1974, Powell): NLRB did not have to use N&C rulemaking in determining if some employees were managers or not. It was within agency discretion to choose adjudication as a venue in which to make that decision.

Formal rulemaking & formal adjudication = *Chevron* deference

Interpretive rule/policy statement = usually not *Chevron* (still do sometimes, see *Mead*)

Informal adjudication = no case law addressing whether or not *Chevron* applies (per Funk: informal adjudication has the “force of law” and therefore should satisfy *Mead*, but *Mead* never clarified if the was an interpretive rule or an informal adjudication – look at the level of procedures used in the informal adjudication, higher level = *Chevron*, lover level probably not – understudied area)

## Rulemaking

Rulemaking allows bright line policies (better compliance); but can only have prospective effect (unless Congress grants otherwise). Informal rulemaking allows “ex parte” contact (HBO). The key questions:

* Does agency have authority to promulgate substantive rules?
* Can agency write a rule that will make facts less material, so that hearing unnecessary?
  + For example, narrow the issue to “was regulated party following the rule?” rather than a full blown hearing of “is the rule a good idea?” which invites lots of expert testimony at each adjudication.
* Can rule have retroactive effect?
  + No, unless Congress specifically grants that power.
* How does due process apply to an adjudication enforcing an ambiguous rule?
  + *GE v. EPA* (DC Cir, 1995): Agency ALJ imposed a fine during an enforcement adjudication of a rule which was ambiguous, so GE wasn’t on notice. GE sought review and DC Cir agreed that where, as here, GE’s interpretation was “reasonable,” and the agency “struggled to provide a definitive reading” of the rule, GE was not on notice. Therefore, cannot be punished/fined. Though is now clearly on notice for the future. The agency’s interpretation stands though on *Seminole Rock* deference. (Note in this case, ALJ could only interpret the rule and apply it, couldn’t address constitutional/DP concerns.)

## Non-Legislative Rules

No notice and comment required under § 553 for interpretive rules/policy statements/rules of agency org, procedure or practice. However, publication of interpretive rules and policy statements in the Federal Register is required by § 552.

Can get public attention and compliance, though, by communicating agency’s views. Can also direct the agency work force. Agency can also generally change its mind on a non-legislative rule without notice to the public.

### Interpretive Rules v. Policy Statements

* Interpretive rule is a statement “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”
* Policy statement is a statement “issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”

Advantages:

* Efficiency of avoiding notice & comment
* Beneficial to public (regulated entities know agency’s stance) & agency employees (can be used to establish uniformity within agency)

Disadvantages:

* May be adopted without public input
* Agency may treat is as binding (purposefully to avoid notice & comment or erroneously assume policy is legally binding)
* People may be adversely affected by reliance if the agency later on changes the interpretation

### Distinguishing between Legislative and Non-Legislative Rules

Agency will always defend a rule adopted without N&C as a valid, non-legislative rule. Courts apply the “Legal Effects Test” to evaluate whether the rule is legislative (but probably improperly adopted without N&C) or non-legislative (ok to adopt without N&C, but otherwise limited):

1. Whether in the absence of the rule, there would be an adequate basis for enforcement action
2. Whether the rule interprets a legal standard or whether it makes policy (does agency use interpretive tools such as canons of construction; is the rule more specific than the thing it is interpreting? If so, probably a policy statement.)
3. Whether the interpretive rule is consistent with the thing it claims to be interpreting or says something else
4. Whether the interpretive rule is inconsistent with a prior, long-standing, definitive interpretive rule (not accepted in all circuits, since agencies are allowed to change their interpretations)
5. Whether agency contemporaneously indicated it was issuing an interpretive rule
6. Whether person signing the agency document had authority to bind the agency or make law

Things that DON’T matter: whether or not it was published in the CFR; whether agency subsequently adopted same rule by N&C.

This is like the difficulty in distinguishing between *substantive* and *procedural* rules when looking at the procedural exception to § 554 (above).

#### Policy Statement v. Legislative Rule

Apply the “binding effects test”: does the agency statement impose a new duty or merely announce the intention to impose a new one at some time in the future? Regulated parties “must” = new duty; regulated parties “should” = policy.

If it’s a policy statement, no binding effect. If it’s a legislative rule, and not adopted with N&C, it cannot be enforced.

American Hospital Association v. Bowen (DC Cir, 1987) [also discussed in Informal Rulemaking, procedural v. substantive, above]: Medicare cost control review by Peer Review Organizations passed by Congress “with a broad brush.” HHS had to set about planning how to implement. Put out an RFP to hire a contractor. AHA sued on basis that RFP description of the work to bid on was a “rule” which should have gone through N&C.

Court applied a two-prong test and found that the RFP was a statement of policy, not a legislative rule:

1. Statement of policy may not have a present effect—it must be prospective
2. A statement of policy must leave the agency decision makers free to exercise discretion (if it is binding on the agency, it’s not a policy statement)

#### Interpretive Rule v. Legislative Rule

Assuming agency has power to promulgate legislative rules, courts examine a rule to see if it is interpretive or legislative by looking at two factors:

1. How the agency characterizes its action (gets a minimal level of deference)
2. Source of the duty described in the rule (gets the most weight). “If agency is describing with greater clarity or precision a duty that a statute or regulation has already established, a court will conclude that the agency has issued a ‘non-legislative rule.’ If a court determines that the agency is creating an entirely new duty” it will find that the rule is legislative, and violated N&C procedures.

*American Mining Congress v. Mine Safety & Health Administration* (DC Cir, 1993): Program policy letters about x-ray standards to diagnosis lung disease were not legislative rules, just interpretive ones.

Key factors: there would be an adequate basis for enforcement without the letters; not published in the CFR; agency hadn’t invoked its general legislative authority; the letters didn’t effectively amend a prior legislative rule

– Rule: An agency’s rule is subject to notice & comment procedures if it has the “force of law” – not great wording, technically if it didn’t go through notice & comment in the first place, it is impossible to have the force of law

Metropolitan School District v. Davila (7th Cir, 1992): letter from DOE interpreting Individuals with Disabilities Education Act was interpretive, not legislative. Focused on agency’s characterization of its action in the document (interpreting the section following a SCOTUS decision on it and relying on legislative history) and on fact that document didn’t create new rights or duties (just laid out an opinion about meaning).

Per Funk: look at all the facts and circumstances to see if it’s being treated as having binding legal effect, none really have legal effect because they didn’t go through notice & comment – no real set test for this

### How much can a person rely on a non-legislative rule?

**Agency changing its mind:**

Rule: Agency can change its mind without prior notice about the content of a non-legislative rule.

*• Alaska Professional Hunters Association v. FAA* (DC Cir, 1999): Had to allow N&C due to reliance on a 40+ year established interpretation.

*• MBA v. Harris* (DC Cir, 2013): In determining whether or not notice & comment is required, reliance is only a factor – subsequently went to SCOTUS who called *Vermont Yankee* and overruled both

**Estoppel against the government**

Rule: Supreme Court has said there might be a fact-pattern where you could sue the government for estoppel, but they’ve never found one.

*• Heckler v. Community Health Services* (SCOTUS, 1984, Stevens): CHS got Medicare reimbursement based on a misinterpretation of regs. Its Medicare fiscal intermediary, Traveller’s, verbally told them it was ok to put in. Generally, estoppel doesn’t apply to government like it does to everyone else. “Those who deal with the Government are expected to know the law.”

*• Office of Personnel Management v. Richmond* (SCOTUS, 1990, Kennedy): Refuses to make categorical rule that there is no estoppel against the Government. But, says that on separation of powers grounds, members of the executive branch cannot promise to spend money which must be appropriated by Congress.

**Due Process in reliance**

*Appeal of Eno (New Hampshire Dept of Employment Security*) State law case, 1985. Important because written by Souter when he was on the NH Supreme Court. Unemployed person reported that she was seeking work, in answer to weekly question at the unemployment office, to get unemployment, then denied unemployment for that period because not seeking work to the department’s standard. Found a due process violation in the dept not having communicated expectations to her adequately.

**TAKEAWAY:** equitable estoppel is pretty much a dead end against the government, but you can make many of the same arguments for Due Processes reasons & the principles on fundamental fairness.

## Judicial Deference

*Skidmore* deference is that paid to an agency’s non-legislative interpretation of a statute—weak deference. *Skidmore* was before *Chevron*. After *Chevron*, at least two justices (Scalia and Breyer) thought that Skidmore deference no longer existed (replaced by Chevron), but not a unanimous view.

##### **Name Case:** *Skidmore v. Swift & Co.* (SCOTUS, 1944)

Issue: Whether employees of Swift & Co. were entitled to overtime pay under FLSA, more generally whether or not a bulletin interpreting a statute issued by the DOL was to be given any weight

Facts: An “interpretive bulletin” had been issued by the Dept. of Labor which indicated overtime pay for “inactive duty” – the lower courts did not take this bulletin into account because the agency did not use rulemaking to adopt the interpretation

Christensen v. Harris County (SCOTUS, 2000): DOL opinion letter said public sector ee’s getting comp time instead of OT could not be compelled by employer to use their comp time unless employees agreed in advance to that practice. When Sheriff’s Office tried to force ee’s to schedule time off to use up their comp time, deputies objected and tried to rely on the DOL letter. Court applied *Skidmore* deference and found that the letter was unpersuasive.

##### **Name Case:** *United States v. Mead* (SCOTUS, 2001, Souter)

Court distinguished between *Chevron* and *Skidmore*. *Chevron* deference would apply if “Congress delegated authority to the agency generally to make rules carrying the force of law and the agency interpretation claiming deference was promulgated in the exercise of that authority.” Non-legislative rule is not automatically barred from *Chevron* deference.

*Skidmore* claim might be applicable, especially since the regulatory scheme is highly detailed and the agency has expertise. Remanded for that consideration.

*Barnhart v. Walton* (SCOTUS, 2002, Breyer): Creates factors to determine if *Chevron* deference applies to a non-legislative rule (here it did). Factors:

* Interstitial nature of the legal question
  + Per Wikipedia: "Interstital federal lawmaking" is a species of "U.S. common law" which arises where Congressional statutes implicitly compel federal courts to fill gaps to interpret the federal law, should a case or controversy arise, where the transactions or issues typically would be controlled by state law (such as real property regulatory programs). United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973).
* Related expertise of the agency
* Importance of the question to the administration of the statute
* Complexity of that administration
* Careful consideration of the question by the agency over a long period of time

##### **Name Case:** *Bowles v. Seminole Rock & Sand Co.* (SCOTUS, 1945) / *Auer v. Robbins* (SCOTUS 1997)

Established a new level of deference regarding agency’s interpretation of its own regulations – high level of deference, agency has the right to interpret its own regulations. Doctrine is from *Seminole Rock* but *Auer* is cited more often. **Exception:** when “regulation” agency claims to be interpreting is just a parrot of a statute.

# Reviewability Under APA

Standard agency defense tactics including raising various challenges to the plaintiffs’ ability to bring a claim at all. This is often litigated long before the merits are litigated, if they ever are (and it is the agency’s hope they aren’t). In class, Funk refers to this as the agency/DOJ “pressing a function key” on the computer to generate a standard defense.

## Primary Jurisdiction

This doesn’t specifically apply to suits involving the government; it’s a doctrine that applies when one private actor sues another private actor (or a state/local government). The idea is that that the expert on a specific legal issue is the agency rather than the courts. So, court leaves it to the primary jurisdiction of the agency to answer the question (akin to when a court is asked to certify a question). Then, with the agency’s answer, come back to court if the agency answer doesn’t resolve the issue.

## Standing

##### **Name Case:** *Lujan v. Defenders of Wildlife* (SCOTUS, 1992, Scalia)

Three factors as an “irreducible constitutional minimum”:

1) Injury (concrete & particularized, actual or imminent)

2) Causation (injury is “fairly traceable” to defendants’ complained about conduct)

3) Redressability (“likely” that requested relief will actually fix the problem – don’t need 100%)

* Causation and Redressability are had to establish when a party is suing over something btw the government and a 3rd party
* To find an individual with standing, the challenge is to focus on what the injury would be
* Is an increased risk an actual injury in itself? Varies by circuit. (The more drastic the injury might be, generally, the lower the amount of increased risk needs to be.)
  + An injury must be concrete; a procedural violation is not an injury unless it gives rise to a concrete injury (or the possibility of one that has a likelihood of being redressed—causation and redress can be less direct in the case of a procedural violation)
* Tougher to get standing on a constitutional issue than a statutory issue (like NEPA).

**Associational/representational standing**:

1) Must have a member with standing (as above);

2) Purpose of the organization related to the lawsuit going on;

3) Member with standing doesn’t have to be a named party (i.e., not seeking monetary relief)

**Prudential standing or statutory standing:** Court-made doctrine (so Congress can pass laws to eliminate it). Short version: you need a cause of action to get into court.

Cases: Monsato (standing found for organic alfalfa farmers who wanted to prevent GMO seeds being sown nearby; “high probability”) and Clapper (Amnesty Intl workers worried that TSA was spying on their overseas contacts; “speculative”). Hard to reconcile those cases.

Per Funk: “Prudential standing” and “statutory standing” are not good terms – it is what the law requires so it is not “prudential” and it is not a jurisdictional issue so it is not “standing.”

## Exclusions

§701 APA grants judicial review (according to its terms) but specifically excludes review to the extent that:

a) judicial review is precluded by statute;

b) agency action is committed to agency discretion by law.

It’s pretty rare that §701(a)(1) applies and there is specific statutory exclusion. Mostly it’s a common law issued under § 701(a)(2).

### Statutory Preclusion

##### **Name Case:** *Abbott Laboratories v. Gardner* (SCOTUS, 1967, Harlan)

Facts: FDA rule (to carry out new law) to require brand name drug to list its generic name in font half as large (Tylenol must also say acetaminophen). Law said, “labels and other printed materials.” Rule said, “every time the trade name is used.” Pharma lobby sued saying agency had exceeded its statutory authority. Sought pre-enforcement review.

Per Court: APA encodes a presumption for review of a final agency action.

Test: “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.”

Here, no such intent found in the legislative history; the existence of procedures for review of certain issues **does not =** intent to preclude review of other issues. So, pre-enforcement review allowed here.

*Block v. Community Nutrition Institute*, SCOTUS 1984 (O’Connor)

Applies test from *Abbot Labs*, but finds that Congressional intent can also be **inferred** from the statutory structure itself. “In particular, at least when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded.”

#### Committed to Agency Discretion by Law (§ 701(a)(2))

Statute grants discretion to an agency, but does not establish a standard against which to evaluate the discretion (such as “shall exercise reasonable discretion”), then it’s been committed to agency discretion by law (no standard for court to apply in reviewing it). Citizens to Preserve Overton Park v. Volpe.

But, review can be impliedly precluded in other ways, too….

##### **Name Case:** *Heckler v. Chaney* (SCOTUS, 1985, Rehnquist)

Facts: prisoners sentenced to death by lethal injection petition FDA, arguing it was “required” to evaluate the drugs to confirm that they were “safe and effective” for human execution before they could be sold in interstate commerce (drugs had not been FDA approved for executions). Argued that unapproved use of approved drug = “misbranding.”

Rehnquist Opinion: Interprets §701(a)(2) which has not been done by Sup. Ct. in detail before. *Presumption of reviewability can be overcome by another presumption (here, presumption of prosecutorial discretion).*

Reasons for prosecutorial discretion: it’s a fact-based judgment call to prosecute or not, and then another evaluation to determine if it’s the best use of agency resources. And, in declining to prosecute, agency isn’t infringing in the areas that courts are generally supposed to protect people. And agency’s discretion in enforcement is akin to prosecutorial discretion in the Executive branch.

Exceptions:

* If Congress creates a statute to guide prosecutorial discretion
* If agency denies prosecution based solely on legal grounds (ie, we won’t take that action because we do not have authority to do so). This is not an exercise of discretion, so a court can review it.
* We’re just not going to enforce it. (Not declining enforcement in a particular case, based on specific facts, but as a policy matter.)

Brennan concurrence: Holds out specific areas this decision doesn’t reach (wants to avoid over-application of this holding): 1) agency claims it does not have authority; 2) agency engages in a pattern of non-enforcement; 3) agency refuses to enforce a regulation lawfully promulgated and still in effect; 4) non-enforcement violates constitutional rights.

Marshall concurrence: sees the correct basis to decide the issue as “refusals to enforce… are reviewable in the absence of ‘clear and convincing’ congressional intent to the contrary, but that such refusals warrant deference when, as in this case, there is nothing to suggest that an agency with enforcement discretion has abused that discretion.” Concerned about agencies refusing to enforce for bad reasons, such as vindictive/personal reasons, simply ignoring the request, or when agency might use resource-allocation arguments as a “sham.”

*Webster v. Doe* (SCOTUS, 1988, Rehnquist): Gay CIA employee fired. National Security Act gave director broad authority to termination when he “deemed such termination necessary or advisable in the interests of the US.” Standard “exudes deference to the Director” and “forecloses application of any meaningful judicial standard of review.” HOWEVER: that section does not exclude review of constitutional claims. “Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.”

Scalia dissented: Judicial review even of constitutional claims is precluded by the statute. Citizens care more about their statutory rights than their constitutional ones, Scalia asserts.

*Lincoln v. Vigil* (SCOTUS, 1993). Indian Health Services decision about how to allocate a block grant was precluded from judicial review. “the very point of a lump sum appropriation is to give an agency the capacity to adapt to changing circumstances…”

Funk: but, you could challenge the allocation on procedural grounds—it was a “rule” and should have gone through N&C rulemaking.

**Takeaway:** overarching law/Constitution can potentially limit the agency’s discretion even if it is designated to the agency by law – DP claims/discrimination/etc. – Agency does not have the discretion to violate the Constitution

## Agency Action

Defined by APA: “‘agency action’ includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”

*Lujan v. National Wildlife Federation* (SCOTUS, 1990, Scalia). The “land withdrawal review program” was not an agency action because it was too broad. NWF wanted an EIS of the review program as a whole.

*Norton v. Southern Utah Wilderness Alliance* (SCOTUS, 2004, Scalia): The action not taken (the inaction) has to be a discrete action (included in the APA definition of agency action) that the agency was legally required to take, in order to be an “inaction” under APA. – prosecutorial discretion still exists

## Cause of Action

An injury that qualifies for purposes of standing may or may not qualify to establish a cause of action under 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 thereof

#### Legal wrong

Allege that common-law, statutory or constitutional rights have been infringed. Example: ordered by an agency to do something (your liberty is harmed). Things that happen to other parties cannot be the basis of your own liberty being harmed.

#### Aggrieved… within the meaning of a relevant statute

Is the aggrieved party within the zone of interests that a particular law was designed to protect? (NOTE: this does not mean that a private right of action has to exist… either under a criminal statute, or under a civil statute where a third party is aggrieved by an agency decision.)

It’s hard for an agency to show someone is not in the zone of interests; presumptively, they are if they have standing.

*Air Courier v. American Postal Workers Union* (SCOTUS, 1991, Rehnquist): statute limiting private competitors to US postal service was designed to ensure cross-subsidization of expensive routes, not to protect jobs. Therefore, when USPS allowed private courier services to handle “international remailing,” the USPS employees were not in the zone of interests protected by the statute and did not have a cause of action.

*National Credit Union Administration v. First National Bank & Trust Co*. (SCOTUS, 1998, Thomas): Test is whether the aggrieved party is “arguably within the zone of interests.” Do not ask whether Congress intended this group to be protected. Instead, identify the interests arguably to be protected, then inquire whether the plaintiff’s interests impacted by the agency action are within those. (Subtle, but avoids congressional intent.) Federal credit unions are limited as to their customers so that they can provide services to poorer folks, working people. As agency allowed them to consolidate and reach out to more potential customers, banks didn’t like that. Thomas found that purpose of act was to limit customers, so competitors’ interests were within the zone of interests.

## Timing

#### Finality

When is an agency action “final”? Different SCOTUS formulations:

* Is the agency done with it?
* Either it is sufficiently direct and immediate to have effect on day-to-day business, or, is one by which rigors or obligations have been determined or from which legal consequences will flow.
* Action is definitive statement of agency’s position; action has status of law with penalties for non-compliance; direct and immediate impact; immediate compliance is expected

*Taylor-Callahan-Coleman v. Dole* (5th Cir, 1991): Two DOL wage-hour advisory letters (sent to other employers saying that probation officers were non-exempt) were not final agency action with regard to the plaintiff. The letters were “akin to threshold determinations” and did not set out a definitive statement of policy and did not have status of law—no penalty for non-compliance. Holding specifically excluded offering an advisory opinion on the “question of willfulness which may later arise” but said that the letters did not have binding force.

To determine if agency action is final, courts consider:

1. Is it a definitive statement of agency’s decision?
2. Status of laws/penalties for non-compliance
3. Is the impact on the plaintiff direct and immediate?
4. Whether immediate compliance was expected

*Automatic Laundry v. Shultz* (DC Cir, 1971): DOL wage-hour advisory letter was a final agency action because: it was issued to the plaintiff, based on plaintiff’s specific facts; was written to a national trade org on behalf of a large segment of the industry; the letter made a determination about all coin operated launderettes; Wage-Hour division intended letter to be a “deliberative determination” and “expected conformity.”

*Appalachian Power Company v. EPA* (DC Cir, 2000): EPA’s “periodic monitoring guidance document” was a final agency action. It was a policy statement to the states to put another layer of monitoring on top of permits, or EPA wouldn’t approve the permits. EPA adding “this is not a rule; don’t rely on this” at the end of the letter didn’t mean it wasn’t a final agency action. “If an agency acts as if a document issued at hq is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency’s document is for all practical purposes ‘binding’.” (487).

* **Note:** Binding effect alone isn’t enough (ex.: temporary restraining order is binding, but it is not final)
* To be “final” it must be the end of the agency’s decision-making process AND action must determine “rights and obligations” or be one from which “legal consequences will flow.”

#### Exhaustion of Administrative Remedies

• Party needs to exhaust administrative remedies before going to court.

• Protects agency authority (discretion and expertise; opportunity to correct own errors; avoid encouraging disregard of agency procedures) and conserves judicial resources (focus only on issues still contested; development of admin record helps with fact-finding)

• Exceptions carved out to avoid hardship caused by delaying or precluding judicial review

*McCarthy v. Madigan* (SCOTUS, 1992, Blackmun): case was before the PLRA was amended to require full exhaustion before going to court. Balancing test: “the interest of the individual in retaining prompt access to federal judicial forum against countervailing institutional interests favoring exhaustion.”

Three identified circumstances where individual need outweighed institution:

1. Would cause undue prejudice in subsequent court actions
2. Administrative relief would be inadequate because some doubt agency can give effective relief
3. Agency shown to be biased/predetermined outcome.

HERE, short administrative deadlines looked prejudicial and inmate was seeking $ damages, which agency couldn’t give.

* No longer good law for APA: SEE *DARBY V. CISNEROS.* Remains good law for exhaustion under other statutes besides APA.
* Rehnquist, Scalia, Thomas: concur based entirely on the fact that prison’s grievance procedure could not offer an effective remedy for that sought ($). Did not agree with majority on short deadlines.

*Darby v. Cisneros* (SCOTUS, 1993, Blackmun): Though §704 is phrased in terms of finality, it constitutes statutory exhaustion provision that substitutes for the common law doctrine. As long as agency requires exhaustion (in its rules) and puts the action on hold pending next level of admin review, it can insist that parties exhaust their administrative remedies before going to court. No court had seen that in § 704 before, and courts had applied the common law balancing test as described above.

• Federal courts cannot require complete exhaustion if the agency mandate/statute doesn’t call for it

ISSUE EXHAUTION: judge-made doctrine that, in absence of exceptional circumstances, courts will not consider arguments not first presented in the administrative proceeding – assures agency has ability to consider an issue

#### Ripeness

• This is a common law concept—which suggests it shouldn’t survive *Darby*, but it does. At some level, ripeness can be a constitutional issue (speculative injury, lack of causation), but generally it is less precise.

• Ripeness can be a problem for plaintiffs even after a final agency action.

• Ripeness usually, but not always, involves pre-enforcement review. *Does the order/rule change primary conduct on a day-to-day basis?*

• Exhaustion and ripeness can look a lot alike, but… exhaustion focuses on the position of the party seeking review, while ripeness is more concerned about institutional relationships between courts and agencies.

##### **Name Case:** *Abbot Laboratories v. Gardner* (on ripeness)

Seeking pre-enforcement review, which government doesn’t want to allow.

Court found it ripe: Issue is purely a legal one (no need for factual record); rule was final agency action; rule can give rise to criminal sanctions; pharma industry must change all labels, printed materials, etc (huge burden) to avoid non-compliance (in which case possible that the issue will never be ripe, since they might not be sanctioned); asking them to face criminal sanctions and be criminal defendants before challenging was too much. Test for ripeness:

1. Fitness of issue for judicial review (legal not factual)
2. Hardship to the parties from withholding court consideration
3. Whether the courts would benefit from further factual development

# Agency Structure

## Delegation of Legislative Power

• “Intelligible Principle” test: Congress does not violate the prohibition against delegating its legislative powers as long as it sets boundaries for the agency’s authority. May still be struck down if the delegation is broad and ambiguous to offer the court sufficient guidance with respect to the extent of the agency’s authority.

*Whitman v. American Trucking* (SCOTUS, 2001, Scalia): issue regarding whether the CAA delegates legislative power to the administrator of the EPA within the bounds of the intelligible principle.

• “Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to perform’” (citing *J.W. Hampton*)

• Here, intelligible principle is “at a level requisite to protect public health from the adverse effects of the pollutant in the ambient air”

• Intelligible principle has only ever found to be lacking in two statutes

Non-delegation doctrine often used to interpret statutes narrowly to avoid constitutional issues

## Legislative Vetoes

##### **Name Case**: *INS v. Chadha* (SCOTUS, 1983, Burger)

One house veto violated the presentment clause and bicameralism – if something alters the legal rights of a person (here, Chadha’s ability to remain in the US) it must go through bicameralism and presentment

Bright line rule: One and two-house vetoes are unconstitutional because EITHER

1. They are a legislative act (action with legal effect without complying with Presentment clause), OR
2. They are enacting/carrying out a statutory provision which is an executive act which they can’t do

Recall: a joint resolution of Congress is presented to the president (so does not violate the presentment clause); a concurrent resolution is not presented. A joint resolution is a bill, except that as a point of parliamentary procedure, it may not be amended on the floor.

## Appointments and Removals

Art. II, § 2: [The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint … all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

### Legislative Appointments & Removals

*• Buckley v. Valeo* (SCOTUS, 1976, per curiam): Current commissioners could do things that a Congressional committee could do (legislative tasks, like gathering information and investigating), but could not engage in tasks appropriate to the executive branch (enforcement and prosecution power).

• Congress permitted to appoint officers whose function is limited to an investigative or informative nature

*• Bowsher v. Synar* (SCOTUS, 1986, Burger). Comptroller General was given authority by Congress to report to the President on sequestration cuts, President had to take certain actions based on this Holding: Congress can’t appoint a legislative position and retain termination authority that will conduct executive acts (seeing that the laws are faithfully executed). Unconstitutional violation of separation of powers.

### Executive Appointments

##### **Name Case:** *Morrison v. Olson* (SCOTUS, 1988, Rehnquist)

Distinction between principal and inferior officers is important (principal ones require advise and consent of Senate; Congress may delegate power to appoint inferior officers to Executive).

Appointment process:

* Principal: Must be appointed by president with advice and consent of Senate
* Inferior: May be appointed in the same way as Principals, or may be President alone, Courts of Law, or the Heads of Departments

4 Factors that distinguish inferior officers from principal ones

1. Answer to a higher official who is below the level of the President (such as AG)
2. Temporary position, limited duration
3. Limited jurisdiction-can’t prosecute/investigate just anything, only certain identified things
4. Limited duties

HERE: cross-branch appointment was appropriate because executive branch couldn’t appoint someone to investigate itself and judicial branch was the “most logical place” for the appointing authority to move to.

### Executive Removals

*• Myers v. US* (SCOTUS 1926): NO LONGER GOOD LAW; held that “the power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment.” President could fire postmaster without Senate approval. Applied the removal power broadly.

*• Humphrey’s Executor* (SCOTUS, 1935): Held that administrative agencies were not appendages of the president and that he could not fire head of FTC without good cause (“inefficiency, neglect of duty or malfeasance in office”) if that’s how Congress wrote the statute. Congress has power to set up agencies to perform quasi-legislative or quasi-judicial work independently of the president.

##### *Morrison v. Olson* (on removals)

May Congress limit the removal power for President? Generally no, with two exceptions

If the office in general is such that independence from the President is desirable (Morrison was an independent counsel investigating the executive branch; she was appointed cross-branch by the Courts)

* Rule (“fuzzy” per Funk): No restriction allowed on firing if such a restriction interferes with the exercise of the President’s core function. Funk articulated this also as the restriction may not be of such a nature as to impede the President’s ability to make sure the laws are faithful executed.
  + Rehnquist/Majority:
    - Said Myers was correct that there are some roles that are “purely executive” over which President has power to remove at will, but this wasn’t one of them: independent counsel’s role is not “so central to the functioning of the executive branch as to require at will term”.
    - Pointed out she could be removed for good cause
  + Scalia dissent: That’s crazy, if she’s investigating the president’s closest advisors, that’s pretty central to the exec branch; court has made up a new balancing test

Can impose a standard of removal only for “good cause” (but, from PCAOB, only 1 level of it)

* Humphrey’s Executor: Power of removal is not unlimited, allows standard for principle officer
* Morrison v. Olson: allows it for an inferior officer
* But under PCAOB, can’t add the two levels together.

Funk pointed out that ALJ’s are “for cause” protected and the people who can remove them are too. So, are ALJ’s unconstitutional? Or are they just “employees” and not officers (exercising significant authority)?

# Public Access

## Freedom of Information Act (FOIA) (APA § 552)

• FOIA gives its own cause of action; do not rely on APA § 702!

• Agency has the burden to show why it should withhold the documents. And it has *de novo* review in the courts, no deference.

• FOIA has a presumption in favor of disclosure; it is NOT a prohibition on disclosure. Currently, AG/DOJ has told agencies it will only defend on FOIA claims if 1) the material is exempt; and 2) agency has made a finding that release is not in the public interest.

Logistics:

* Time limits are generally ignored (20 days to respond).
* Commercial requests: agencies may charge for direct search costs, duplication, and review.
* Non-commercial requests (news media, educational, non-commercial scientific org): can change for reasonable duplication fees (but if late, no fees). “News media” is very broad.

### Three major aspects

1. § 552(a)(1) Certain types of materials have to be published in the Federal Register in order to provide constructive notice. If not, person who doesn’t have notice of them can’t be adversely effected (this is the only enforcement mechanism—can’t sue over non-publication).
   * Agency’s organization, procedures, rules, and general interpretive statements
2. § 552(a)(2) Things not published must be indexed and made available for inspection in the agency library. (If not, agency can’t use them against people.)
   * Adjudicatory decisions, policy interpretive statements, staff manuals that effect the public
3. § 552(a)(3) Upon request by any person, agency must make records available if reasonably described
   * “Any person” is very broad, no citizenship requirements; a fugitive from justice was not a “person” for FOIA purposes when he sought law enforcement records about his case.
   * Standard is that they must be reasonably described so that a staff member would know where to look for them.
   * Area for litigation: is this an “agency record”?

*Bureau of National Affairs Inc. v. US DOJ* (DC Cir, 1984). Four factors to determine if appointment calendars, daily agendas, and phone logs were “agency records”:

1. Records within agency control?
2. Records generated within the agency?
3. Records place into the agency’s files?
4. Records used by the agency for any purpose? (this seems to drive a lot in both cases)

• inclusion of personal information alone does not automatically exempt something from FOIA

*US DOJ v. Tax Analysts* (SCOTUS, 1989). Were tax court opinions sent to the agency with each verdict “agency records”? The documents were being used by the agency, which seemed to weigh heavily for the court. Agency must either “create or obtain” the requested materials and be in control of them at the time the request is made. Physical location is not the only factor (*Kissinger*) & agency must actually possess records, not just have access to obtain them (*Forsham*)

### FOIA Exemptions:

(1) Classified materials (national defense or foreign policy) that (A) are designated classified by an EO and (B) are in fact properly classified pursuant to such EO [court may review that the documents are properly classified]

* While courts may review documents to make sure they are properly designated classified, in practice they almost never do anything like that
* The “Glomar rule” allows CIA to “neither confirm nor deny” in response to a FOIA request

(2) Related solely to the internal personnel rules and practices of an agency;

* This exemption only applies when the records have no impact on the public.

(3) Specifically exempted from disclosure by statute

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* *Critical Mass Energy Project v. Nuclear Reg. Commission* (DC Cir 1992). Test for when commercial data provided to the government is exempt from FOIA

1. Subjective prong: does the person providing the information wish to keep it confidential?
2. Objective prong:
   * If given voluntarily, is automatically confidential if it is of a kind that customarily would not be released to the public by the person from whom it was obtained
   * If given because its required, evaluate if disclosure with have either effect:
     1. Impair the government’s ability to obtain necessary information in the future
     2. Cause substantial harm to the competitive position of the person who provided the info.

* Case did not deal with the issue of: the info was provided voluntarily, but the government could have required it (had authority to require it).

(5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; [ONE OF THE MOST HEAVILY USED EXEMPTIONS]

* Intended to capture common law privilege for the government. Covers, per the Court:

1. Executive privileged material: pre-decisional advice from subordinates or peers (not a direction from a boss to an employee); includes summaries or edited versions of non-exempt materials (advice might be gleaned from what was selected); drafts.
2. Attorney-client privilege (can raise the issue of “who is the client?” for a government lawyer)
3. Attorney work product (in preparation for litigation)
4. Government’s own confidential commercial info
5. Factual statements made to air crash investigators

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

* Applies to natural persons, not corporations
* Balancing test: public interest in disclosure v. private interest in maintaining privacy
* Information requestor must demonstrate a legitimate public need for the info

(7) Records or information compiled for law enforcement purposes (if they meet any of six criteria),;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

* This exemption is written broadly and interpreted broadly

(9) geological and geophysical information and data, including maps, concerning wells.

### Reverse FOIA suits

A party that has provided info to the government is seeking to keep it from being disclosed in response to a FOIA request from another party. The agency’s procedures will lay out its obligation to notify the submitter of confidential information that another party is seeking it.

##### **Name Case:** *Chrysler Corp. v. Brown* (SCOTUS, 1979, Rehnquist)

First reverse FOIA case; the template for how they are handled

Facts: 3rd party sought Chrysler’s AAP which was submitted as required by OFCCP (Chrysler contractor for Defense Logistics Agency).

Chrysler arguments:

1. FOIA exempt = bar on disclosure [argument failed badly]
2. The Trade Secrets Act bars disclosure of “confidential statistical data” by a government employee

Gov’t: TSA doesn’t prohibit it b/c OFCCP regulations authorize the release

Chrysler: OFCCP regs adopted w/o N&C, therefore do not have the force of law

Court: TSA doesn’t create a private right of action, it’s a criminal statute

But… Chrysler could pursue a claim under APA § 702 (if suffers “legal wrong” or is “adversely effected” within the meaning of a “relevant statute”). Here TSA is the “relevant statute” so if Chrysler can satisfy zone of interest test (see, reviewability above), can seek judicial review of a final agency action (the decision to release the info).

Reaffirms that FOIA is exclusively a disclosure statute, not a confidentiality statute (it doesn’t prohibit the release of anything)

## Federal Advisory Committee Act (FACA)

Aimed at monitoring the number and expenses of advisory committees; and at making sure special interests don’t have undue influence (limited committee memberships; secrecy).

Does not have its own cause of action—must sue via APA—arbitrary and capricious review. All the litigation action is around the definition of an “advisory committee” under the act:

The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration

“Established” is read large—in its broadest scope. “Utilized” is read out of the statute by the case law.

*Public Citizen v. US DOJ* (SCOTUS, 1989, Brennan): ABA Standing Committee to give “background checks” on candidates for federal judgeships was not an “advisory committee” because to allow it so would have meant finding the statute improperly created Constitutional problems (lollygagged around in legislative history).

*In re Cheney* (DC Cir, 2005): DC Circuit doesn’t like this law. Focused on who was a “member” of a committee—not defined by FACA. The private parties present did not vote and did not have veto authority, therefore they were not members of the committee (did the fed employees present do those things? Doesn’t matter), therefore the committee was composed only of federal employees, therefore exempt from FACA. Concerns about separation of powers.

*NW Forest Resource Council v. Espy* (DC District, 1994): 5 state university professors who participated in a committee compiling technical environmental data were not federal employees and since government conceded they were members of the committee, its use violated FACA.

### Takeaways:

* If agency head hires a consultant to go around and solicit views of people she wants to know the views of and then write up a report, that group of interviewees is not an “advisory committee” and FACA doesn’t apply.
* If an agency violates FACA and you sue, all you get is the information (meeting minutes, etc.) if it exists. You can’t block the decision made with the committee’s advice.

## Government in the Sunshine Act

Intent is open government, requires publication of upcoming meetings, etc. plus open meetings.

Applies to agencies “headed by a collegial body composed of two or more individual members…” That is, multi-member independent regulatory committees (FCC, SEC, NLRB, etc.)

Requires that “agency meetings” be held in public.

* The “agency” is the agency as described above OR a “subdivision thereof” which means a quorum of the members (majority)—enough to do business. “Subdivision” does not include subordinate agency staff.
* A “meeting” is where the agency/subdivision engages in “deliberations” that “determine or result in the joint conduct or disposition of official agency business.” If group is discussing matters outside the scope of its formally delegated authority, it is not a meeting.
  + General background information is not a meeting per SCOTUS in *FCC v. ITT World Com*, 1984. From that case, it looks like agency could talk about a lot of things, as long as it didn’t actually decide.
  + There are some categorical subject matter exemptions, based on FOIA exemptions, plus a few court-created ones.
  + Challenge: if the agency has a gathering, it can’t easily defend that it wasn’t a “meeting” if it doesn’t keep minutes of the gathering.

Provides its own Cause of Action (not APA § 702).

If you sue an agency for violating the Sunshine Act, you get a transcript of the meeting, if one exists. You cannot, by the terms of the act itself, get an injunction to block any decision made at the meeting.

# Oregon APA

* A formal adjudication is called a “contested case hearing”
* Trigger to have a contested case hearing is not statutory—it’s whenever due process would require a hearing on the record
* Has a Central Panel, so that ALJ’s are employed in a central department, not in the individual agencies. (Office of Administrative Hearings.)
* Interpretive rules are supposed to go through N&C, whereas in Federal APA, can adopt interpretive rules non-legislatively.
* No provision for formal rulemaking—everything is supposed to be N&C, not mini-trials
* Agencies may issue declaratory rulings, but in practice, agencies don’t do it (why constrain their own discretion?)
* No associational standing except for environmental citizen suits
* Oregon ALJs can rule on OR Constitutional issues, unlike Federal ones
* OR APA: substantial evidence standard includes both law & facts – federal APA doesn’t say this, but assumed included as a practical matter