**Administrative Law Outline**

Fall 2016

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**Administrative Law Outline2**

Fall 2016

Administrative Law Practice

(CB 1-49; APA § 551)

1. Introduction
   1. *Fund for Animals, Inc. v. Rice* (11th Cir., 1996)

**F:** Illustrative of typical administrative law case, including that a three-party dispute with two private actors (private persons and regulated entities) on each side of the dispute and the governmental agency and that both private actors may be unhappy

**H:** The Fund for Animals loses its challenge and the Corps wins, however, the Fund for Animals has made changes better for the environment

1. What is Administrative Law? – The law that governs, limits, and restrains agencies (e.g. ESA, NEPA) and the law that agencies make (e.g. permits, regulations)
   1. APA § 551 – “‘Agency’” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include…” (goes on to exceptions)
   2. What Do Agencies Do?
      1. Regulate Private Action
      2. Administer Entitlements Programs – including offering benefits
   3. How do agencies accomplish this?
      1. Make rules/regulations – not by Congress because time consuming, too detailed, and agencies apply the regulations by making adjudications
      2. Issue orders after adjudication – apply facts to the law to determine whether to allow/probit someone from doing something
      3. Investigate
      4. Separation of power – agencies have both legislative and judicial function while operating under the executive branch, APA maintains separation of powers by creating procedures to cure the problem of agencies have a mix of all the powers
   4. What laws constrain agencies?
      1. Constitution through separation of powers, due process
      2. Federal statutes – sources of the agency’s authority and general procedural statutes applying to all agencies (e.g. APA, NEPA)
      3. Executive orders – not enforceable by their terms in court but political force
      4. Court decisions – review agency action, tell agencies what to do
   5. Types of agencies
      1. President is not an agency – traditional practice, separation of powers
      2. Dependent executive branch agencies and subentities – Cabinet as heads of Departments
         1. Cabinet – traditionally the President’s closest advisors, but now WH filled with advisors not apart of the Cabinet
      3. Independent executive branch agencies – e.g. EPA
      4. Independent regulatory agencies – bipartisan, multi-member, term of years/indefinite appointment, removal for cause
   6. State administrative law –
      1. In state law some state agencies are elected rather than appointed (e.g. in OR Sec’y of State, Treasurer, AG all elected), meaning often not close ties with the Governor, often in another/the other party and looking to become president
      2. State public universities are state agencies
      3. In OR local gov’ts (cities, counties) not subject to admin law procedures
   7. As a government lawyer – agency not who heads the agency is your client; represent the presidency not the President

Rulemaking

(CB 51-138, 145-187; EO 12866; Regulatory Flexibility Act; APA §§ 553, 706)

1. Introduction to Rulemaking
   1. APA § 553 and other statutes (e.g. NEPA, Paperwork Reduction Act)
   2. Types
      1. Informal rulemaking – requires N&C (notice in the Federal Register, receive public comments), governed by APA § 553
      2. Formal rulemaking – governed by APA §§ 556 & 557
         1. Presumption against formal rulemaking – statute must require “rules to be made on the record after an opportunity for agency hearing” or otherwise make clear that formal rulemaking is required (e.g. “requires formal rulemaking”) (*Florida East Coast Railway Co.*)
      3. Hybrid rulemaking – any rulemaking procedure going beyond APA N&C procedures, virtually every rule does this now
   3. Courts cannot require additional procedures beyond those required by the APPA, Constitution, or other statutes, even if they think they are a good idea (*Vermont Yankee Nuclear Power Corp.*)
   4. Notice of Proposed Rulemaking (NOPR/NPRM) – requires only (1) notice of time, date, and location of proceeding, (2) terms or substance of proposed rule, (3) legal authority
2. Rulemaking Initiation
   1. Sources of Proposed Regulations
      1. Administrative staff recommendation – if identifies problems agencies should address; enforcement efforts often produce information about effectiveness of regulations
      2. Petition from the public – through lobbying and/or filing rulemaking petitions
         1. APA § 553(e) – each person has a right to petition for issuance, amendment, or repeal of a rule
         2. APA § 555 – agencies must respond promptly to petitions
      3. Statutory mandate from Congress
      4. Pressure from Congress
      5. Pressure from the President/White House
      6. Pressure from lobbyists
   2. Petitions for Rulemaking
      1. Agency Inaction, scope of review – APA § 706(1) Scope of Review – “...The reviewing court shall – compel agency action unlawfully withheld or unreasonably delayed”
         1. *Telecommunications Research & Action Center v. Federal Communications Commission* (D.C. Cir. 1984)

**Rule:** Courts can compel agency action that is unreasonably delayed; to determine whether agency’s delay is so egregious to warrant mandamus, consider – (1) “rule of reason” (shall not act unreasonably); (2) did Congress provide timetable for response?; (3) Are human health and welfare at stake?; (4) effect on activities of a higher competing priority?; (5) Nature and extent of interests prejudiced by delay

* + 1. Denial of a Petition
       1. *Arkansas Power & Light Co. v. Interstate Commerce Commission* (D.C. Cir., 1984)

**Rule:** The court will only compel an agency to institute rulemaking proceedings in *extremely rare instances*, meaning the scope of their review is very narrow. Adequately explained that rulemaking would be unnecessarily burdensome and individual adjudications could accomplish the same result.

* + - 1. *Massachusetts v. E.P.A.* (S. Ct., 2007)

**Rule:** Once an agency responds to a petition for rulemaking, its reason for action or inaction must conform to the authorizing statute

**H:** Court found EPA’s denial of petition for rulemaking illegal because it offered no reasoned explanation for its refusal to decide whether GHGs cause or contribute to climate change – meaning the Court found agency’s action egregious enough per *Arkansas Power* because agency was acting country to the plain meaning of the statute. Its arguments for denial that (1) not authorized to do so at this time and (2) unwise to do so at this time were, the Court found, (1) without legal basis and (2) had nothing to do with whether GHG emissions contribute to climate change

1. APA Rulemaking Procedures
   1. N&C rulemaking required to inform the agency and allow public to get involved
   2. The Exceptions
      1. General Exemptions (§ 553(a)) – military, contracts, public property, personnel grants, loans – but must be published in the Federal Register (but not notice, think of like press release) but without public comment (no notice so no public comment)
      2. Exceptions from Notice and Comment (§ 553(b)) – only excepts from notice in the FedReg but § 553(c) only triggers public comment where notice is required therefore excepted from notice and comment requirements
         1. Interpretative rules or policy statements
         2. Rules of agency organization, practice, and procedure
         3. *American Hospital Assn. v. Bowen* (D.C. Cir., 1987)

**Rule:** Whether agency action encodes (puts into law) a substantive value judgment (must do x or y to get something) or puts a stamp of approval/disapproval on a given type of behavior? Whether alters the rights or interests of the parties?

**H:** Exempt because procedural, does not tell the hospital it has to do anything

* + - 1. *Air Transport Association of America v. Department of Transportation* (D.C. Cir., 1990)

**H/Rule:** Regulations for adjudicating penalty are not exempt under procedure and good cause exemptions because they encode a substantive value judgment in that they affect defendants’ right to administrative adjudication and there are no time constraint creating emergency because statutory deadlines that are too short are still effective and own failure contributed to deadline pressure

**Note:** Not precedent, vacated judgment; *JEM* disavows (since vacated didn’t need to be overruled) – no longer good law

* + - 1. *JEM Broadcasting Company, Inc. v. Federal Communications Commission* (D.C. Cir., 1994)

**Rule:** Does not alter rights or interests of parties, but could alter manner in which parties represent themselves

**H:** Procedural (disavows *Air Transport*) because didn’t change standards by which FCC evaluates applications

**Takeaway:** Telling people what to do is more likely to be substantive

* + - 1. Good cause – impracticable (need to act immediately), unnecessary (technical issues, no one can care), contrary to the public interest (emergency, putting out information might undermine ability to do it)
  1. Interim final rules – adopt a rule but it is ineffective for 30 days while receiving comments, if it receives comments will initiate N&C
  2. Formal, Informal, or Hybrid Rulemaking
     1. *United States v. Florida East Coast Railway Co.* (S. Ct., 1973)

**H:** The Interstate Commerce Commission’s proceeding is governed by only APA § 553 informal rulemaking (rather than §§ 556 and 557 formal rulemaking) where the relevant Act authorized the Commission to act “after hearing” as that was not the equivalent of a requirement that a rule be made “on the record after opportunity for an agency hearing” as used in § 553(c)

**Rule:** Presumption against §§ 556 and 557 formal rulemaking where the authorizing statutory language is ambiguous, meaning it must have the § 553(c) language that a rule be made “on the record after opportunity for an agency hearing” to be in §§ 556 and 557. “On the record” or “after opportunity for agency hearing” not even enough, must have full phrase or specification by Congress, e.g. “this requires formal rulemaking“)

* + 1. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (S. Ct., 1978)

**H:** Circuit court erred in remanding on “‘ineluctable mandate’” that “‘the procedures followed during the hearings were inadequate’” as unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress

**Rule:** “Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.” “Absent constitutional constraints or extremely compelling circumstances,” administrative agencies “‘should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties’” – proposition that courts cannot require additional procedures beyond those required by the APA, Constitution, and other statutes

* 1. Informal Rulemaking Requirements
     1. Notice
        1. Test for whether adequate notice (different formulations of the same idea)
           1. (1) Logical outgrowth – not logical outgrowth if materially alters or substantially departs
           2. (2) Fairly apprised of issues in rule
           3. (3) Put on notice that interests were at stake
           4. (4) Issue on the table
           5. (5) In character with the original scheme
        2. *Chocolate Manufacturers Association v. Block* (4th Cir., 1985)

**Rule:** That commented does not mean had adequate notice – removed chocolate milk from list without providing adequate notice that the elimination of flavored milk would be considered, instead said trying to eliminate sugars generally

* + 1. Opportunity for Comment – Ex Parte Communications
       1. *Home Box Office v. Federal Communications Commission* (D.C. Cir., 1977)

**Rule:** Once a notice of proposed rulemaking has been issued, any official or employee reasonable 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 attorney or agent for any such party prior to the agency’s decision (i.e. ex parte communications). If such contacts nonetheless occur, 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.

**Note:** No longer good law because of *Vermont Yankee* (this case was decided one year prior to that), however, any agency taking submissions following its closing period will place these in the public docket pursuant to *Home Box Office* even though they don’t have to in order to safeguard themselves and keep post-comment period honest, i.e. no inappropriate lobbying when going to be reduced to writing and put in the public docket

* + - 1. *Sierra Club v. Costle* (D.C. Cir., 1981)

**H:** No statutory provision against these communications but CAA says must put oral communications of “central relevant” in public docket – up to agency’s discretion to determine what central relevance is, good law under CAA unclear whether would apply to an APA case

**Rule:** Briefings from Congress/President not requiring entry into the public docket (not oral type communications requiring entry into docket, tread lightly with communications with the President) but with private persons ^ should enter into public docket because may appear as corruption if don’t

**Note:** Not required after *Vermont Yankee* but often agency policy to enter anyway, just as court says so here (see Note under *Home Box Office*)

* 1. Hybrid Rulemaking Procedures
     1. Statutory Requirements
        1. Regulatory Flexibility Act
           1. Trigger – whether rule has significant economic impact on a substantial number of small business, organizations, or governments [which are subject to it]
           2. Analysis – purpose; statement of objectives and legal basis; description of affected small entities; reporting and recordkeeping requirements; description of regulatory alternatives
        2. Paperwork Reduction Act
           1. Trigger – whether agency imposing reporting or recordkeeping requirement on 10 or more people
           2. Analysis – must go through N&C procedure prior to imposing requirement; must determine that necessary, not unnecessarily duplicative, plain language, takes into account problems of small entities
     2. Executive Order Requirements – only WH enforces
        1. EO 12866 – each executive agency shall prepare an agenda of all regulations, submit list of planned regulatory activities assessing benefits and costs of significant actions and submitting proposal to Office of Information and Regulatory Affairs (OIRA), need comments from OIRA within 120 days [or before publishing]
     3. Ossification – slow-down of rulemaking due to additional requirements, many observers think it has fundamentally changed the nature of the process

1. Judicial Review
   1. Statutory Interpretation – subject to judicial review under APA § 706
      1. Standard of review – “not in accordance with law” or in excess of statutory jurisdiction, authority, limitations
      2. Why do courts defer to the agency? – implicitly delegated to agency by Congress, agencies are experts, agencies more politically responsible for decisions (more democratic), national uniformity
      3. *Chevron v. Natural Resources Defense Council, Inc.* (S. Ct., 1984)

**Rule:** **(0)** Does *Chevron* deference apply? *See Brown v. Williamson*, *Gonzales v. Oregon*, and *King v. Burwell* (all finding that Congress did not intend to leave interpretation to the agency)

**(1)** If yes, has Congress spoken to the issue unambiguously? Look to language, legislative history, canons of statutory construction, and plain meaning; if yes, no deference to agency, end of case.

**(2)** If no, is the agency’s answer/interpretation based on a permissible construction of the statute? A reasonable person just must have been able to reach that interpretation, not based on whether the court thinks it’s right or wrong; if yes, defer to agency’s interpretation (court cannot impose its own construction of the statute, need not be the only interpretation); if no, regulation is invalid (must be A&C or manifestly contrary to the statute)

**H:** Congress did not have a specific intention on the applicability of the bubble concept in these cases and EPA’s use of that concept here is a reasonable policy choice for the agency to make

* + 1. No *Chevron* deference for statutes like APA that apply to everyone – only apply when a single agency administers the statute (e.g. CAA)
    2. Consider *Mead* too when considering whether *Chevron* applies – administrative implementation of a particular statutory provision qualifies for *Chevron* deference (strong deference) when (1) it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and (2) that the agency interpretation claiming deference was promulgated in the exercise of that authority
    3. *Chevron* deference applies to procedural decisions
    4. Judicial interpretation of statute trumps agency’s interpretation only if a prior holding determined the statute’s meaning was unambiguous
  1. Substantive Decisions
     1. Standard of Review (§ 706)
        1. Informal (§ 553) – Arbitrary, capricious, abuse of discretion, not otherwise in accordance with law
           1. Did agency make a reasonable decision when looking at the record? Consider relevant factors and adequate explanation
           2. Doesn’t matter that the court could make a reasonable decision, only whether the agency made a reasonable decision
        2. Formal (§§ 556 & 557)
           1. Unsupported by substantial evidence – sometimes required under statutory mandate for informal or hybrid rulemaking; ask whether reasonable decision when looking at the record (essentially the same standard as A&C)
     2. Reasons why a decision might be A&C – more likely to defer if complex scientific idea or depending on the economic impacts
        1. If didn’t consider relevant data
        2. If relied on irrelevant factors
        3. If failed to consider an important aspect
        4. If explanation is at odds with the evidence
     3. Adequate Explanation
        1. Agencies are not required to produce written finding as a procedural matter (*Citizens to Preserve Overton Park*) – can question agency heads to determine if response was adequate, receives heightened scrutiny if post hoc justification (though post hoc justifications ok)
        2. *SEC v. Chenery I* (S. Ct., 1947)

**Rule:** When an agency has not provided an adequate explanation, even if the court itself could discern an adequate explanation from the record, must remand to agency because agencies, not courts, have discretion in implementing the statute (but works with *Overton Park* ^, meaning post hoc justifications ok but receives heightened scrutiny)

* + - 1. To avoid heightened scrutiny (*Overton Park*) agencies provide a written justification prior in the FedReg prior adoption
      2. *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.* (S. Ct., 1983)

**Rule:** A&C and substantial evidence as applied are the same; same standard whether adopting or rescinding rule; must explain evidence and offer rational connection between facts and choice made; defer to agency about unclear results of studies; A&C because did not consider all aspects – failed to consider inertia or only airbags

Adjudication

(CB 189-311; APA §§ 554, 554(d), 556, 557, 557(d))

1. Introduction
   1. Adjudication – any final determination of an agency that is not rulemaking, e.g. licensing, enforcement, disability hearings
   2. Types
      1. Formal (APA) adjudication – must give notice to parties of hearing and offer opportunity to reach settlement; trial-like with an ALJ; no ex parte communications
      2. Informal (non-APA) adjudication – falls under the APA (§ 555) but no procedures proscribed by the APA
         1. Safeguard is Constitutional Due Process
         2. Administrative Judge (AJ) – less safeguards to ensure unbiased opinion, can be prosecutor one day and judge the next
2. Four tests for formal or informal adjudication –
   1. (1) Presumption for formal adjudication unless statute specifies otherwise
   2. (2) Presumption against formal adjudications unless statute or legislative history says otherwise
   3. (3) No presumption – if statute is ambiguous, apply *Chevron* to agency’s interpretation (seems to be the controlling test)
   4. (4) Hearings mandated by Due Process are required to be formal adjudications
3. Formal (APA) Adjudicatory Procedures
   1. Notice – time, place, manner, legal authority, matters of fact and law
   2. Opportunity to appear before agency
      1. Likely can intervene if you would have standing to appeal
   3. Settlement – opportunity before hearing for parties to settle
   4. ALJs – presides over hearing and does everything a trial judge would do
      1. Makes initial or proposed order – initial decision unless agency must do something to make final; proposed decision means agency must do something to make final
      2. Employee of agency they work for but are independent of that agency
      3. Cannot question constitutionality of statute of legality of regulations
   5. Appeals – decide law and facts *de novo*; when appeal from ALJ usually appeal to agency itself (exception e.g. split enforcement, see below)
   6. Burden of Proof
      1. Standard – preponderance of the evidence (51%)
      2. Residuum rule – cannot totally rely on hearsay for administrative decision
         1. Note, S. Ct. got rid of this in administrative proceeds, now can completely rely on hearsay but not all hearsay in good enough (some lacking in foundation)
   7. Testimony and Documents
   8. The “Split Enforcement” Arrangement (e.g. OSHA and OSHRC)
      1. OSHRC further insulates judges from agency
      2. Rationale: Further protects employers from possible bias that DOL might have regarding the adjudication of safety or health violations
      3. If receive citation from OSHA inspector, you can say you request a hearing before ALJ (though through OSHRC) and then OSHRC on appeal and then federal court
         1. v. under normal model (not split enforcement) would appeal to the agency (e.g. EPA) not a split enforcement agency (e.g. OSHRC)
      4. Defer to agency (OSHA) interpretation of regulation rather than OSHRC
   9. Applying Adjudicatory Procedures
      1. *National Labor Relations Board v. Local Union No. 25, International Brotherhood of Electrical Workers* (2d Cir., 1978)

**Rule:** Judge could not *sua sponte* concludethat the collective bargain agreement was illegal as there was not adequate notice

* + 1. *Southwest Sunsites, Inc. v. Federal Trade Commission* (9th Cir., 1986)

**Rule:** Despite applying new standard, party proceeded against understood issue and was afforded full opportunity to justify his conduct

* + 1. *John D. Copanos and Sons, Inc. v. Food and Drug Administration* (D.C. Cir., 1988)

**Rule:** To determine if prejudice look at what happened v. procedures – could provide for summary withdrawal with no genuine issue of fact requiring hearing, did not need to specify type of evidence needed to justify hearing as answer was obvious (should have identified specific evidence could have produced with notice)

* + 1. *Wallace v. Bowen* (3d Cir., 1989)

**Rule:** Hearsay could be used as substantial evidence but only if had opportunity to cross examine

1. Ex Parte Communications
   1. Prohibited in formal adjudication but no similar ban in informal adjudication
      1. Prohibition applies to any interested party outside the agency – WH is considered outside
      2. Prohibition applies to agency staff members prosecuting or investigating case
   2. For informal (non-APA) cases consider whether there was a due process violation
      1. Differences between the APA and Due Process
         1. No harmless error built into the definition of due process violation – is an error (void the proceeding) but must be prejudicial (in order to due process error)
            1. Harmless error built into definition of due process error – if due process that is not prejudicial
         2. Burden of proof
            1. APA – only must show ex parte communication and then burden shifts to government to show not prejudicial
            2. Due Process – person alleging prejudice must prove
   3. *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority* (D.C. Cir., 1982)

**Rule:** Prohibits communications relevant to merits but not procedural questions or status reports

**Remedies** (for ex parte communications): Disclosure or voidable; considerations for whether should be voidable – irrevocably tainted, gravity of the communications, did they influence, were contents unknown to opposing parties, would remand serve a useful propose

**H:** (1) FLRA members – could discuss admin and budget matters and discussion of memo didn’t taint the proceedings or unfairly advantage; (2) Sec’y of Transportation – less clear if proper but did not taint case (outside of the agency because head of another department); (3) union president – improper but didn’t harm adjudication as did not affect outcome (no party benefited from)

* 1. *Stone v. Federal Deposit Insurance Corporation* (Fed. Cir., 1999)

**Rule:** Whether ex parte communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances – consider whether introducing new evidence, whether employee knew of error, and whether it exerted undue pressure on deciding official to make a certain decision

1. Due Process Hearings – when APA does not apply (informal adjudication) – “no person should be deprived of life, liberty, or property without due process of law”
   1. Rule – four questions
      1. Is it a government action? – does not apply to private actions
      2. Is it applying facts in a specific case?
         1. General regulations do not trigger due process (too burdensome)
            1. *Bi-Metallic Investment Comp*
         2. Requires individualized decisionmaking
            1. *Londoner*
         3. Factors in determining if there is individualized decisionmaking – number of people affected, extent of impact on each person, factual basis for determining impact
      3. Is it depriving someone of liberty or property?
         1. Property right – legitimate claim of entitlement, including government benefits
            1. *Goldberg v. Kelly*
            2. *Sinderman* – implied contract would create contractual right (legal claim of entitlement)
            3. *Roth* – Need legitimate claim of entitlement, something creating property right, must come from somewhere in law
         2. Liberty interest – freedom from restraint; to protect reputation; to engage in profession
            1. *Paul v. Davis*
      4. Does the procedure give due process?
         1. *Codd v. Velger*
         2. *Loudermill*
         3. *Shands*
   2. Individualized Decisionmaking
      1. *Londoner v. Denver* (S. Ct., 1908)

**Rule:** Hearing because amount of tax each person owes/paid depends on specific facts, affect on individual grounds

* + 1. *Bi-Metallic Investment Company v. State Board of Equalization* (S. Ct., 1915)

**Rule:** No hearing because challenging tax increase that applies to everyone, no individual facts

* 1. Protected Interests
     1. Property Interest
        1. *Goldberg v. Kelly* (S. Ct., 1970)

**H:** Termination of state welfare benefits have the same adverse impact on a person as when the government deprives someone of private property as citizens have an expectation that entitlements, like private property, were protected by the government’s obligation of due process, therefore due process required

**Rule:** Abandoned the right/privileges distinction in which the former was protected from deprivation without due process and the latter not, meaning the latter is now also protected from deprivation without due process (*but* outlier as lesser procedural protections are adequate where privileges)

Note: Not good law, Due Process requires virtually formal adjudication

* + 1. Liberty Interest
       1. *Paul v. Davis* (S. Ct., 1976)

**Rule:** Damage to reputation not enough, requires stigma plus – plus cannot arise from the stigma itself – e.g. damage to reputation and couldn’t purchase booze under law, hurts reputation and is kicked out of school

* + - 1. *Codd v. Velger* (S. Ct., 1977)

**Rule:** Because did not contest facts, no need for any procedure; if admitted everything, no point in having procedure

* + - 1. *Cleveland Bd. of Education v. Loudermill* (S. Ct., 1985)

**Rule:** If there is a choice of punishment, you have right to present about it

* + - 1. *Shands v. City of Kennett* (8th Cir., 1993)

**Rule:** City official’s statements not damaging enough to create stigma

* 1. Due Process Hearing Procedures
     1. *Mathews v. Eldridge* (S. Ct., 1976)

**H:** No evidentiary hearing required prior to termination of disability benefits because, applying the test, would require a lot of work by the government for little benefit to the plaintiff

**Rule:** Identification of the specific dictates of due process generally requires consideration of three distinct factors – (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Based on caselaw, court said “[o]nly *Goldberg* held that due process requires an evidentiary hearing prior to a temporary deprivation” and that there “that welfare assistance is given to persons on the very margin of subsistence.”

* + 1. Procedures tailored to facts of case – determine necessary procedures on individual basis
    2. *Goldberg v. Kelly* – limited to welfare benefits context; due process requires virtually formal adjudication –
       1. Timely and adequate notice
       2. Confront and cross examine witnesses
       3. Present own arguments and evidence
       4. Represented by counsel
       5. Impartial decisionmaker
       6. Decision rests solely on evidence at trial
       7. Statement by decisionmaker explaining decision and evidence relied upon
    3. *Goss –* Due process required in student suspension, required – notice, explanation of evidence, opportunity to present his side; factors influencing this decision – minimal harm to student, number of disciplinary actions possibly large, costs imposed on education institution disproportionate to student benefit
    4. *Board of Curators of the University of Missouri v. Horowitz* (S. Ct., 1978)

**Rule:** Where a student was dismissed for failing to meet academic standards not an appropriate place for the court to get involved because it was a purely academic decision (subjective)

* + 1. *Gabrilowitz v. Newman* (1st Cir., 1978)

**Rule:** Where student accused of assault and not permitted to have counsel and where possible impending criminal charges – permitted counsel to advise appellee whether he should answer questions and what he should not say to safeguard from self-incrimination since the student’s private interest and risk of erroneous deprivation could be huge because of the potential of a criminal trial and no huge administrative or financial burden on the university

* + 1. *Osteen v. Henley* (7th Cir., 1993)

**Rule:** Where student breaks noses and possible criminal charges – private interest is school scholarship; gov’t interest is not insubstantial (time and money), risk of error is trivial as school has no reason to expel people wrongly so the court does not overturn the suspension because had lawyer that advised (but did not participate) in the hearing

* 1. Neutral Decisionmaker
     1. *Withrow v. Larkin* (S. Ct., 1975)

**Rule:** Practicing medicine without a license – presumption against bias (non-neutrality) because assume board will put aside any bias that they have

* 1. Mere fact that state did not follow state procedures is not a due process violation

1. Judicial Review
   1. The Substantial Evidence Standard (APA § 706) – agency action unlawful if unsupported by substantial evidence in a case subject to §§ 556 & 557 (formal agency action) or otherwise reviewed on the record
      1. For formal adjudication of questions of fact (information adjudications of fact requires A&C standard)
      2. *Universal Camera Corp v. NLRB* (S. Ct., 1951)

**Rule:** The substantial evidence test applies to the evidence in the whole record (but ALJ’s and agency’s decision) on both sides – “Congress has merely made clear that a reviewing court is not barred from setting aside a[n] [agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewing in a light that the record in its entirety furnishes, including the body of evidence opposed to the [agency]’s view”

* Reviewing court not barred from setting aside a decision when it cannot find substantial evidence supporting decision when viewing entire record, including opposing evidence

**Note:** Despite this holding, the substantial evidence standard remains highly deferential (requiring only “more than a mere scintilla” or “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion” – *Consolidated Edison Co. v. NLRB*), considering the whole record substantial evidence is the equivalent of the evidence necessary to withstand a motion for a directed verdict, thus the court’s role is not to weigh or reweigh the evidence and determine where the preponderance lies but instead to determine whether the agency decision meets a particular legal standard – the substantial evidence standard

* + 1. Distinguish between questions of basic fact and ultimate fact
       1. Basic fact – e.g. is the language in the student paper really from other articles or brief
       2. Ultimate fact – e.g. did the student really commit plagiarism (involves both law and fact)
    2. Two types of evidence –
       1. Testimonial – when considering testimonial evidence, judges make a credibility determination based on *demeanor evidence* (requires testimonial inference, what not found in the transcript; deferential) and *derivative evidence* (what is found in the transcript; non-deferential)
       2. Documentary – e.g. plagiarized paper and articles/brief plagiarized from
  1. Substantial Evidence and the ALJ’s Credibility Findings
     + 1. ALJ’s decision becomes part of the record – agency can make *de novo* determination, except with respect to demeanor because they did not see it (meaning agencies should defer to ALJ’s demeanor determination
     1. *Torres v. Mukasey* (7th Cir., 2008)

**Rule:** Can you think of another reasonable explanation? Using *derivative* (not demeanor evidence – defer on that) evidence, might you come out with a different conclusion? Don’t defer to credibility determination drawn from incomplete evidence or speculation; improper behavior (e.g. hostility) during trial can render credibility determination unreliable

* + 1. *Jackson v. Veterans Administration* (Fed. Cir., 1985)

**Rule:** Where removed from position for sexual harassment, needed to explain why did not defer to credibility determination. Court found in one instance Board’s ruling was supported by substantial evidence (second witness)

* 1. Mixed Questions of Law and Fact
     1. *National Labor Relations Board v. Hearst* (S. Ct., 1944)

**H:** “Employee” as used in the relevant statute is ambiguous and therefore the Court defers to the agency’s determination

**Note:** Precursor to *Chevron* deference/statutory interpretation

**Rule:** An agency’s determination is to be accepted if it has “warrant in the record” and a reasonable basis in law

* + 1. *Evening Star Newspaper Company v. Kemp* (D.C. Cir, 1976)

**Rule:** Where killed by gunshot wound while at work death resulted from injuries sustained in course of employment because carried a gun to protect employer’s property, killed by fellow employee

* + 1. *Durrah v. Washington Metropolitan Area Transit Authority* (D.C. Cir., 1985)

**Rule:** Where fell on stairs while getting soda after leaving post the court found no basis in law and reason to conclude was outside conditions of employment simply because he broke a rule – expected to use stairs/vending machine, incidental to employment

* 1. Standard of review in questions of law in formal adjudication – not in accordance with law
  2. Arbitrary and Capricious Review
     1. Informal Adjudication
        1. *Citizens to Preserve Overton Park v. Volpe* (S. Ct., 1971) – informal rulemaking but provides the A&C standard/rule

**H:** In arbitrary and capricious review of the Secretary of Transportation’s approval of funds to build highway through Overton Park, the Court remanded to the lower court to determine what the Secretary knew in making that decision and how he knew it

**Rule:** Arbitrary and capricious review does not require meeting the substantial evidence standard but the generally applicable standards of APA § 706 require the reviewing court to engage in a substantial inquiry – (1) whether the Secretary acted within the scope of his authority – delineation of the scope of the Secretary’s authority and discretion; (2) whether the actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law – whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment, inquiry should be searching and careful but narrow, the court is not empowered to substitute its judgment; (3) whether the Secretary’s action followed the necessary procedural requirements

**Standard:** May provide post hoc justifications but standard is heightened scrutiny (meaning courts place an extra eye on, take a closer look); A&C review – ask whether agency act reasonably in light of the agency record ^ (see rule above); post hoc justifications may mean questioning of agency heads

**Implication:** (to last point) Agency heads now provide pre-decisional justifications to avoid potential question

* + 1. Review for “Adequate Reasons”
    2. Review for Consistency or the Need to Explain a Change

Choice of Procedures and Nonlegislative Rules

(CB 313-322, 326-406)

1. Three options – (1) adjudication, (2) rulemaking, and (3) nonlegislative rules
   1. In determining which to apply consider – does statute require one method or another? What was historically done? Did issue arise in respect to a particular person/business or did agency decide to address issue?
2. Option One: Adjudication
   1. Advantages – pick the bad apple to target, flexible, under the radar, may be specialized and cannot be captured in rule
   2. Disadvantages – must bring more cases, no prior warning (harder to comply), singles out one defendant when may have multiple possible defendants
   3. Legal Constraints
      * 1. *SEC v. Chenery II* (S. Ct., 1947)

**H:** SEC had deference on choice of procedure, see rule below and the SEC was not precluded from using adjudication merely because it had a retroactive effect, comparing the retroactive effect on the defendant to the benefit to the public of using adjudication to adopt a new policy

**Rule:** “The choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency,” meaning the agency is entitled to informed discretion as to whether to use rulemaking or adjudication

**Note:** Only one case has held contrary and that was based on a distinct fact in that case, i.e. that had started rulemaking, abandoned them midstream, and then started an adjudication

* + 1. *National Labor Relations Board v. Bell Aerospace Company Division of Textron Inc.* (S. Ct., 1974)

**Rule:** Choice between rulemaking and adjudication lies within Board’sdiscretion; can announce new policy in adjudicative proceeding even with reliance on past policy because adverse consequences from reliance not substantial, no damages or fines involved

* 1. Retroactive politics (new policies with earlier effect)
     1. Adjudication – likely to uphold cease and desist v. refund – no retroactive effect; weight equities when results in disgorgement (give something up that you did not have right to in first place)

1. Option Two: Rulemaking
   1. Advantages – more fair (comment), clear (compliance easier), applies to everyone, more information
   2. Disadvantages – cost, politics (adjudication more under the radar), inflexibility
   3. Retroactive policies (new policies with earlier effect)
      1. Rules – Congress must expressly authorize agency to make retroactive rules; consider conduct generating liability – is it prior to rule?
   4. Ambiguous Rules – regulations can be ambiguous but not so ambiguous that lacks notice
      1. *General Electric Company v. U.S. Environmental Protection Agency* (D.C. Cir., 1995)

**Rule:** Though interpretation was fair, did not provide adequate notice because ambiguous – interpretation was far from a reasonable person’s understanding of regulations

1. Option Three: Nonlegislative Rules
   1. Nonlegislative rules – non-binding, lack the force of law
   2. Two types
      1. Interpretive rules – agency’s construction of statutes and rules it administers, could probably be applied retroactively (always interpreted this way)
      2. Policy statements – manner in which agency proposes to exercise discretionary power, prospective
   3. Three issues – APA imposes requirements concerning publication, challenge on grounds that are really legislative rules, members of the public will rely on rule – what happens if changes interpretation?
   4. Advantages – efficient (not subject to many procedural requirements), beneficial (inform public of agency’s perspective, ensure uniformity in management)
   5. Disadvantages – no public input, may treat as legally binding on public, may harm those who rely on them if agency changes position
   6. Distinguishing Nonlegislative from Legislative Rules
      1. Policy Statements
         1. *American Hospital Association v. Bowen* (D.C. Cir., 1987)

**Rule:** Test for policy statements v. legislative rules – (1) Does it have present or future effect (present = not policy statement), (2) discretion left to agency vs. bright line rule (discretion left to agency = non-legislative), (3) agency characterization at time of adoption (e.g. putting in manual rather than CFR indications that it is a policy statement), (4) binding on agency, (5) does binding effect impose obligations, (6) inconsistent with existing legislative rule

* + 1. Interpretive Rules
       1. *American Mining Congress v. Mine Safety & Health Administration* (D.C. Cir., 1993)
       2. *Metropolitan School District v. Davila* (7th Cir., 1992)

**Rule:** Test for interpretive rules v. legislative rules (*AMC* and *Davila*) – (1) adequate basis for enforcement without interpretive rule (if yes, interpretive), (2) published in CFR (but this factor no longer exists), (3) did agency invoke legislative authority (if no, interpretive), (4) does it effectively amend a prior legislative rule (if no, interpretive), (5) agency characterization, (6) does it create a new duty (if no, interpretive)

* + 1. Legal Protection of Reliance on Nonlegislative Rules
       1. Changing interpretation –
       2. *Alaska Professional Hunters Association, Inc. v. Federal Aviation Administration* (D.C. Cir., 1999)

**Rule:** Where changed in policy regarding guide pilots – once an agency gives it regulation an interpretation, can only change through N&C rulemaking, factors considered – (1) part of administrative common law, (2) definitive, (3) significant change, (4) reliance

**Note:** No longer good law – S. Ct. has since held that interpretive rules don’t need to go through N&C because would violate APA (because procedures not included in the Act) and *Vermont Yankee*

* + - 1. *Mortgage Bankers Association v. Harris* (D.C. Cir., 2013)

**Rule:** Where change position on loan officers – agency must go through N&C rulemaking if it gives a regulation a definitive interpretation (reliance considered) and later significantly revises

**Note:** No longer good law – S. Ct. has since held that interpretive rules don’t need to go through N&C

* + - 1. S. Ct. approach – changes to interpretations do not require N&C because both original and current positions would constitute interpretive rules (otherwise would violate APA and *Vermont Yankee*)
      2. Wrong interpretation –
      3. *Heckler v. Community Health Services* (S. Ct., 1984)

**H:** Government not estopped from recovering funds improperly expended due to reliance here told medicare expense reimbursable but were not

**Rule:** Party claiming estoppel must have relied on adversary’s conduct in such a manner as to change his position for the worse, reasonably in that the party claiming estoppel did not know nor should have known that its adversary’s conduct was misleading, and heavier burden when asserting estoppel against government

**App:** No detrimental change – only can’t keep money it shouldn’t have had, possible bankruptcy not enough; no reasonable reliance – advice from conduit, knew question was doubtful, oral

* + - 1. *Office of Personnel Management v. Richmond* (S. Ct., 1990)

**Rule:** Payment of money from Treasury must be authorized by statute so where loss of disability benefits because wrong advice of government employee, unable to recover

* + - 1. *Appeal of ENO (New Hampshire Department of Employment Security)* (N.H., 1985)

**Rule:** Where unemployment benefits denied because of insufficient efforts in finding job, holding may be limited, due process forbids government from denying claims by an unfair procedure

* 1. Judicial Deference
     1. Statutory Interpretation
        1. *Chevron* only applies with legislative rules or formal adjudication (*Hearst*)
        2. *Skidmore v. Swift* (S. Ct., 1944)

**H:** Held that the lower courts failed in not considering the agency Administrator’s “interpretive bulletin” in determining whether employees were entitled to overtime pay under the Fair Labor Standards Act and remanded the case back to the Court of Appeals because of this failure

**Rule:** Rulings,interpretations, and opinions of the Administrator, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

**Note:** “Weak deference”

* + - 1. *Chevron v. Natural Resources Defense Council, Inc.* (S. Ct., 1984)

**Rule:** **(0)** Does *Chevron* deference apply? *See Brown v. Williamson*, *Gonzales v. Oregon*, and *King v. Burwell* (all finding that Congress did not intend to leave interpretation to the agency)

**(1)** If yes, has Congress spoken to the issue unambiguously? Look to language, legislative history, canons of statutory construction

**(2)** If no, is the agency’s answer/interpretation based on a permissible construction of the statute? A reasonable person just must have been able to reach that interpretation, not based on whether the court thinks it’s right or wrong

**H:** Congress did not have a specific intention on the applicability of the bubble concept in these cases and EPA’s use of that concept here is a reasonable policy choice for the agency to make

**Note:** “Strong deference”

* + - 1. *Christensen v. Harris County* (S. Ct., 2000)

**Rule:** Courtdid not accord opinion letter *Chevron* deference considering the power to persuade where required employees to use comp time, only defer to agency’s interpretation of regulation when statute is ambiguous

* + - 1. *United States v. Mead Corporation* (S. Ct., 2001)

**H:** Customs and Border Protection “ruling letter” fails to qualify under *Chevron* as the terms of the Congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law; may qualify for *Skidmore* weak deference

**Rule:** Administrative implementation of a particular statutory provision qualifies for *Chevron* deference (strong deference) when (1) it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and (2) that the agency interpretation claiming deference was promulgated in the exercise of that authority

* + - 1. *Barnhart v. Walton* (S. Ct., 2002)

**Rule:** Was interpretation when denied benefits a valid interpretation courts should give *Chevron* deference to? Consider – longstanding interpretation? Complexity of system? Interstitial nature of question? Careful consideration?

* + 1. *Mead* or *Barnhart* to determine whether *Chevron* deference applies?
       1. Unclear, should argue all tests
       2. Most lower courts use *Mead*
    2. Interpretations of Agency Regulations
       1. *Bowles v. Seminole Rock & Sand Co.* (S. Ct., 1945)

**Rule:** Courts should defer to an agency’s interpretation of its own regulations. Though the intention of Congress or principle of the Constitution may be relevant in choosing between various constructions, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation

* + - 1. *Auer v. Robbins* (S. Ct., 1997)

**Rule:** Deference to an agency’s interpretation of its regulations contained in an amicus brief filed by the agency

* + 1. No strong deference if language of the statute and regulation state the same thing

Reviewability

(CB 407-542; APA §§ 701(a), 701(b)(2), 702, 704)

1. Introduction
   1. Per new S. Ct. case – begin with presumption of review
   2. Constitutional requirements for litigation under APA
      1. Jurisdiction
         1. Standing
         2. Subject Matter Jurisdiction
      2. Cause of Action – § 702 may apply for matters not covered by specific review provision
         1. No excluded from review
            1. Does statute preclude judicial review?
            2. Is agency action committed to agency discretion by law?
         2. Must be agency action
         3. Must be suffering legal wrong or adversely affected or aggrieved within the meaning of the statute
         4. Exhaustion of remedies
      3. Ripeness – approp for judicial determination and courts won’t interfere with administrative process
      4. Venue
      5. Primary jurisdiction – if is question of primary jurisdiction with agency, will leave with agency to see what they say
2. Standing
   1. Three requirements for standing –
      1. Injury – not hypothetical, certainly impending, particularized, imminent, concrete
         1. Must use affected area
         2. Need continuing, present effects
         3. Includes reasonable fear (*Laidlaw*)
         4. Procedural injury not enough (*Summers*)
         5. Requirements for increased risk – significant increase in risk, substantial risk (*Clapper* & *Monsanto*)
      2. Causation – injury alleged must be fairly traceable to the alleged unlawful act, lower burden if it is a procedural violation
      3. Redressability – likely (not speculative) that it will redress or avoid plaintiff’s injury, lower burden if it is a procedural violation
   2. Associational standing – when association or group itself is injured
   3. Representational or organizational standing – organization can sue on behalf of member(s)
      1. Member has standing (injury, causation, redressability)
      2. Purpose of organization relation to subject matter of lawsuit
      3. Member does not need to bring suit - injunctive or declaratory relief
      4. *Lujan v. Defenders of Wildlife* (S. Ct., 1992)

**H:** Court of appeals failed in denying the Secretary’s motion for summary judgment as respondents have not made the requisite demonstration of at least injury (rejects “ecosystem nexus,” “animal nexus,” and “vocational nexus” arguments) and redressability

**Rule:** The party invoking federal jurisdiction bears the burden of establishing these elements and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, e.g. the manner and degree of evidence required at the successive stages of litigation (not mere pleading requirements)

**(1)** Plaintiff must have suffered an “injury in fact” – an invasion of a legally-protected interest which is **(a)** concrete and particularized, meaning that the injury must affect the plaintiff in a personal and individual way, and **(b)** “actual or imminent, not ‘conjectural’ or hypothetical’”

**(2)** There must be a causal connection between the injury and the conduct complained of – the injury must be “fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court”

**(3)** It must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision”

* 1. *Monsanto Co. v. Geertson Seed Farms* (S. Ct., 2010)

**App:** Where genetically engineered alfalfa (1) injury – substantial risk of gene flow, would have to conduct testing and take measures to minimize potential contamination (cost); (2) causation – harms readily attributable to deregulation policy; (3) redressability – injunction would remedy

* 1. *Clapper v. Amnesty International USA* (S. Ct., 2013)

**Rule:** Harder to establish standing in cases about intelligence gathering and foreign affairs

**H/App:** No standing because (1) no injury – too speculative, must be certainly impending not mere conjecture, relies on chain of possibilities, expenditures based on hypothetical future harm not enough; (2) no causation – multiple authorities government could invoke

* + 1. Zone of Interests (previously prudential standing)
    2. *Federal Elections Commission v. Akins* (S. Ct., 1998)

**Rule:** (Zone of interests test) Injury asserted by plaintiff arguably falls within zone of interests to be protected or regulated by statute in question

**H:** Standing where injury in fact was inability to obtain information requiring disclosure under a statute, important that injury was about voting

1. Exclusions from Judicial Review under the APA
   1. Two exceptions to judicial review –
      1. (1) Statute precludes judicial review (directly or implicitly) – interpreted narrowly especially where would foreclose any review or would preclude constitutional claims
      2. (2) Committed to agency discretion by law
   2. Statutory Preclusion
      1. *Abbott Laboratories v. Gardner* (S. Ct., 1967)

**H:** In a challenge to Federal Food, Drug, and Cosmetic Act regulations requiring labels, advertisements, and other printed matter relating to prescription drugs to designate the established name of the particular drug involved every time its trade name, the Court found that nothing in the FDCA precluded this action

**Rule:** The APA embodies the basic presumption of judicial review to one “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,” so long as no statute precludes such relief or the action is not one committed by law to agency discretion; need clear and convincing evidence of Congressional intent to overcome presumption of judicial review, not enough that some acts are made reviewable to exclude reviewability of others

* + 1. *Block v. Community Nutrition Institute* (S. Ct., 1984)

**Rule:** Preclusion of judicial review must be fairly discernible in statutory scheme, consider – language, legislative history, statutory scheme as whole; clear and convincing evidence standard not applied in strict evidentiary sense

**H:** Where milk market orders implicitly precluded from review as consumers are not a part of the system and therefore Congress did not want consumers to challenge it

* 1. Committed to Agency Discretion
     1. Committed to agency discretion means completely committed to agency discretion by law, i.e. no standard against which to assess exercise of discretion (*Overton Park*)
        1. No law to apply – no law outside of regulation limiting agency discretion
     2. *Heckler v. Chaney* (S. Ct., 1985)

**H:** In a challenge that drugs used by states for human execution were not approved for such uses, the court found that the presumption that agency decisions not to institute proceedings are unreviewable is not overcome by the enforcement provisions of the FDCA

**Rule:** Even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion, in such cases the statute can be taken to have committed the decisionmaking to the agency’s judgment absolutely – re an agency’s absolute right of prosecutorial discretion; consistent with abuse of discretion standard of review in § 706 because if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for abuse of discretion

* + - 1. Prosecutorial discretion – discretion to enforce law or not take enforcement action; exceptions if an agency – claims it has no statutory jurisdiction to reach certain conduct, engages in pattern of nonenforcement of statutory langauge; refuses to enforce regulation lawfully promulgated and still in effect (refusing to enforce law), nonenforcement decision violates constitutional rights
    1. *Webster v. Doe* (S. Ct., 1988)

**Rule:** Where CIA terminated employee because he was gay – cannot sue under APA (committed to agency discretion, wording of statute “to the extent” committed agency discretion), could sue for possible constitutional violation (always restricted by Constitution, no discretion or authority to violate Constitution)

1. Agency Action – only allows judicial review of an agency action, including failure to act
   1. *Lujan v. National Wildlife Federation* (S. Ct., 1990)

**Rule:** Land withdrawal program is not an agency action because is composed of individual actions, cannot make wholesale attack on program, must attack a particular agency action

* 1. *Norton v. Southern Utah Wildlife Alliance* (S. Ct., 2004)

**Rule:** Failure to act must be failure to take a discrete action that is legally required, excludes programmatic attack

1. Cause of Action
   1. Must be suffering legal wrong of adversely affected or aggrieved within meaning of statute
      1. Legal wrong – common law or constitutional right infringed; deny legal or property right
      2. Adversely affected or aggrieved – if you have Constitutional standing
         1. Within zone of interest?
   2. Issues – does not statute provide a cause of action?
      1. Within zone of interests – are you interests within those that Congress intended to protect or benefit?
         1. Unless about N&C always involves another statute
         2. Look to specific provision and not entire statute
      2. Do not use term prudential standing on the exam
   3. *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO* (S. Ct., 1991)

**Rule:** After showing plaintiff is adversely affected, must show within zone of interests, three questions – What statute? Are they the primary beneficiaries? Are they within the zone of interests anyway?; suggests that if what you’re interested in is not what the statute is interested in, you are not within the zone of interests

* 1. *National Credit Union Admin. V. First National Bank & Trust Co.* (S. Ct., 1998)

**Rule:** May be within zone of interests even if not the beneficiaries if interests are coincident with the interests of the statute (even if reasons are different)

* 1. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* (S. Ct., 2012)

**Rule:** Zone of interests is not a particularly demanding test – must be arguably within the zone of interests, not within the zone of interests only where marginally related or inconsistent with purposes of the statute

1. Timing
   1. Three principles impact timing of judicial review
      1. Final agency action – unless authorized earlier (§ 704)
      2. Exhaustion of any administrative remedies (§ 704)
      3. Ripe for review – prudential (no statutory basis, judge-made)
   2. Purposes – avoid interference in agency decision-making process and judicial economy
   3. Finality
      1. Test 1, two requirements – (1) agency must be finished with it, (2) is it sufficiently direct and immediate to affect day-to-day business of someone? (practical consequences)
      2. Test 2 – action from which right or obligations have been determined or from which legal consequences flow
      3. *Abbott Laboratories* – factors in determining finality –
         1. Whether challenged action is definitive statement of agency’s position
         2. Whether actions have status of laws with penalties for noncompliance
         3. Whether impact on plaintiff is direct and immediate
         4. Whether immediate compliance was expected
      4. *Taylor-Callahan-Coleman Counties District Adult Probation Department v. Dole* (5th Cir., 1991)

**H:** Opinion letter regarding overtime requirements for probation officers is not a final agency action – issued to someone else, not district (could seek own opinion letter and challenge); not generally applicable (in response to discrete injury); no direct or immediate impact on district (no immediate action required); no definitive statement of policy or status of law

* + 1. *Appalachian Power Company v. Environmental Protection Agency* (D.C. Cir., 2000)

**Rule:** Final agency action where permits must require periodic monitoring – end of decisionmaking process (reflects a settled agency decision, does not matter that can be changed in future), creates obligations on part of state regulators and those they regulate

* + 1. S. Ct. in *Sackett* – compliance order to stop filling wetland and take remedial actions is final agency action because subjects them to $25,000 in penalties a day (legal consequence)
    2. S. Ct. in *Hawks Co.* – jurisdictional determination from Corps is final agency action (look to both practical and legal consequences (re combine tests))
  1. Exhaustion – must exhaust administrative remedies before seeking judicial review (numerous exceptions)
     1. *McCarthy v. Madigan* (S. Ct., 1992) – good law only for non-APA cases

**H:** No exhaustion requirement here because cannot award monetary damages, record accumulated would not help later during judicial review, agency does not have expertise in interpreting this area

**Rule:** Must exhaust administrative remedies unless exception applies

**Exceptions:** Three exceptions where hardships to party may outweigh exhaustion benefits (for non-APA only) – (1) undue prejudice to subsequent court action (e.g. short period to file appeal), (2) administrative remedy not adequate (e.g. challenging constitutionality), beyond what agency can do, (3) administrative adjudicatory party that you are required to appeal to is biased against you and therefore appeal is a pointless exercise

* + 1. *Darby v. Cisneros* (S. Ct., 1993) – good law only for APA cases

**H:** APA says is a final agency action *unless* statute requires you to exhaust your administrative remedies

**Rule:** Two-part requirement for exhaustion in APA cases – (1) does the statute or agency require exhaustion? (2) Is administrative action inoperative (does not take effect) pending review?

* + 1. Issue exhaustion – if you raise an issue before the court, you better have raised it before the agency, courts will not consider arguments not first presented in an administrative proceeding
    2. By filing appeal or invoking existing administrative procedures, can make decision no longer final
  1. Ripeness
     1. Proper time for court to review agency action
     2. Purpose – to avoid entangling courts in abstract disagreements over agency policies and protect agencies from judicial interference until an administrative decision is formalized and its effects are felt
     3. *Abbott Laboratories v. Gardner* (S. Ct., 1967)

**H:** The challenge to the FDCA regulatory labeling and advertising requirements are ripe, or appropriate for judicial resolution at this time

**Rule:** Ripeness is best seen in a twofold aspect, requiring evaluation of both (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration – where a legal issue presented is fit for judicial resolution and where a regulation requires an immediate and significant change in the plaintiff's’ conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the APA must be permitted, absent a statutory bar or some other unusual circumstance

**App:** (1) Fitness because issue was purely a legal question and action was a final agency action and (2) looking at hardship to the parties – impact on party is direct and immediate (could harm them severely) and would not cease delay

* + 1. *National Park Hospitality Ass’n v. Dep’t of Interior* (S. Ct., 2003)

**Rule:** Evaluate the fitness of issues for judicial decision and hardship to parties of withholding court consideration

**App:** Where Contract Disputes Act with national parks concessions (2) no practical harm because effectively general policy statement, doesn’t affect primary conduct and (1) further factual development would help court in determining legal issues

Agency Structure

(CB 543-560, 576-645)

1. Introduction
   1. Tradition test for independent regulatory agencies – multi-member, bipartisan, term for years, good cause removal
2. Delegation of Legislative Power
   1. Nondelegation doctrine – intelligible principle test – Congress doesn’t violate prohibition against delegating its legislative powers as long as it sets the boundaries of the agency’s authority
      1. Cannot be broad and ambiguous – but public interest is sufficient
      2. Cannot delegate to private parties – seems to not apply where private entity is subject to federal oversight, e.g. Amtrak; may also be able to make recommendations
      3. *Whitman v. American Trucking Associations, Inc.* (S. Ct., 2001)

**Rule:** Broadly construe intelligible principle

**H:** Court find well within limits of nondelegation precedents where CAA limits EPA’s discretion with instructions to set air quality criteria, in this case NAAQS for particulate matter and ozone

* + 1. Rarely do not find an intelligible principle – interpret statutes to avoid Constitutional questions, i.e. whether unconstitutional delegation

1. The Legislative Veto – unconstitutional, Congress cannot reserve right to veto rules or orders, must meet presentment and bicameralism requirements
   1. Presentment and Bicameralism
      1. *Immigration and Naturalization Service v. Chadha* (S. Ct., 1983)

**H:** Since the act was essentially legislative in purpose and effect, that is that the action taken had the purpose and effect of altering the legal rights, duties and relations of persons outside of the legislative branch, the action was subject to the standards prescribed in Art. I, i.e. bicameralism and presentment

**Rule:** Constitutional lawmaking requires bicameralism and presentment to the President, as the Constitution is explicit and unambiguous in prescribing and defining the respective functions of the Congress and of the Executive in the legislative process

* + - 1. Only provision was unconstitutional, could still suspend deportation and must submit to Congress, no unilateral resolution
    1. Joint resolution – passed through both houses and presented to the President
  1. Post-Veto Developments
     1. Corrections Day – process established by the House for correction of Congressional and agency “mistakes” where when House approves a bill, may place on Corrections Calendar which specifies one or two days a month when the House will consider adoption of the bill under fast-track procedures; totally ineffective as to getting bureaucracy under control
     2. Congressional Review of Agency Rulemaking – Congress can disapproved jointly and send to President
     3. The Regulations from the Executive in Need of Scrutiny Act of 2011 (REINS Act) – proposed (not enacted), would require Congress to approve by law all major rules before taking effect, Constitutional because meets bicameralism and presentment requirements

1. Appointment and Removal
   1. Legislative Appointments and Removals
      1. Severability principle – last law that made things unconstitutional should be thrown out
      2. *Buckley v. Valeo* (S. Ct., 1976)

**Rule:** Congress cannot appoint Officers of the United States (officers = exercising significant authority under laws of US)

**H:** Congress did not have the authority to appoint members because all members had to be appointed in accordance with Appointments Clause where created FEC with members appointed by Congress; but even if improperly appointed members of Commission can still exercise powers but only of investigative and informative nature (re legislative functions)

* + 1. *Bowsher v. Synar* (S. Ct., 1986)

**H:** Where Comptroller General (legislative branch) reviews budget cuts the powers vested in the Comptroller General violation the Constitution

**Rule:** Congress can’t reserve for itself power to remove officer charged with execution of laws execution of laws except by impeachment because would reserve control over execution of laws, only have removal power over solely legislative officers

**Remedy:** Allowed legislature to remove him but threw out executive powers

* 1. Executive Appointments and Removal
     1. Principal officers – appointed by President with advice and consent of the Senate
     2. Inferior officers – appointed by President alone, heads of departments, or judiciary, default is with advice and consent of the Senate, but not necessary
     3. *Myers –* Congress cannot restrict President’s power to remove purely executive officers
     4. *Humphrey’s Executor –* Congress can reasonably limit removal power for quasi-legislative and quasi-judicial appointees
     5. *Morrison v. Olson* (S. Ct., 1988)

**H:** Appointment of the independent counsel by the court does not fun afoul of the constitutional limitation on “incongruous” interbranch appointments and the imposition of a “good cause” standard for removal by itself does not unduly trammel on executive authority

**Rule:** May not limit Presidential removal powers that interfere with the President’s core functions – correct analysis to ensure that Congress does not interfere with the President’s exercise of the “executive power” and his constitutionally appointed duty to “take care that the laws be faithfully executed,” not to define rigid categories of those officials who may or may not be removed at will by the President (i.e. overruling *Humphrey’s Executor*’s analysis but affirming its outcome); inferior officer – less likely to interfere with President’s core function, good cause removal not burdensome, inferior officer because – subject to removal by higher executive branch official below President, limited duties, jurisdiction limited to what granted to her, tenure limited

* + 1. *Edmond v. United States* (S. Ct., 1997)

**Rule:** For whether inferior officer – work directed and supervised at some level by others who were appointed by Presidential nominee with advice and consent of the Senate

**H:** Judges of Criminal Appeals Court are inferior officers because they have no power to render a final decision unless permitted to do so by other Executive Officers where civilian members appointed to Court of Criminal Appeals

* + 1. *Free Enterprise Fund v. Public Company Accounting Oversight Board* (S. Ct., 2010)

**Rule:** Dual for-cause provisions are unconstitutional because insulate members, decrease public accountability, contrary to Art. III’s vesting of executive powers in President (could not ensure laws are faithfully executed), only applies to officers, not employees

Remedy: Sever one of the for-cause provisions (re Severability Principle)

1. Presidential Control
   1. *PHH Corp. v. CFPB* (D.C. Cir., 2016)

**F:** Single director head of independent agency not checked by the President (executive agencies, however, checked by President)

**Rule:** Heads of independent agencies not accountable to or checked by President– only accountable to and checked by fellow board members, therefore single director cannot head independent agency because is a threat to liberty (**H**)

**Remedy:** Sever unconstitutional provision from remainder of the statute (re Severability), here means make removable by the President (executive agency?)

* 1. President has procedural supervisory authority over administrators – can require reports, regulatory agenda; can suggest preferred course of action – cannot contravene statutory command, agency must be able to defend President’s preferred choice
  2. Three ideas about President’s control over agencies
     1. Agencies are legally bound to take orders because President’s authority is binding (“unitary executive” – agencies just agents of the executive
     2. Presumption that President has directive authority unless it is an independent agency (only removed for cause)
     3. President is overseer and not decider

1. Line Item Veto Act
   1. *Clinton v. City of New York* (S. Ct., 1998)

**Rule:** Line item veto unconstitutional – may give President authority to carry out line item veto about a specific bill within that specific bill

**R:** One Congress cannot bind future Congress or enable President to bind future Congress – Congress cannot give President authority it never had itself; differentiates between line item veto and exempting from import duties (historical case) because cancellation power based on same conditions Congress evaluated when passed statute, Congress didn’t qualify discretion (though did have to make three determinations, rejecting policy argument made by Congress

Public Access to Agency Processes

(CB 739-808)

1. The foundation of our government recognizes two themes – one supporting public access to government decisionmaking and one supporting confidentiality in government decisionmaking
2. Three parts to FOIA – publish rules, procedures, and interpretive statements in FedReg; Certain things must be available for inspection, including electronically, interpretive statements, records requested three or more times, staff manuals; shall make available records requested
3. The Freedom of Information Act (FOIA), **§ 552** 
   1. The FOIA Request
      1. Permitted by any person – including felons, corporations; only doesn’t apply to fugitives from justice and statutory exception for foreign governments
      2. Agencies must only respond to requests for agency records, agency includes government corporations and Executive Office of the President (but not entities that only advise the President)
      3. *The Bureau of National Affairs, Inc. v. United States Department of Justice* (D.C. Cir., 1984)

**Rule:** Factors for determining whether an agency record (altered by *Tax Analysts*, see below) – if in agency’s control; generated within agency; place in agency’s files; used by agency for any purpose (most important) – purpose for which created? Extent relied upon?

**F/H:** Three records analyzed – (1) telephone records – no, no evidence used for business and not in files; (2) daily agendas – yes, in files and aids in doing business; (3) appointment calendar – no, for individual’s use and contains substantive and personal records

* + 1. *United States Department of Justice v. Tax Analysts* (S. Ct., 1989)

**Rule:** Factors in determining whether agency record – in agency’s control when FOIA request made, agency must create or obtain requested material

* 1. FOIA Exemptions
     1. Presumption in favor of disclosure
     2. Must release segregable portions of documents
     3. (1) Classified information
        1. Classified according to President’s EO
        2. Courts should decide whether it is lawfully classified, but instead defer to President
        3. Glomar denial – if even conceding you have the document would reveal you have classified documents, you can say you neither can confirm nor deny its existence (answer upheld by court(s))
     4. (2) Solely related to internal personnel rules and practices of the agency
     5. (3) Specifically Exempted by Statute – Some other law requires nondisclosure or creates specific requirements or disclosure
     6. (4) Confidential business information (CBI) or trade secrets
        1. *National Parks and Conservation Association v. Morton* (D.C. Cir., 1974)

**Rule:** Two-part test for CBI involuntarily given – (1) Information would not generally be made public by person from whom it was obtained *and* (2) would either (a) impede government from getting information in the future or (b) could cause competitive harm

* + - 1. *Critical Mass Energy Project v. Nuclear Regulatory Commission* (D.C. Cir. *en banc*, 1992)

**Rule:** Can withhold if information that would not generally be made public by person from whom it was obtained

* + 1. (5) Exempts inter- or intra-agency memoranda and letters which would not be available by law to a party other than an agency in litigation with the agency
       1. Covers privileged material (e.g. attorney-client, work product)
       2. Covers pre-decisional material – want to ensure frank and candid advice, includes summaries and drafts
    2. (6) Personal privacy – detailed government records on an individual which can be identified as applying to that individual
    3. (7) Law Enforcement Records
    4. (8)/(9) Financial Institution Records and Oil Well Data
  1. Reverse FOIA Suits
     1. *Chrysler Corporation v. Brown* (S. Ct., 1979)

**F:** Suit to stop release of information (“reverse FOIA”) under the APA and Trade Secrets Act

* Trade Secrets Act – cannot release information unless authorized by law, regulations here did not have force of law, plus no private cause of action

**Rule:** FOIA does not forbid disclosure; can bring suit under APA and argue that release is contrary to law (here, Trade Secrets Act)

**Note:** *Chrysler* will win on remand

* 1. State Open Records Laws

1. The Federal Advisory Committee Act
   1. Requires advisory committee meetings to be open to public and records from meetings must be available for public inspection
      1. To apply, at least one member must *not* be a full-time government employee
      2. First Lady is a government employee for purposes of statute
      3. Does not include advisory group created by government contractor
   2. *Public Citizen v. U.S. Department of Justice* (S. Ct., 1989)

**Rule:** FACA not intended to include *any* group from which Executive seeks advice (where ABA Standing Committee for Presidential judicial appointments) – interprets “utilize” to read establish [by federal government], meaning existing groups/committees exempt because not established by the federal government; raises grave Constitutional questions about infringing on President’s Art. II power and separation of powers

* 1. *In re Cheney* (D.C. Cir. *en banc*, 2005)

**Rule:** People who do not vote or have veto power are not considered part of the committee, participation alone (e.g. aides) not enough (where group of full-time employees sought advice from non-federal employees, industry leaders)

* 1. *Northwest Forest Resource Council v. Espy* (D.D.C., 1994)

**H:** Where included some non-federal employees (re professors) was an advisory committee because professors were not federal employees (no federal duties, did not observe formalities) and were established and utilized by the President (offered recommendations)

**Remedy:** Enjoin advisory committee if still in existence or make information generated by committee public

1. The Government in the Sunshine Act
   1. Every portion of every meeting of an agency shall be open to the public
      1. Agency = agency headed by collegial body (re multi-member independent regulatory agencies only, e.g. FCC, FTC, SEC)
      2. Meeting = meeting of quorum of an agency where deliberation occurs
   2. *Federal Communications Commission v. ITT World Communications, Inc.* (S. Ct., 1984)

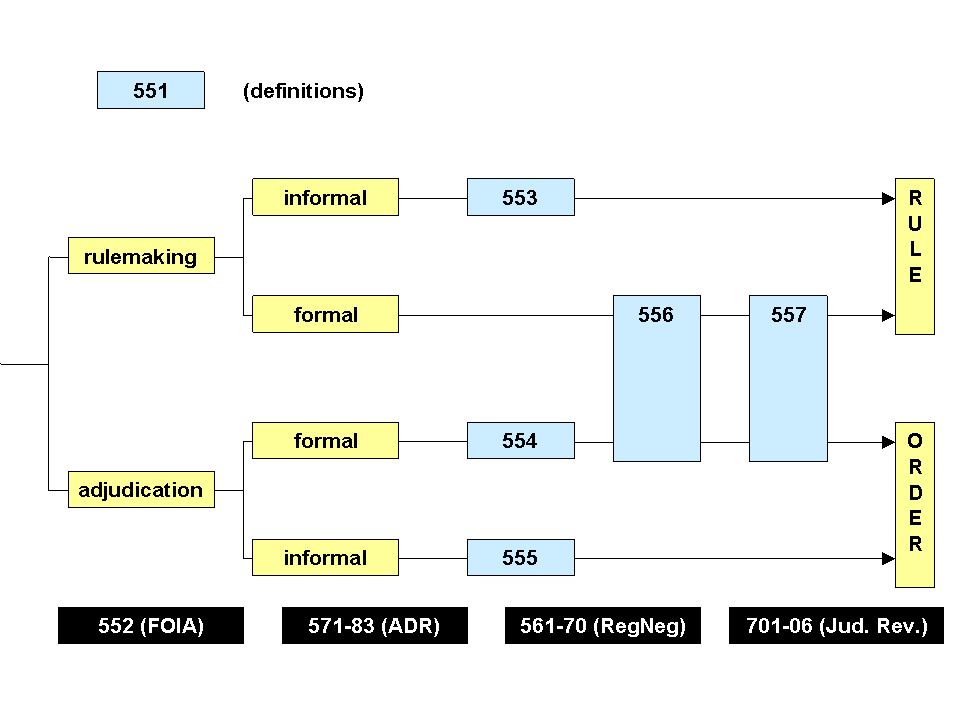
**Rule:** No meet where – did have quorum of subcommittee but meetings not about subjects they had formally delegated authority over and not deliberative (background information, exchange of views only); deliberation test – must be focused on discrete proposals or issues as to cause or be likely to cause individual participating members to form reasonably firm positions regarding matters pending or likely to arise before agency

Oregon Administrative Law

(From Funk’s lectures throughout semester)

1. State agencies headed by elected people – i.e. Secretary of State, Oregon State Treasurer
2. Cities, counties, local governments are not state agencies
3. Rulemaking
   1. No rulemaking through trial-like techniques (formal rulemaking)
   2. No A&amp;C review of rulemaking – No requirement to challenge in court that rules are unreasonable
   3. No Chevron deference – No deference to agency with respect to interpreting ambiguous statutory terms
4. Formal adjudication referred to as a contested case and informal adjudication as other than a contested case
5. ALJs can question constitutionality of statutes and legality of laws [unlike in federal court]
   1. Full power to say what the law is
6. Got rid of Residuum Rule as well
7. Many states have central panels – Entities outside agency that employ the ALJ
   1. ALJ acts for many different agencies
   2. After ALJ issues proposed decision, agency may modify – Significant changes must be explained
   3. Agency may not change any findings of historical fact
8. Substantial evidence (adjudication standard of review) includes an explanation of the connection between facts found and law applied
9. No interpretive rules in Oregon – Must always go through notice and comment
10. Oregon has declaratory rulings – Right of person to seek determination from an agency as to the applicability of a statute, rule or order
11. State legislative delegation: Does not follow federal way of doing this
    1. No intelligible principle doctrine
    2. Must have adequate safeguards – Is an unconstitutional delegation if it does not provide adequate safeguards for people who might be affected by this delegation
       1. If subject to APA, is an adequate safeguard
12. Oregon’s Open Records Law has many more exemptions than FOIA – More like 30-40

APA Flow Chart



1. **§ 552** – contains the so-called Freedom of Information Act (FOIA) which was added to the APA by Congress in 1966, opening up vast amounts of government-held information to public inspection and copying
2. **§§ 571-583** – added in 1990 and authorize a variety of alternative dispute resolution (ADR) procedures for agencies
3. **§§ 561-570** – added in 1990 and contain authority for so-called negotiated rulemaking (“RegNeg”)
4. **§§ 701-706** – contain the act's provisions governing judicial review of agency action