

## I. Introduction to the Administrative Process

### A. Overview of Administrative Law

1. Administrative law comes from four main sources – the Constitution, APA (general and comprehensive), particular agency enabling acts (specific), and administrative common law
2. Judicial review – mechanism for enforcing procedural and substantive constraints on agency action.
3. Enforcement – regulatory norms are enforceable by agencies and sometimes by private parties affected by violations of regulatory norms.

### B. Function of Administrative Agencies

1. Distribution of government benefits, granting of licenses and permits, policy making in a wide variety of regulated agencies.
2. Benefits of agency regulation (versus cts/common law)
  - a. more specialized knowledge
  - b. more efficient
  - c. broader range of available tools
  - d. agency can adopt rules rather than be stuck w/ controversy of parties
3. drawbacks to agency
  - a. more political
4. types of admin agencies
  - a. executive agencies – heads of agencies making up the President's cabinet, serve at President's will/pleasure.
  - b. independent agencies – insulated from Pres control, headed by multi-member group rather than single agency head, members w/ fixed staggered terms, can only be removed for cause

## II. Due Process

### A. Introduction

1. Fifth Amendment – no person shall be deprived of life, liberty, or property w/o due process of law.
  - a. applies to states via 14<sup>th</sup> Amendment
  - b. same case law under 5<sup>th</sup> and 14<sup>th</sup> Amendments
2. Substantive due process versus procedural due process
  - a. substantive due process – limits on what government can regulate
  - b. procedural due process – procedures by which government may affect individual's rights

### B. Interests protected by due process

#### 1. *Goldberg v. Kelley*

- a. Facts: welfare benefits terminated if caseworker determines that no longer eligible. No opportunity for personal appearance, for oral presentation of evidence, and for confrontation and cross examination of adverse witnesses. Can request post-determination hearing and then obtain judicial review.
- b. Held: due process requires an adequate hearing prior to termination of welfare benefits.
- c. Court emphasized fact that welfare necessary for individuals to obtain essential food, clothing, housing, and medical care.
- d. pre-termination hearing need not take form of judicial or quasi-judicial trial. Hearing must:
  - i) be at a meaningful time and in a meaningful manner
  - ii) must get timely & adequate notice detailing reasons for proposed termination
  - iii) must have effective opportunity to defend by confronting adverse witnesses and presenting own arguments and evidence orally
  - iv) right to bring counsel
  - v) impartial decision maker, who must state reasons for determination and indicate evidence relied upon.
- e. written submissions are unrealistic for many recipients who lack educational attainment necessary to write effectively and cannot obtain professional assistance
- f. Dissent – decision has no basis in Constitution but based solely on conception of fairness
- g. here, court abandoning rights-privileges distinctions

## 2. Roth Test

- a. Teacher hired for fixed 1 yr term; completed term and informed that wouldn't be rehired.
- b. Held: not entitled to a hearing or statement of reasons not rehired. Due Process only extends to liberty or property interests and here, no property interest or liberty interest.
- c. **Test:** To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it.
- d. property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.
- e. Here, Roth had no expectation of being rehired – only hired for 1 year term.
- f. Defacto tenure – *Perry v. Sinderman* – right to reemployment found based on implied contract, arising from practices of institution.
  - i) entitlement does not have to be based on a written contract or statutory grant.
- g. if agency adopts a regulation, it is an enforceable rule that creates an entitlement – *Goldsmith v. Board of Tax Appeals*

## 3. “Liberty” and “Property”

- a. property – depends on some entitlement created & defined by an independent source (*Roth*).
- b. liberty – freedom from material interference with people's fundamental interests
  - i) *Roth*: liberty must be read broadly, encompassing not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of conscience and generally to enjoy these privileges long recognized as essential to the orderly pursuit of happiness by men.
  - ii) reputational harm may be deprivation of a liberty interest (*Roth*)
    - “stigma plus” another deprivation (ex. fired from job) req for due process violation. *Paul v. Davis* (stigma alone doesn't trigger prior hearing right)
- c. must be deprived of something (*Roth* suggests that this is different than being denied something you want but don't yet have).
- d. *American Manufacturers Mutual Ins. Co v. Sullivan* – Court seemed to hold that no due process rights are available to an applicant for benefits (rather than a person challenging termination of benefits).
  - i) Court distinguished *Mathews v. Eldridge* and *Goldberg v. Kelly* on grounds that those cases dealt with individual's interest in continued payment of benefits.
- e. ***Cleveland Board of Education v. Loudermill*** – property rights in continued employment
  - i) Legislature may elect not to confer a property interest in [public] employment but it may not constitutionally authorize the deprivation of such an interest, once conferred, w/o appropriate procedural safeguards.
    - if employer can only dismiss for cause – entitlement
    - if employer can dismiss for any reason – no entitlement
  - ii) here, statute did not provide adequate pre-termination procedures
- f. contracts w/ government – Supreme Court has held that ordinary state court breach of contract actions provide all the process that is due.
- g. As long as a property deprivation is not *de minimus*, its gravity is irrelevant to the question whether account must be taken of Due Process Clause. *Goss v. Lopez*.
  - i) Placing a police officer on paid sick leave so that he could not wear a badge or carry a gun or arrest people is a *de minimus* deprivation. *Swick v. City of Chicago* (7<sup>th</sup> Cir.)
- h. *Town of Castle Rock v. Gonzales*: Mother got restraining order against husband; he violates order and kidnaps their 3 kids. She calls police but they do nothing. Later, he murdered kids.
  - i) Ct says no liberty interest
  - ii) concurring – state did not assure safety, only ensured process/service

4. State law – sometimes different – Cal., for example, has rejected *Roth* and held that a discretionary standard can trigger due process protection. *Saleeby v. State Bar*.

- a. liberty = freedom from arbitrary adjudicative procedures
- b. what protections are necessary depends on balancing the various interests involved.

### C. Timing of the Hearing

#### 1. *Matthews v. Eldridge*

a. Eldridge was informed the SS benefits would be terminated in a letter w/ reasons for termination. He could request time to submit add'l info & submitted dispute of one medical condition. Agency found ceased to be disabled. Instead of requesting reconsideration, commenced this action challenging validity of procedure.

b. **Test:** In determining what process is due, consider

- (1) the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through procedures used and the probably value, if any, of any additional or substitute procedural safeguards.
- (3) the Gov't interest, included function involved and fiscal and administrative burdens that add'l procedures would entail.

c. procedure adequate here (no evidentiary hearing required).

- i) not same situation as *Goldberg* where gov't benefit is only income source and based on financial need. Here, family contributions & other forms of gov't aid available
- ii) medical evaluation is more sharply focused and easily documented – dependant on routine, standard, unbiased medical reports (more reliable)
- iii) written submissions better than oral in medical disability situation
- iv) recipient has full access to all information relied upon by agency
- v) not insubstantial burden on gov't

2. In case of emergency, the state could deprive an individual of liberty or property w/o prior hearing, even if later remedy is inadequate

a. *North American Cold Storage v. Chicago* – Court upheld state law providing for destruction w/o prior hearing of food held in cold storage which authorities, after inspection, believed to be rotting & creating public health prob. Court said that adequate remedy available in tort law.

b. an important government interest accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the deprivation. *FDIC v. Mallen*.

c. health and safety concerns sufficient

d. However, even when an agency is responsible for protecting public health or preventing environmental degradation, due process clause imposes some limits on its ability to impose obligations on private persons w/o hearing. *TVA v. Whitman*.

#### 3. Timing

a. Court has accepted abbreviated pre-termination procedures designed to insure that the gov't has probably cause for its decision, not that the decision was right.

b. *Cleveland* – pre-termination procedures serve as an initial check against mistaken decisions (whether there are reasonable grounds or not)

#### 4. How long a delay?

a. delay of one year tolerated in *Matthews*;

b. However, delay in post-termination hearing could still itself be a constitutional violation. *Loudermill* (but 9 mos. okay)

c. *City of Los Angeles v. David* – when interest in a prompt hearing is purely monetary, balance weighs much less in individual's interest. (Here, pl. challenged 27 day delay in hearing about recouping \$134.50 for car towing).

#### 5. Suspension v. discharge

a. Court more lenient when it comes to suspension

b. *Gilbert v. Homar* – due process allows the suspension of tenured campus policeman w/o a prior hearing and w/o pay

c. state often finds that exigent circumstances require that a professional license be immediately suspended.

## D. Elements of a Constitutionally Fair Hearing

1. *Ingraham v. Wright*: paddling of students in schools challenged; does due process require notice and opportunity to be heard first?

a. Held – No. Availability of a **statutory or common law remedy** that can compensate an indiv. for loss of liberty or property militates against right to predeprivation notice and hearing

b. Prong 1: corporal punishment implicates a constitutionally protected liberty interest but low risk of erroneous deprivation b/c teacher sees misconduct and traditional common law remedies (tort) are fully adequate to protect due process (prong 2).

c. Prong 3: incremental benefits of prior hearing could not justify the cost

i) high societal costs (primary educational responsibility)

d. *Goss v. Lopez* – held that disciplinary suspension of high school students for 10 days or less deprived them of property (state created entitlement to public education) and liberty (serious damage to standing w/ fellow pupils and teachers and later opportunities for education and employment).

i) Required “some kind of hearing” – written notice of the charges against him and if he denies them, an explanation of the evidence the authorities have and opportunity to present own side of story. Like a “conversation.”

ii) Different than *Ingraham* b/c *Ingraham*, to be effective, teachers must enforce punishment on the spot.

2. *Parratt v. Taylor*

a. Held that the availability of state tort action after a random and unauthorized deprivation of property satisfied requirements of due process

i) prison officials lost a prisoner’s \$23 hobby kit.

b. However, if pre-deprivation hearing is feasible, *Parratt* rule does not apply.

c. Negligent deprivation of property is not a due process violation at all. *Daniels v. Williams*.

3. Right to Counsel

a. APA § 555(b) provides that a person compelled to appear in person b/f an agency or representative thereof is entitled to be represented or advised by counsel.

i) some agencies exempt from APAp coverage

ii) gov’t no required to pay for the attorney

b. *Walters v. Nat’l Ass’n of Radiation survivors* – Ct refused to allow veterans to bring lawyer when applying for gov’t benefits, citing Congressional intent that lawyers not share in award.

i) Congress can choose different model for disbursing benefits than taking away – informal, investigatory meeting w/o lawyers.

4. A student dismissed for academic reasons rather than disciplinary reasons is entitled to much less process – perhaps none at all.

a. *Board of Curators, Univ. of Mo v. Horowitz* – dismissal rested on academic judgment of school officials that she did not have necessary clinical ability to perform adequately as a medical doctor. More subjective and evaluative than typical factual questions presented in disciplinary decision, so trial would not be very helpful.

5. If there are no factual issues involved, an agency can dispense with oral hearing. *Altenheim German Home v. Turnock* (7<sup>th</sup> Cir.)

6. *Van Harkin v. City of Chicago* – no right to confront police officer who have parking ticket b/c huge costs to gov’t, not a huge personal interest, and confrontation would not substantially decrease risk of erroneous deprivation.

## E. Rulemaking versus Adjudication

1. Adjudication

a. affects identifiable persons on basis of facts peculiar to each of them.

b. procedural due process applies.

2. Rulemaking

a. government action that is directed in a uniform way against a class of people

b. no procedural due process

3. Determining if rulemaking or adjudication

a. *Londoner v. Denver*

- i) Facts: Denver ordinance allowed city counsel to establish a special assessment district for paving streets. The total cost of the job would be apportioned among the individual property owners in the district. Council’s determination was binding. Owners allowed to file complaints but no opportunity for an oral hearing. Objections were filed, but when ordinance passed, it said that no compliant/objection was filed.
- ii) Held: process violated due process; small number of people exceptionally affected
- iii) owners not given an opportunity to be heard (need hearing)

b. *Bi-Metallic Investment Co. v. State Board of Equalization*

- i) suit enjoining State Board of Equalization and CO Tax Commission from putting in force an increased valuation of all taxable property in Denver by 40%
- ii) here, rule applies to more than a few people, applies the same across the board, and it is impracticable that everyone has a direct voice in its adopted
- iii) citizens can protect their rights through power of voting.
- iv) limits of due process in rulemaking

c. *Florida East Coast* – affirms *Bi-Metallic* – no hearing req. in across the board rulemaking

d. also ask whether subject matter is susceptible to receipt of evidence

4. Legislative versus adjudicative facts

- a. specific facts about a particular dispute (adjudicative fact) versus a broad general problem (legislative fact)
- b. adjudicative facts usually answer the questions of who did what, where, when, how, and why, with what motive
- c. legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide issues of law and policy

**III. Administrative Adjudication**

A. Statutory Hearing Rights

1. Generally

- a. Federal APA and 1961 MSAPA do not require adjudicative hearings
- b. APAs lay out rules for formal hearings, but agencies need not use those procedures except where an external source (like another statute or state/federal constitution) requires a hearing.
  - i) these hearings are called formal adjudication
- c. If no external source requires a hearing, the agency is usually free to choose its own dispute resolution procedure

Overview of the APA Procedural Models

	ADJUDICATION	RULEMAKING
Informal	no requirements	§553 – notice and comment
Formal	§554 notice to parties, separation of functions	
	§556 trial type hearing w/ ALJ, exclusive record	§556 trial type hearing w/ ALJ, exclusive record
	§557 formal findings, ban on ex parte contacts	§557 formal findings, ban on ex parte contacts

2. Federal

- a. APA §554(a) adjudication required by federal statute to be determined on the record after opportunity for an agency hearing signals Cong. intent for formal adjudication.
  - i) on the record = formal adjudication (triggers §556 and 557 requirements)
  - ii) when hearing is on the record, the trier of fact is not allowed to consider any evidence except that which has been admitted at the hearing. APA §556(e)
- b. In APA formal adjudication:
  - i) agency must separate its prosecuting and adjudicating functions
  - ii) agency must allow for cross examination at the hearing
  - iii) if the private party wins and the agency’s position was not substantially justified, the private party is entitled to recover attorney’s fees
  - iv) hearing must be conducted by ALJ

c. **City of West Chicago v. NRC**

- i) Corporation sought permission to demolish six buildings and store on-site additional contaminated material. City challenges NRC order granting licensing amendment. Statute requires NRC to grant a “hearing” if requested.
  - ii) Court held that informal hearing sufficient.
  - iii) magic words “on the record” not necessary to trigger formal hearing requirement
  - iv) However, in absence of “on the record” words, Congress must clearly indicate intent to trigger formal hearings and magic words indicate such Congressional intent.
    - no such intent demonstrated here
  - v) City had meaningful chance to submit statements and data explaining its viewpoint.
  - vi) no due process violation b/c generalized health, safety, and enviro concerns not liberty or property interests
- d. *Seacoast* – prior to *City of West Chicago*
- i) Congress is presumed to intend formal adjudication procedures in a statute governing adjudication when it uses the word “hearing”
- e. no specific procedures required for informal adjudication
- f. If several applicants are competing for a single mutually exclusive license, S. Ct. has held that both applicants must be considered together in a single comparative hearing. *Ashbacker Radio Corp. v. FCC*

3. State

- a. 1961 MSAPA requires an external source to trigger formal adjudication.
- b. 1961 MSAPA defines “contested case” (to which formal adjudication provisions apply) as a proceeding, including but not restricted to ratemaking and licensing, in which legal rights, duties, and privileges are required by law to be determined by an agency after an opportunity for a hearing.
  - i) if not a contested case, then virtually no procedures required by MSAPA
- c. ***Sugarloaf Citizens Ass’n v. Northeast Maryland Waste Disposal Authority*** (Md.) – the determination of whether a particular hearing required by statute is a contested case depends on applying the definition of “contested case” in the APA to the agency activity, not whether the statute uses language indicating that the hearing is adjudicatory.
  - i) here, formal hearing required b/c involves an application for a permit by a specific person or entity to construct a particular facility at a specified location.
  - ii) much broader than federal APA (contested case hearing must be provided if hearing required by statute, regulation, or constitution).
  - iii) here, words “public hearing” sufficient to trigger formal adjudication
- d. ***Metsch v. University of Fla.***
  - i) student denied admission to law school. Requested hearing, which was denied.
  - ii) Fla. Court held – no substantial interest; no administrative hearing required.

B. Limiting issues to which hearing rights apply

- 1. Agency can use rulemaking to resolve an issue and thereby displace an individual’s statutory right to an evidentiary hearing on that issue.
  - a. ***Heckler v. Campbell***
    - i) Issue: whether HHS can rely on published medical-vocational guidelines to determine a claimant’s right to Social Security disability benefits.
    - ii) Held: yes – to require Secretary to relitigate existence of jobs in national economy at each hearing would needlessly hinder an already overburdened agency.
  - b. protections in rulemaking are sufficient
  - c. only available for those issues that do not require case-by-case determination
  - d. ***Bowen v. Yuckert*** – Court upheld another part of the grid that made determinations that pertained to characteristics of the individual applicant – impairment severity.
  - e. ***Sullivan v. Zebley*** – Court struck down rule under which a child would be deemed eligible for benefits only if he or she had one of 182 medical conditions listed in the rule.

2. If Congress has given rulemaking power to an agency and conferred a right to individualized consideration or an evidentiary hearing, the Court has endorsed a presumption that the rulemaking provision will prevail.
  - a. *American Hospital Ass'n v. NLRB* – even if statutory scheme requires individualized determinations, decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses intent to withhold that authority
3. Safety valve essential – regulations should (must?) permit the affected persons to seek a waiver of the rules if they can show adequate reasons to justify one.
  - a. in *Heckler v. Campbell*, Court found that there was a safety valve b/c if they fail to describe a claimant's particular limitations, ALJ is not supposed to apply them.
  - b. However, in *FCC v. WNCG* majority of the court said that prior cases did not hold that the Commission may never adopt a rule that lacks a waiver provision.
4. Summary Judgment
  - a. an agency can use administrative summary judgment to deny a hearing when there are no disputed issues of material fact. *Weinberger v. Hynson, Westcott, & Dunning*
  - b. must be clear that no material fact issues presented
5. Showing a Material Fact at issue
  - a. A court might allow an agency to refrain from a hearing if the party who wants the hearing cannot show what would be accomplished there.
  - b. Party must show that there is an issue of material fact in order to get a hearing
    - i) does not have to be a detailed factual allegation

### C. Institutional decision and personal responsibility

1. Models of adjudicative decision-making
  - a. judicial model – adjudicative decision by an agency is like a decision by a judge; thus, administrative process should resemble judicial process as closely as possible.
    - i) ALJ personally listens to the evidence and arguments; no preconceptions; etc
  - b. institutional model – views an agency as if it were a single unit with the mission of implementing a regulatory scheme.
    - i) off the record consultation
2. *Morgan Cases*
  - a. *Morgan I* – “the one who decides must hear”
    - i) party's right to a full hearing required a personal decision by the agency head.
    - ii) strikes a blow to the institutional method
    - iii) most cases brush aside claims that the decision-maker was insufficiently familiar with the record.
    - vi) *Morgan II* – administrator not required to be physically present at the taking of testimony. Rather that he “dipped into the record from time to time” to get its drift, read the parties briefs, and discussed the cases w/ his assistants.
    - v) Presumption that the deciding officials have complied with the legal requirements, such as familiarizing themselves with the record. *Kansas Faculty*.
      - Usually not possible to subject decision-makers to discovery or trial about how they made a decision
      - *Morgan IV* – Sec. questioned about decision-making methods; Court admonished inquiry.
      - Absent a strong showing of bad faith or improper behavior, inquiry into mental processes must be avoided. *Citizens to Preserve Overton Park*.
        - o Only applies if agency fails to explain its decision; if the agency furnishes some explanation, the ct should review case based on that explanation. If insufficient, remand to agency for new one, rather than conduct a trial to find out how decision was made.
  - b. *Morgan II* – due process requires the preparation of an intermediate report
    - i) those who are brought into the contest with the Gov't in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the gov't proposes and to be heard upon its proposals before it issues its final command.

- ii) later case made clear that due process does not require an intermediate report absence a showing of substantial prejudice from failure to prepare one. *NLRB v. Mackay Radio and Telegraph*
- iii) In NJ, held that if an intermediate report is created, the parties have a right to see it and object to it. *Mazza v. Cacicchi*.
  - Supreme Court has never resolved
- iv) *Ballard v. Comm'r of Internal Revenue* – (US Tax Ct rule that hearing of certain cases could be assigned to a special trial judge, who prepares an opinion after hearing the case. Tax Court can modify or reject the opinion.) Court held that trial judge's decision cannot be kept secret; it should be made part of the record.

#### D. Separation of Functions – §554(d)

1. Administrative process criticized b/c a single agency makes the rules, investigates violations, prosecutes cases, and decides those cases.
  - a. However, this is the hallmark of the administrative process
  - b. promotes efficiency and effectiveness
2. Most agencies have an internal separation of functions; persons engaged in adversary conduct on the agency's behalf cannot serve as an administrative decision-maker or furnish off-the-record advice to the decision-makers or supervise persons engaged in decision-making.
  - a. *Walker v. City of Berkley* – City employee job terminated; challenged decision as violation of procedural due process. **Held:** same person cannot serve as both decision-maker in administrative process and as the advocate for the party that benefited from the decision in a federal court proceeding involving the same parties and same underlying issue.
    - i) However, prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review. *Goldberg v. Kelly*.
    - ii) *Withrow v. Larkin* – combination of investigative and adjudicative fxns does not, without more, constitute a due process violation. However, there, different people performed the investigative and decision making functions.
    - iii) *Nightlife Partners v. City of Beverly Hills* – (same person served as an advocate, then adversary, and also advisor to the judge). Court held that there was a clear violation of separation of functions – the same person cannot serve as an advocate and then turn around and advise the decision-maker.
  - b. APA and MSAPA (1981) prohibit adversaries (investigators/prosecutors) from serving as adjudicators off the record. But other employees can furnish off-record advice to adjudicators.
  - c. Under the APA, an ALJ cannot consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate.
    - i) *Butz v. Economou* – nor may a hearing examiner consult any person or party, including other agency officials, concerning the fact at issue in the hearing, unless on notice and opportunity for all parties to participate.
    - ii) ALJ can probably receive law or policy advice from agency staff members.
  - d. ALJ can't be supervised by a person engaged in performing adversary fxns for the agency.
3. Exceptions
  - a. Congress exempted initial ratemaking and licensing proceedings from separation of fxns (not accused of wrongdoing).
  - b. Principal of necessity – a biased or otherwise disqualified judge can decide a case if there is no legally possible substitute decision-maker.
  - c. does not apply to head of agency – exempt b/c necessary

#### E. Bias

1. *Andrews v. Agricultural Labor Relations Board*
  - a. facts: ALRB filed complaint against Andrews alleging unfair labor practices arising out of a contested election lost by United Farm Workers. Person appointed to hear the case was an attorney that worked on employment discrimination cases for Mexican Americans. Andrews moved to disqualify.

- b. Held – A trier of fact with expressed political or legal views cannot be disqualified on that basis alone, even in controversial cases. **Must show concrete evidence of bias.**
  - c. right to an impartial trier of fact does not mean that the trier must be completely indifferent to the general subject matter before him. Bias refers to the mental attitude of a judge towards a party, not to any views he may entertain regarding the subject matter.
2. Grounds for disqualification
- a. personal interest – decision-maker or family has personal (usually financial) stake in the decision. *Tumey v. Ohio*.
    - i) *Ward v. Village of Monroeville* – disqualified a small town mayor from serving as traffic court judge when fines went into city treasury, not mayor’s pocket b/c fines were a significant part of town’s budget (more fines = less taxes).
    - ii) *Marshall v. Jerrico* – sums collected as penalty for child labor law violation returned to agency as reimbursement for costs of enforcement. Held – no bias b/c prosecutorial rather than adjudicatory capacity
  - b. professional bias – decision-makers by profession have a pecuniary interest.
    - i) *Gibson v. Berryhill* – state optometry agency comprised solely of independent optometrists disqualified. Court held that board members had a personal pecuniary interest in limiting entry into field of independent optometrists. (adjudicatory)
    - ii) However, optometry board consisting of a majority of independent optometrists not invalid in all cases. *Friedman v. Rogers*. (non-adjudicatory)
  - c. prejudgment or animus
    - i) prejudgment of the individualized facts of case
    - ii) animus against a particular litigant or class of litigants.
    - iii) test for disqualification is whether a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. *Cinderella Career and Finishing Schools v. FTC* (agency chair criticized newspapers for accepting ads strongly resembling the ads by Cinderella).
  - d. **Andrews** – ruled that appearance of bias (without proof of actual bias) does not violate due process.
    - i) appearance of bias standard used to disqualify federal and state judges
    - ii) MSAPA – disqualification if judge is or may be disqualified
  - e. an ALJ that decides a case against a party is not disqualified from deciding the case again on remand absent showing of concrete bias.

F. Ex Parte Contacts – §557(d)

1. APA prohibits ex parte communications relevant to the merits of the proceeding b/w an interested person and an agency decision-maker or any other employee who may reasonably be expected to be involved in the decision-making process.
- a. formal adjudication is supposed to be decided solely on the basis of the record evidence. APA §556(e) (“the transcript of testimony and exhibits, together w/ all papers and requests filed in the proceeding, constitutes the exclusive record for decision.”)
  - b. ALJ can get ex parte advice from other employees on legal issues but CANNOT get advice from any employee on factual issues. §554(d)(1).
  - c. ex parte communication = written or oral communication not on the record, of which parties lack notice.
    - i) does not include status report unless the status report could affect agency’s decision on the merits.
2. Remedies for Ex Parte Communications
- a. disclosure of the communication and its content. §557(d)(1)(C).
    - i) notice to parties and opportunity to respond
  - b. the violating party must show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation. §557(d)(1)(D)

c. Improper ex parte communications, even when undisclosed during agency procedures, don't necessarily void agency decision; Rather, agency proceeding is voidable. **PATCO v. FLRA.**

- i) **Test:** in enforcing this standard, a court must consider whether, as a result of the improper ex parte communications, the agency's decision-making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair.
  - ii) considerations – gravity of the ex parte communication, whether the contacts may have influenced the agency's ultimate decision, whether the party making the contacts benefited from the agency's ultimate decision, whether the contents of the communication were unknown to opposing parties, and whether vacation and remand would serve useful purposes.
3. **PATCO** communications
- a. Sec. of Transportation – FLRA order was not overturned b/c the discussion of PATCO's situation was brief, labor leader had not made any threats or promises, and the conversation did not affect the outcome of the case (no prejudice).
  - b. Dinner w/ Union Pres. – interested person, even if not party to case. Normally dinner okay b/c they are friends but they discussed merits – improper.
  - c. ultimately not reversed b/c brief contact, no threats or promises made, and didn't affect case
4. DC Circuit has made it clear that the ex parte ban in APA §557(d) is an absolute rule.
- a. agency can't make exception to §557(d) no matter how useful that exception may be to the agency's regulatory mission. *Electric Power Supply Ass'n v. Fed. Energy Regulatory Comm'n*
5. God Squad Case: President is interested person w/ a lot of influence – no ex parte communications permitted in adjudication (different than in rulemaking where ex parte comm. allowed).

#### G. The Role of Political Oversight

##### 1. *Pillsbury v. FTC*

- a. issue – whether Pillsbury was deprived of due process by improper interference by Congressional committees w/ the decisional process of the FRC while the Pillsbury case was pending b/f it.
- b. **Held:** Congressional intrusion into the adjudicative aspects of the FTC is improper and requires remand for a new decision because here there was a “searching examination” into the mental process of the Commission – improper.
  - i) when an investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function.
  - ii) concerned with the right of private litigants to a fair trial, and equally important, with their right to the appearance of impartiality
  - iii) rule codified at §557(d)
  - iv) often, inquiries into agency position okay
  - v) In the end, Commission not disqualified b/c enough time had passed and new members on the Commission; but contact still illegal.
- c. *Pillsbury* only applies to judicial or quasi-judicial proceedings (formal adjudication). *DC Federation of Civic Ass'n v. Volpe.*
  - i) rule does not apply when formal adjudication is on the horizon but not imminent.

##### 2. Informal adjudication

- a. Even though *Pillsbury* does not apply, there are still limits on legislative intervention.
- b. Thus, if a decision-maker relies upon Congressional pressure in making his decision, the decision is arbitrary and capricious.

## IV. The Process of Administrative Adjudication

### A. Investigations and Discovery

1. *Craig v. Bulmash* – a subpoena can be enforced where the investigation is for a lawfully authorized purpose, within the power of the legislative body to command. Probable cause is satisfied as long as the subpoenaed documents are relevant to the inquiry.
  - a. An agency's subpoena to obtain information to investigate in an enforcement proceeding is held to a lesser standard than that for a criminal prosecution.

- b. Commissioner investigating Bulmash's alleged failure to pay minimum wage. Law requires employers to maintain records of names, addresses, and wages of all employees.
  - c. 4<sup>th</sup> Amendment satisfied when:
    - i) subpoena is within agency's authority and jurisdiction
    - ii) the terms of subpoena are not too vague or indefinite or burdensome
    - iii) seeks information relevant to the investigation
    - iv) agency not acting in bad faith or for unlawful purpose
    - v) info sought is not privileged
  - d. Also no valid 5<sup>th</sup> Amendment claim.
    - i) 5<sup>th</sup> Amendment can only be invoked where there is a threat of criminal (not civil sanctions)
    - ii) only available to people, not corporations
    - iii) can be defeated by grant of immunity
2. Agency must go to ct to enforce subpoena. *ICC v. Brimson* – agency can't enforce its own subpoena
  3. Agency not required to give notice to persons investigated when it subpoenas materials from third party even though it will be too late for person investigated to raise defenses. *SEC v. Jerry T. O'Brien*.
  4. Privileges apply to agency investigations.
    - a. attorney-client
    - b. marital
    - c. 5th Amend privilege NOT applicable – witness can't refuse to take the stand in admin case
  5. Physical searches
    - a. when an agency physically inspects or searches a home or business, it must ordinarily secure a search warrant. *Marshall v. Barlow's Inc.*
    - b. to obtain an administrative search warrant, the inspector need not establish probable cause to believe a violation has occurred. It is sufficient if the choice of the particular employer to be inspected was based on reasonable and neutral standards (ex. statistical sampling).
      - i) *Barlow* Rule does not apply to certain pervasively regulated businesses like liquor and guns. *New York v. Burger*.
      - ii) *Burger* requires 4 criteria b/f warrantless search – (i) substantial gov't interest; (ii) unannounced inspections must be necessary to further the regulatory scheme; (iii) the statute must advise the owner of the periodic inspection program; (iv) searches must be limited in time, place, and scope.
  6. No exclusionary rule in administrative law
    - a. evidence that was illegally seized in violation of the 4<sup>th</sup> Amend. is probably admissible in admin proceedings even if could not be admitted in a criminal proceeding.
    - b. However, some courts believe that evidence must be excluded in admin proceedings if the manner in which it was obtained constituted egregious violations of 4<sup>th</sup> Amend.
    - c. *INS v. Lopez Mendoza* – illegally seized evidence can be used in admin procedure to deport
  7. Discovery
    - a. 1981 MSAPA appears to provide normal civil rules of discovery for admin investigations.
    - b. However, APA does not require any form of discovery. *Citizens Awareness Network v. US* (1<sup>st</sup> Cir) (Ct upheld NRC's elimination of discovery and substitution of mandatory disclosure).
- B. Evidence at the Hearing**
1. ***Reguero v. Teacher Standards and Practices Commission*** (Oregon): rejects residuum rule; hearsay evidence alone, even if inadmissible in a civil or criminal trial, is not incapable of being substantial evidence. (Teacher lost license b/c of sexual misconduct toward students; students' hearsay testimony introduced but students did not testify and teacher submitted countervailing evidence).
    - a. Court rejects any categorical way of determining substantiality; need case-specific inquiry
    - b. Residuum Rule: agency decision must be supported by some evidence that would be admissible in a civil or criminal trial.
      - i) still accepted by most states
      - ii) appears APA §556(d) and 1981 MSAPA reject – no order in a formal adjudication may be issued that's not supported by reliable, probative, and substantial evidence.
    - c. Residuum Rule rejected in federal courts

2. Burden of Proof and Standard of Review
  - a. proponent must discharge its burden of proof by preponderance of the evidence.
    - i) burden of proof to establish an exception from a regulatory statute is on the party asserting that the exception exists. *NLRB v. Kentucky River Community Care Inc.*
  - b. Generally, agency findings of fact are reviewed for substantial evidence.
3. Hearsay
  - a. *Olabanji v. INS* – 5<sup>th</sup> Cir. Held that reliance on affidavit of a witness violated due process b/c INS could have subpoenaed him to testify and be subject to cross examination.
  - b. *Ezeagwuna v. Ashcroft* – State Dept. official's letter re fraudulent asylum documents (based on info from an embassy official he never met) was neither reliable nor trustworthy and contained multiple hearsay. Reliance on the letter was a violation of due process.
4. In administrative hearings, administrative judges are expected to take an active role in developing the record; especially important when one party is not represented by counsel.
5. Open v. Closed Hearings
  - a. *Detroit Free Press v. Ashcroft* – 6<sup>th</sup> Cir. Held that deportation hearings are formal and adversarial in nature and thus must be kept open to public.
    - i) in response to Creppy memo
    - ii) Court held further that decision to close hearings must be made on a case-by-case basis and the denial of an open trial must be supported by findings sufficiently specific that a reviewing court could determine whether the closure order was properly entered.
  - b. *North Jersey Media Group v. Ashcroft* – 3<sup>rd</sup> Circuit decline to follow *Detroit Free Press* based on concerns about terrorism. Held: no First Amendment right of access to deportation hearings closed by Creppy memo.
6. Cross Examination
  - a. APA requires that in adjudication, party is entitled to conduct such cross examination as may be required for a full and true disclosure of facts. 556(d).
  - b. *Citizen's Awareness Network v. US* – NRC rule dispensed with cross examination rights; party seeking cross-examination must first seek permission from hearing officer and establish that it is necessary.
    - i) 1<sup>st</sup> Cir. Upheld that rule as equivalent to the APA standard
    - ii) APA requires that cross examination be available when required for full and true disclosure of the facts.
    - iii) rule okay though b/c discretionary, rather than complete abolishment of cross examination. But must be allowed when necessary for full disclosure of facts.

### C. Official Notice

1. Agencies may take official notice of matters, including personal knowledge of the fact-finders.
  - a. expertise of agencies
  - b. general/broad policy considerations
2. ***Franz v. Board of Medical Quality Assurance*** – agency record must provide as complete a basis for judicial review as due diligence makes feasible, including any technical matter necessary to enable a lay judge to determine whether an agency's decision has adequate support (when info beyond lay knowledge, must provide enough info for evaluation by lay judge).
  - a. when in an adjudication an agency intends to rely on members' expertise to resolve legislative fact issues, it must be specifically identified, the agency must notify the parties and provide an opportunity for rebuttal (rebuttal – APA §556(e))
  - b. notification must be complete & specific enough to give effective opportunity for rebuttal.
  - c. It must also help build a record adequate for judicial review.
    - i) notification should include brief statement explaining the opinion held by the adjudicative body, reasons for the opinion, and the members' qualifications to hold it.
  - d. board of experts not required to summon expert opinions.
  - e. Levin: Ct unlikely to uphold agency decision based on official notice in face of strong case presented to the contrary.

3. Rebutting officially noticed evidence

a. *Castillo-Villagra v. INS*

i) legislative facts that are non-disputable – agency need not provide an opportunity for rebuttal.

ii) legislative facts that are disputable –agency must give notice and offer opportunity to respond

iii) adjudicative facts – must give notice and opportunity to respond.

b. Most cases hold that the opportunity to rebut officially noticed facts can occur in the form of a motion to reopen the proceedings for further evidence.

4. When an agency relies on background knowledge and experience to evaluate evidence, it is not taking official notice of anything and need not specially notify the parties and afford an opportunity to contest the evaluation.

a. hard distinction to draw

b. one way to read *Franz* is that it requires agency to provide opportunity for rebuttal in both.

D. Findings and Reasons – APA §§ 55(e), 557(c)(3)(a)

1. In constitutionally required hearings, the decision-maker should state the reasons for his determination and indicate the reasons he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. *Goldberg v. Kelly*.

2. *CIBA-Geigy Corp* (NJ)

a. Department of Environmental Protection (DEP) renewed a permit allowing D to discharge chemically-treated stuff into ocean.

b. DEP's permitting process doesn't fit into either adjudication or rulemaking.

i) Although DEP didn't conduct a trial-type hearing in considering Ciba-Geigy's permit renewal application, the agency reviewed extensive documentation submitted by both Ciba-Geigy and interested members of the public and included fact evidence of draft permit and evidence offered during public comment period

ii) An agency must set forth findings of fact if it acts in a quasi-judicial capacity.

- So people know how the decision was reached and can decide whether it was arbitrary, capricious or if extralegal considerations drove the decision

c. No matter how great a deference the court is obliged to accord the administrative determination which it is being called upon to review, it has no capacity to review at all unless there is some kind of reasonable factual record developed by the administrative agency and the agency has stated its reasons grounded in that record for its action.

d. This is a problem for judicial review, b/c there is nothing in the record that indicates how DEP concluded that Ciba-Geigy's permit complied with the EPA's Ocean Discharge Criteria Regulations. Second, the record did not indicate clearly how the permit comported with New Jersey's anti-degradation policy [in the state's water quality regulations].

e. 4<sup>th</sup> Circuit w/ strict approach in *AT & T Wireless v. Virginia Beach* – letter w/ summary of case, meeting minutes, votes of council, and stamp "DENIED" constituted a "writing."

i) if Congress wanted findings and reasons, they should have required them under APA §557(c)

3. Post-hoc explanations are usually not permitted (met w/ suspicion and disfavor). *Overton Park*.

a. requiring findings encourages agencies to hold themselves to a higher standard – no pure discretionary or arbitrary decision making.

b. remand back to agency for findings if findings insufficient

E. Equitable Estoppel

1. *def* – If A's statement or conduct reasonably induces B's detrimental reliance, A will not be permitted to act inconsistently with its statement or conduct.

2. *Footo's Dixie Dandy Inc v. McHenry* (Ark): In some situations a state may be estopped by the actions of its agents (here, would have been absolutely entitled to a tax status)

a. estoppel is not an action that should be readily available against the state, but neither is it a defense that should never be available.

- b. *Gestuvo v. INS* (Dist. Ct) recognized estoppel when certain essential elements were present:
  - i) the party to be estopped must know the facts
  - ii) he must intend that his conduct should be acted on or must so act that the party asserting estoppel had a right to believe it so intended
  - iii) the latter must be ignorant of the true facts, and
  - iv) he must rely on the former's conduct to his injury
- c. Ark Court finds that the circumstances of the case warrant equitable estoppel
- 3. Supreme Court has never accepted an estoppel claim and has rejected them on numerous occasions.
  - a. *Office of Personnel Management v. Richmond* – Supreme Court implied that it is unlikely to uphold a claim for equitable estoppel against the government in any circumstances but did not totally slam the door.
    - i) here, former gov't employee retired on disability considering whether to take a job; asks personnel office whether if he takes job, he can still get benefits. Orally assured that could still get benefits and given brochure confirming interpretation, so takes job. However, four years prior, Congress changed law, person didn't know and brochure not updated and no longer can get benefits.
    - ii) to allow payment here would be payment not authorized by Congress; don't want to enable the exec branch to undo laws passed by Congress. However, Ct didn't decide case on that basis. Rather, said no benefits b/c Constitution says no money shall be drawn from Treasury except consequence of appropriations made by law.
  - b. *Heckler v. Community Health Services* – Court denied equitable estoppel but stated some of the basic elements of estoppel:
    - i) written advice
    - ii) from the government itself, rather than an intermediary
      - here, info from intermediary rather than agency itself so no estoppel
    - iii) showing a detrimental reliance (ex. Loss of a legal right or any adverse change in status).
  - c. Government often gives advice – if the government could be estopped by mistaken advice, agencies would be deterred from giving such advice and could open floodgates to litigation.
  - d. Occasionally, without invoking the language of estoppel, federal courts have found ways to protect people who have been misled by government.
  - e. Party can rely on a declaratory order w/o concern
    - i) declaratory order – administrative equivalent of judicial declaratory judgments.
    - ii) binds all parties.

## V. Rulemaking Procedures

### A. Importance of Rulemaking

- 1. Advantages over adjudication
  - a. greater participation by all affected parties
  - b. more appropriate procedure to resolve general questions
  - c. prospective application
  - d. uniformity
  - e. political input
  - f. agency can set agenda
  - g. more efficient for agency
  - h. easier for affected people to research
  - j. executive and legislative oversight
- 2. Disadvantages as compared to adjudication
  - a. rules are often over or under inclusive
  - b. adjudication allows agencies to make decisions where it can observe the actual operation of the law, rather than making decisions in the abstract.
  - c. adjudication allows agencies to deal with new and unexpected problems
  - d. adjudication allows for clarification of ambiguities of rules

## B. Definition of “Rule”

### 1. Federal

- a. defines “rule” in §551(4) – whole or part of an agency stmt of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency, including rates, wages, etc.
- b. rule making – agency action which regulates the future conduct of either groups of persons or a single person
  - i) legislative in nature
  - ii) operates in the future
  - iii) primarily concerned with policy considerations
  - iv) applies in general situations
- c. “adjudication” is the agency’s process for formulating an order, a final disposition of a matter other than rule making but including licensing.
- d. Courts almost always presume that agency has rulemaking power even if only relied on adjudication in the past. *Nat’l Petroleum Refiners v. FTC.*

### 2. State

- a. 1981 MSAPA: rule mans the whole or part of an agency statement of general applicability that implements, interprets, or prescribes (i) law or policy or (ii) the organization, procedure, or practice requirements of an agency.
- b. some states define rule more narrowly

### 3. Determining whether rulemaking or adjudication

- a. ***Cunningham v. Dept. of Civil Service***: Two P’s demoted from their jobs. By statute, both were entitled to priority for a new job if it was “comparable” to their old job. Both denied job via letter stating that jobs not comparable.
  - i) issue: whether they are entitled to a hearing on whether the jobs were “comparable.”
  - ii) Held: a hearing is mandated in this case. There are contested adjudicative facts.
- b. Even if rule only affects a single entity, hearing not necessarily required. *Anaconda v. Ruckelshaus* – “The fact that Anaconda alone is involved is not conclusive on the question as to whether the hearing should be adjudicatory, for there are many other interested parties and groups who are affected and entitled to be heard.”

### 4. Results of Rulemaking label

- a. *Bi-Metallic* – due process not required in rulemaking
- b. However, if pl. not entitled to formal adjudication, he may have more rights if the proceeding is deemed to be rulemaking than informal adjudication.

### 5. Prospectivity and Retroactivity

- a. rules normally establish law or policy for the future; orders generally concern past events and have a retroactive effect.
- b. ***Bowen v. Georgetown Hospital***: S. Ct. invalidated retroactive portion of a rule promulgated by HHS.
  - i) retroactivity not favored so rules will not be construed to have retroactive effect unless their language requires the result.
  - ii) even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.
  - iii) Here, secretary had no authority to promulgate retroactive rules.
- c. Courts have given retroactive effect to interpretive rules

## C. Initiation of Rulemaking (Notice and Comment (informal rulemaking))

### 1. Agency must provide adequate notice of a proposed rule to affected parties (§553(d)).

- a. notice
- b. including a statement of the time, place, and nature of the public rulemaking proceedings
- c. reference to the legal authority under which the rule is proposed
  - i) Agency can add supporting documentation for a final rule to the record, but it should only supplement or confirm existing data.

- d. either the terms or substance of the proposed rule or a description of the subjects and issues involved. *Portland Cement*.
  - i) allows interested parties to comment meaningfully
  - e. final rule published in Federal Register. APA §552(a)(1).
  - 2. Agency must give parties a reasonable time to respond (in writing) after given notice. §553(c)
    - a. *CT Light and Power* (DC Cir) – 30 days was not an unreasonable period given the industry’s familiarity with the issues
    - b. *Fla. Power and Light* (DC Cir) – 15 day period sufficient given the statutory deadline the agency faced and the fact that the agency received 61 comments and altered the rule according to comments.
  - 3. **Chocolate Manuf. Ass’n v. Block** (4<sup>th</sup> Cir).
    - a. Facts: USDA promulgated rule dealing w/ appropriate levels of sugar, salt, and fat in foods. Notice talked about lowering sugar but never mentioned chocolate milk. Final rule included chocolate milk as non-recommended food and removed it from program. Pl. challenged rule.
    - b. Held: notice was inadequate
    - c. **Logical Outgrowth Test**: notice is adequate if the changes in the original plan are in character w/ the original scheme and the final rule is a logical outgrowth of the notice and comments already given.
      - i) agency can promulgate a final rule that differs from its proposal but the agency does not have carte blanche to establish a rule contrary to its original proposal just b/c it receives a suggestion to do so.
      - ii) an interested party must be alerted by the notice to the possibility of the changes eventually adopted from the comments.
        - Comments don’t give notice; agency itself must give notice
      - iii) Most cases require a showing of prejudice
  - 4. Causation
    - a. *Air Transport Ass’n v. CAB* – court upheld rule against procedural challenge in part b/c petitioner did not explain what it would have said if it had been given earlier access to the studies.
    - b. *Shell Oil Co v. EPA*: court held that the challenger’s obligation to show prejudice did not apply to a violation of the logical outgrowth principal.
- D. Public Participation
- 1. Informal Rulemaking
    - a. few requirements
    - b. agency is free to limit public participation to written submissions unless the agency determines otherwise or some species of law requires more.
      - i) often agencies exercise discretion to conduct oral hearings
    - c. some people excluded from process b/c lack of money, education, and resources, which can undermine rulemaking.
    - d. growth of E-rulemaking
  - 2. Formal Rulemaking – APA §§ 556, 557
    - a. requires opportunity for trial type hearing, including right to present oral evidence, conduct cross examination and submit rebuttal evidence.
    - b. *US v. Fla. East Coast Railway*: “hearing on the record” language necessary to trigger formal rulemaking; otherwise agency not required to go beyond informal procedures in §553.
      - i) “after hearing” insufficient to trigger formal rulemaking
    - c. formal rulemaking has almost disappeared – very inefficient and time-consuming (years)
  - 3. Hybrid Rulemaking
    - a. statutes instruct specific agencies to make rules using procedures that are somewhat more elaborate than APA informal rulemaking (somewhere b/w §553 and §557)
      - i) for example, statute may require legislative hearing and also opportunity for interested persons to question or cross-examine opposing witnesses (*VT Yankee*).

b. **Vermont Yankee v. NRDC:**

- i) Courts can't impose extra procedures in rulemaking beyond the APA §553 absent clear Congressional intent → demise of hybrid rulemaking
- ii) Administrative agencies should be free to fashion their own rules of procedures absent constitutional constraints of "extremely compelling circumstances."
- iii) Court can still use APA to give a "hard look" and find something "arbitrary and capricious."
- iv) Courts also apply this principle to adjudication as well as rulemaking.

E. Procedural Fairness in Rulemaking

1. Rule of Agency Heads

- a. APA and MSAPAs specifically provide that agency decision-makers must actually consider written and oral submissions received in course of the rulemaking proceeding. §553(c).
  - i) However, the requirement does not necessarily mean that the agency head must personally preside at an oral proceeding or personally read all written submissions.
- b. 1981 MSAPA explicitly provides that others may preside at oral rulemaking proceedings and prepare summaries for subsequent personal consideration by the agency head.
  - i) agency head must understand both sides' arguments – to make an informed decision

2. Ex parte contacts

- a. ex parte contacts are forbidden in formal rulemaking. §557(d).
  - i) if they occur, agency must disclose their substance on the public record
- b. informal rulemaking, assumption was that federal APA neither banned ex parte communications nor required the inclusion of such communications in the record.
- c. **HBO v. FCC** (DC Cir):
  - i) communications received prior to issuance of a formal notice of rulemaking do not have to be put on the public file, unless they form the basis for the agency's action.
  - ii) Once notice of proposed rulemaking has been issued, any agency official or employee who is or may reasonably be expected to be involved in the decision, should refuse to discuss any matters relating to the disposition of the proceeding with any interest person. If ex parte contacts occur, the written document or a summary of the oral communication must be placed in the public file.
  - iii) court concerned with maintaining a full record – record will not reflect an agency's actual basis of decision unless it contains all ex parte communications
- d. **Sierra Club v. Costle** (DC Cir) – displaces **HBO**
  - i) ex parte communications may be desirable in informal rulemaking but all documents or communications that are of central relevance must be disclosed.
  - ii) communications w/ Pres only need to be disclosed if they form basis for decision
  - iii) to overturn rule based on Congressional pressure, must show:
    - the content of the pressure upon the Secretary is designed to force him to decide on facts not made relevant by Congress in the applicable statute
    - the secretary's determination must be affected by those extraneous considerations.
  - iv) rests on an assumption that politics have a large role to play in rulemaking

3. Prejudgment

- a. Clear and Convincing Test: An agency member may be disqualified from a proceeding when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking. **ANA v. FTC** (DC Cir).
  - i) FTC proposed rule banning TV ads for any product directed to children too young to understand the selling purpose of the ad. Chairman of FTC had written and spoken extensively in a variety of settings about children's television and advertisements.
  - ii) impartial does not mean uninformed, unthinking, or inarticulate.
  - iii) mere discussion of policy or advocacy on legal question insufficient
  - iv) Chairman not disqualified b/c he remained free, in theory and reality, to change his mind upon consideration of presentations made by those who would be affected.
- b. much more lenient than standard for adjudication (*Cinderella*)

## F. Statement of basis and purpose

1. APA requires a concise general statement of basis and purpose of agency rule
  - a. *Auto Parts and Accessories v. Boyd* (DC Cir): only major issues of policy need be addressed in a statement of basis and purpose.
    - i) hard to know what court will consider important
    - ii) fed cts ask whether statement of basis and purpose is sufficient to prevent rule from being arbitrary and capricious.
  - b. purpose is to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.
    - i) agency must respond only to arguments that are significant and material
  - c. many state APAs permit agencies to issue rules w/o any written explanation.
2. Rationale for statement of basis and purpose: ***California Hotel & Motel Ass'n v. Industrial Welfare Comm'n.*** (Cal.) (ct says strict requirements for statement of reasons)
  - a. facilitates meaningful judicial review of agency action
  - b. subjects the agency, its decision-making processes, and its decision to more informed scrutiny by the Legislature, and the regulated public, lobbying, and public interests groups, the media, and the citizenry at large.
  - c. induces agency action that is reasonable, rather than arbitrary, capricious, or lacking in evidentiary support
  - d. introduces an element of predictability into the administrative process so public can shape its conduct accordingly
  - e. stimulates public confidence in agency action by promoting both the reality and the appearance of rational decision-making in government.
3. *Chenery* Doctrine: if a rule is challenged in court as arbitrary and capricious, the court normally will use the agency's contemporaneously stated reasoning as the sole basis for resolving the challenge.
  - a. incentive for agency to make sure that its statement of basis and purpose contain a full account of its justifications for adopting a rule.
  - b. post-hoc rationalizations are strongly disfavored.

## G. Issuance and Publication

1. Rules are required to be published and are normally not effective until a specified period after their publication (although many going online now too)
  - a. important b/c it facilitates easy public access to rules' contents
  - b. FRA requires the Federal Register to be published every federal working day, which includes all rules of general applicability and legal effect and notices of proposed rulemaking.
2. Under Federal APA, an agency rule becomes effective no sooner than 30 days following publication.

## H. Regulatory Analysis

1. Regulatory analysis is an intensive, formal examination by an agency of the merits of a proposed rule.
  - a. intended to involve a more detailed and systematic assessment than is inherent in the ordinary process of notice-and-comment rulemaking.
  - b. regulatory analyses can aid careful consideration of the desirability of particular rules by structuring agency consideration of their costs and benefits, their advantages and disadvantages, and the various alternatives available.
2. At the federal level, a series of executive orders have mandated that executive branch agencies engage in cost-benefit analysis.
  - a. required for significant regulatory action – any regulatory action that is likely to result in a rule that may have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.
  - b. only applies to the extent permitted by law. Thus, if statute directs an agency to issue a rule that even the agency itself would not deem cost-justified, the agency must follow the statute.

## VI. Rules As Part of the Agency Policymaking Process

### A. Rulemaking Exemptions – APA §553

#### 1. Good Cause exemption §553(b)(3)(B)

a. Federal and state APAs contain exemptions providing that notice and comment proceedings may be omitted in particular circumstances for good cause.

b. Good cause = situations where it would be unnecessary, impracticable or contrary to the public interest for the agency to follow them

i) example: a rule that makes a “technical correction” by reinstating a rule that was earlier dropped by mistake in a recodification of an agency’s regulations.

ii) public comment unnecessary where the agency has absolutely no discretion about the comments of its rule, as where the task is merely to make a mathematical calculation or ascertain an objective fact.

iii) rules designed to meet a serious health or safety problem, or some other risk of irreparable harm, often qualify for exemption on the basis of impracticability or contrary to the public interest.

- however, pursuant to policy of narrow construction of the exemption, cts sometimes refuse to accept an agency’s assertion of urgency at face value.

c. agency must make explicit finding at the time of issuance that good cause exists and must give reasons for the finding.

d. In addition, for good cause, an agency may dispense of the normal requirement that a rule may not become effective until 30 days after its issuance.

e. When an agency plans on relying upon the good cause exemption, it should issue a rule using direct and final rulemaking.

i) streamlined variation of the normal procedure used for issuing totally uncontroversial rules.

ii) agency publishes the rule and announces that if no adverse comments are received w/in a specified time period, the rule will become effective as of a specified later date. If even a single adverse comment is received, the agency w/draws the rule and republishes it as a proposed rule under normal notice-and-comment procedure.

f. Interim-Final Rules: when agency adopts rule in reliance on impracticable or public interest prongs of good cause exemption, it should require comments on the rule after it becomes effective and perhaps change or rescind rule after considering comments.

g. Direct-Final Rules: agency adopts rule; people have 30 days to object; if objections are received, the rule undergoes normal notice and comment procedures (unnecessary exemption)

#### 2. Procedural Rules

a. rules of agency organization, procedure, or practice are exempted from usual notice and comment procedures.

i) no similar exemption in MSAPAs or in state APAs.

b. *US Dept. of Labor v. Kast Metals Corp.* (5<sup>th</sup> Cir): held – when a proposed regulation of general applicability has a substantial impact on the regulated industry, or an important class of the members or products of that industry, notice and opportunity for comment should first be provided. (Substantial Impact Test).

i) Courts must look beyond the label of “procedural” to determine whether a rule is of the type Congress thought appropriate for public participation.

ii) an agency rule that modifies substantive rights and interests can only be nominally procedural and the exemption for such rules of agency procedure cannot apply.

iii) A rule is not procedural if it departs from existing practice and has a substantial impact on the regulated industry. *Brown Express*.

c. *Chamber of Commerce v. US* – Court found that a directive that required employers to go beyond mere compliance with the Act had a substantive component and thus not a procedural rule. (directive ordered that workplaces w/ worst records would be targeted for inspection but OSHA would forgo inspections if employer enrolled in self-inspection program).

- d. DC Cir has sought, with mixed success, to implement a different test: court inquires more broadly whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior. *American Hospital Ass'n v. Bowen*.
  - i) hard test to implement.
- 3. Exempted Subject Matter -- §553(a)
  - a. proprietary matters – rules relating to public property, loans, grants, benefits, or contracts, are excluded from notice and comment procedure and effective date and right to petition.
  - b. agency management and personnel
  - c. military and foreign affairs functions
    - i) narrowly read exception – *Independent Guard Ass'n v. O'Leary* – rule prohibiting any civilian that used drugs from guarding nuclear weapons found not to involve a military function (must be direct military function)
- 4. Nonlegislative Rules
  - a. legislative rules
    - i) rules issued by an agency pursuant to an express or implied grant of authority to issues rules with the force of law
    - ii) Because they can directly later the rights and obligations of citizens, they are often considered to be the most important type of agency rules.
    - iii) bind private persons; can extinguish citizens' rights to be heard on the issue
    - iv) also bind the issuing agency
    - v) ask whether w/o rule, would there be a basis for agency axn; if rule is not necessary to carry out agency fxn, then not a legislative rule
  - b. nonlegislative rules
    - i) guidance documents – rules that don't have the force of law
    - ii) not automatically binding upon agencies or citizens
    - iii) issues of agency discretion
    - iv) commonly divided into interpretive rules and statements of policy – both exempt from the usual notice and comment and delayed effectiveness procedures.
  - c. policy statements
    - i) *Mada-Luna v. Fitzpatrick* (9<sup>th</sup> Cir): the critical factor to determine whether a directive announcing a new policy constitutes a rule or a general statement of policy is the extent to which the challenged directive leaves the agency free to exercise discretion to follow or not follow the announced policy in an individual case.
      - here, court found that directive was a statement of policy b/c it operated only prospectively and did not establish a binding norm that would limit the director's discretion.
      - Court rejects the substantial impact test as a basis for applying the nonlegislative rules exemption
    - ii) if the directive merely provides guidance to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make individualized determinations, it constitutes a general statement of policy. *Mada Luna*.
    - iii) notice and comment not required for general statements of policy.
    - iv) administrative pronouncement that only binds the agency, not members of the public is binding on the agency. *CNI v. Young* (DC Cir.)
    - v) *CNI* expanded in *CropLife America v. EPA* – Court found that policy statement in a press release was binding given its unequivocal language.
  - d. interpretive rules
    - i) *Hector v. USDA* (7<sup>th</sup> Cir): (internal memo requiring all dangerous animals to be in an 8ft high fence). **Held:** when Cong. authorizes agency to create standards, it is delegating legislative authority, rather than setting forth a standard which the agency can particularize through interpretation. If a rule promulgated through such delegation is intended to bind (rather than be a tentative statement of the agency's view), notice and comment is required.
    - ii) rules w/ a numerical component not usually interpretive; here, 8ft appears to be an arbitrary choice which cannot be derived from a process of interpretation

iii) Court can assume that an agency intended to use legislative rulemaking authority where, in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate.

iv) a rule is plainly not legislative if the agency has no legislative rulemaking authority at all w/ respect to the subject area of the rule.

v) A guideline or interpretive rule that is inconsistent w/the regulation it purports to interpret is invalid; must go through notice and comment rulemaking. *Guernsey; National Family Planning*

vi) in determining whether something is an interpretive rule, some courts ask whether the agency intended the rule to establish a binding norm. If so, rule invalid b/c not enacted w/ notice and comment procedures. Expansion of the "binding effect" test generally used for statements of policy.

## B. Required Rulemaking

1. Courts generally reluctant to interfere w/ agency's choice of lawmaking procedures; *SEC v. Chenery*: agency's discretion to decide whether to make rule or adjudicate (subject to few exceptions)

2. *NLRB v. Wyman-Gordon Co* (plurality opinion) (Board relied upon new rule developed in prior case to bind party in subsequent case).

a. Held: an agency may develop a new policy through adjudication, but it must give subsequent individuals a right to be heard on the question of whether the rule should be modified or abandoned.

i) can cite to precedent but its not conclusive.

b. However, here, this was an order thru valid adjudication.

3. *NLRB v. Bell Aerospace*

a. Agency certified bargaining unit of Bell's buyers that under previous Board policy, would have been regarded as "managerial employees" who could not be given such rights. Co argued that significant policy change should have been made in rulemaking rather than individual adjudication.

b. **Held:** Pursuant to *Chenery*, Board's preference for adjudication deserved great weight

c. When would the Board's lawmaking by adjudication be impermissible?

i) *Mercy Hospital v. Local 250*: Board announced a policy that registered nurses at nonprofit hospitals may always be represented by a separate bargaining unit. A hospital challenged that policy and sought a larger bargaining unit, but the Board refused to receive evidence to support his position. The 9<sup>th</sup> Cir. reversed

4. Reliance and Retroactivity

a. *Bell Aerospace* alludes to three situations in which reliance interests might require a "different result" (*Chenery* exception)

i) The adverse consequences of retrospective adjudicative lawmaking would be substantial to parties who had relied on past decisions of the agency

ii) New liability is sought to be imposed retrospectively by adjudication on individuals for past actions which were taken in good-faith reliance on agency pronouncements

iii) Fines or damages are involved

iv) Note: different result (when cts discern unfair retroactivity) is to hold that any attempt to apply the new policy to the party would be void as an abuse of discretion.

b. According to a leading case, the question of whether a new case-law rule announced in an agency adjudication is unfairly retroactive, so as to constitute an abuse of discretion:

i) Whether the particular case is one of first impression

ii) Whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of the law

iii) The extent to which the party against whom the new law is applied relied on the prior law

iv) The degree of the burden which a retroactive order imposes on a party

v) The statutory interests in applying the rule to the case at hand despite the reliance of a party on the old standard

### C. Petitions

1. Members of the public can petition agency for the issuance, amendment, or repeal of a rule as well as a reexamination of the status quo.
  - a. provides means for focused public input
  - b. MSAPAs require a statement of reasons upon denial of rulemaking petition.
    - i) federal APA does not require any statement but does require a brief statements of the grounds for denial of any application or petition filed with an agency.
2. **WWHT v. FCC**
  - a. broadcasters asked FCC to issue rule requiring cable operators to carry scrambled signals. FCC denied petition.
  - b. **held:** where the proposed rule pertains to a matter of policy w/in the agency's expertise and discretion, the scope of review should be a narrow one, limited to ensuring that the Commission has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that the facts have some basis in the record.
    - i) where an agency decides against rulemaking, the record need only include the petition, comments pro and con, and an explanation of the agency's decision
    - ii) it is only in the rarest and most compelling of circumstances that court acts to overturn agency judgment not to institute rulemaking.
    - iii) extremely narrow judicial review
3. Deadline for response
  - a. even if courts will not supervise petitioning process closely, APA can impose constraints on the process at the agency level.
  - b. 1981 MSAPA requires that an agency act on a petition w/in 60 days
  - c. 1961 MSAPA requires that agency acts w/in 30 days
  - d. Federal APA has no time constrains
4. Even w/o a formal petition, an agency can conduct internal review of its rules to determine which ones should be changed or abandoned.
5. Congress can enact deadlines for the completion of particular proceedings.
  - a. *International Chemical Workers Union* (DC Cir) – a court must consider four factors in determining whether an agency's delay was unreasonable: [rare case]
    - i) the length of time that has elapsed since the agency came under a legal duty to act
    - ii) reasonableness of the delay must be judged in context of the statute authorizing agency action
    - iii) consequences of the delay
    - iv) any plea of administrative error, administrative convenience, practical difficulty in carrying out legislative mandate, or need to prioritize in the face of limited resources
  - b. Lapses: some state statutes put an outside limit on the rulemaking period; if the rule cannot be completed it a certain amount of time, the agency must start over.
    - i) ex. California = 1 year; 1981 MSAPA = 6 mos.

### D. Waivers

1. Agencies often entertain requests for waivers in cases in which the applicants can demonstrate that the rule does not work appropriately in their cases.
  - a. waivers are a necessary corrective to the rigidity of rules
2. Agency must give a hard look to waiver applications that are stated with clarity and accompanied by supporting data and must state the basis for its decision to grant or deny a waiver with clarity and care.  
**WAIT Radio v. FCC** (DC Cir.)
  - a. FCC rejected radio station's application without giving adequate reasons and refused to hold a hearing.
  - b. agency must articulate w/ clarity and precision its findings and the reasons for its decisions.
3. Supreme Court has not held that an opportunity for a waiver is required for every significant rule.
  - a. courts have upheld agency refusals to grant any waivers from certain rules (ex. FAA rule that commercial pilots cannot be over age of 60).

## VII. Political Control of Agencies

### A. Nondelegation

1. Non-Delegation Doctrine: Congress's power to delegate its legislative authority is limited
  - a. separation of powers: Constitution assigned all legislative power to the legislature; therefore, Congress cannot transfer any part of that power to the executive branch agencies.
  - b. checks and balances: delegation to agencies may be inevitable, but the legislature must impose adequate limits on the discretion of such agencies.
  - c. only quasi-legislative and quasi-adjudicative powers implicated; quasi-executive powers are not the subject of the delegation doctrine.
  - d. Issues that come up:
    - i) whether a rule falls w/in the agency's statutory grant of rulemaking power
    - ii) whether the statutory grant is too broad
  - e. General non-delegation rule: Congress can delegate quasi-legislative power as long as it gives the agency an intelligible principal to follow in exercising that power.
2. History
  - a. *Field v. Clark* (1892) – principle that delegation doctrine is important, but court upholds the law anyway
  - b. In 1935, SC twice held statutes unconstitutional under the delegation doctrine (the first and the last time).
    - i) *Panama Refining Co. v. Ryan* – Ct invalidated a provision of Nat'l Indus. Recovery Act that authorized Pres to ban interstate shipments of oil produced in violation of state law because it lacked an intelligible principle of when to ban/when to approve.
    - ii) *Schechter Poultry Corp v. United States* – Ct struck down provision of NIRA that authorized Pres to approve codes of fair competition for poultry and other industries. Ct was particularly concerned that the Act did not prescribe adequate admin procedures for approval of the codes.
  - c. From the New Deal to the Present – Basically, the court just gives lip service to the doctrine but refuses to enforce it
    - i) *Yakus* – Ct upheld statute authorizing FCC to issue regs “as public convenience, interest, or necessity requires.”
3. Revival of Non-delegation doctrine
  - a. ***Amalgated Meat Cutters and Butcher Workman v. Connally***: Act empowered Pres to issue orders and regulations he deemed necessary to stabilize prices, rents, wages, and salaries.
    - i) Court upheld the act b/c it provided sufficient standards to limit the President's discretion.
    - ii) also, limited time frame
    - iii) non-delegation requires courts to examine not only whether statute contains an intelligible standard, but also the total system of controls, both substantive and procedural, that limit agency's power
      - Ct looked extensively at leg. history to find that delegation was proper
  - b. ***Industrial Union Dept, AFL-CIO v. American Petroleum Institute***: OSHA law gives power to sec of labor to adopt safety standards that are reasonably necessary or appropriate to provide safe or healthful places of employment. OSHA construed the act to require standards set at the safest possible level that is technologically feasible & would not cause material economic impairment of the industry.
    - i) 4 justice plurality overturned a benzene standard. But said the delegation was ok.
    - ii) In the absence of a clear mandate in the act, it is unreasonable to assume that Congress intended to give the sec the unprecedented power over American industry. Such a sweeping delegation of power might be unconst. under *Schechter* and *Panama*.
    - iii) A construction of the statute that avoids this kind of open ended grant should be favored. So benzene standard was no good, but act is ok.
    - iv) 3 important functions of non-delegation- ensures decisions are made by congress and people, provides intelligible principles, allows for judicial review to test if principles given are applied right

- c. Court have often required more precise standards in a legislative delegation when the statute threatens a fundamental right such as freedom of speech.
- d. **Whitman v. American Trucking**
  - i) Clean Air Act requires EPA to set air standards at level requisite to protect pub health with adequate margin of safety
  - ii) The text of this law does not mention considering costs in air quality. Court refuses to find implicit in text need to consider costs
  - iii) Const vests all legislative power in congress. Congress must lay down by legislative act an intelligible principle to which the agency authorized to act is directed to conform.
    - Agency can't cure an unlawful delegation by adopting a limiting construction on a statute.
  - iv) Court says scope of delegation is well within const permissible limits.
    - We have almost never felt qualified to second guess congress regarding the permissible degree of policy judgment that can be left to those applying the law; certain degree of discretion is needed.
    - "requisite" means not lower or higher than necessary – fits comfortably w/in scope of discretion permitted by Court's precedent.
  - v) Stevens concurring- court should stop speaking in fictions. Should just recognize, not pretend, that the legislature is delegating its legislative power. Rulemaking authority is legislative power. Those provisions of the const though, do not limit the ability of the leg to delegate their power to others. As long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconst about it.
- e. State Non-delegation – **Thygesen v. Callahan** (Ill.). Held: legislative delegation valid if it sufficiently identifies:
  - i) persons and activities potentially subject to regulation
  - ii) harm sought to be prevented
  - iii) the general means intended to be available to the administrator to prevent the identified harm
  - iv) here, invalid b/c leg did not id the harm to be prevented nor the means to prevent it; also, no meaningful standards.
- f. Delegation to private persons
  - i) raises serious issues b/c private delegtees are not subject to direct political control.
  - ii) S. Ct. invalidated one such law in *Carter v. Carter Coal*
  - iii) However, federal courts have upheld a number of delegations of gov't authority to private delegates.
  - iv) a significant no. of state cases have overturned delegations to private persons or entities.
- g. incorporation by reference of federal law.
  - i) many state statutes incorporate federal statutes and regulations by reference.
  - ii) some states uphold; some don't.
  - iii) Michigan, ex, holds that the legislature does not unconstitutionally delegate power when it incorporates standards set by some other entity, so long as those standards have independent significance. *Taylor v. SmithKline Beecham Corp.*

## B. Legislative Controls

- 1. The most direct means by which legislature can control agency axn is by specifying its desires in the agency enabling act at the outset.
  - a. However, legislatures are rarely very specific in delegating authority to agencies.
  - b. Instead, agencies vested w/ broad discretion under open-ended statutory delegations of authority

## 2. Legislative Veto

- a. mechanism that allows legislators to invalidate or suspend agency action by vote of one House of Congress
- b. Ct. held it is unconstitutional to legislate w/o bicameralism & presentment. *INS v. Chadha*
  - i) two house vetoes are also unconstitutional b/c they violate req. that legislation be presented to Pres.
- c. *Chadha* decision to apply to both adjudication and rulemaking.
- d. Many state legislatures permit legislative vetoes.
  - i) However, courts in at least a dozen states have held such provisions unconstitutional.

## 3. Alternatives to the Legislative Veto

### a. Congressional Review Act

- i) statute that requires virtually all rules of general applicability, adopted by virtually all agencies, to be submitted to Congress and GAO before taking effect.
- ii) distinguishes b/w major and non-major rules
  - major rule is one determined to be economically significant by OIRA
  - a non-major rule can take effect whenever the agency determines, but a major rule cannot take effect for at least 60 calendar days after submitted to Congress.
- iii) Congress can veto rule by enacting a joint resolution of disapproval (like a statute).
- iv) applies to notice/comment rules, interpretive rules, policy statements, etc.
- v) if rule is disapproved, it is treated as if it never took effect – can lead to probs
- vi) if a rule is disapproved, the agency may not reissue the rule in substantially the same form unless Congress enacts legislation enabling it to do so.

### b. suspensive veto

- i) legislative committee suspends an agency rule for a limited period of time
- ii) *Martinez v. Dept. of Industry, Labor, and Human Resources* – Wisc. upheld the statute b/c constitution only had implied separation of powers principles; law did not interfere w/ branches' independence.
- iii) New Hampshire has also upheld suspensive veto
- iv) However, Ky. ruled suspensive veto unconstitutional
- v) more lenience in state ct system b/c less \$, staff, time than Congress

### c. many states only permit suspensive veto or legislative veto on limited grounds.

- i) effectiveness of such limits has been questioned
- ii) If a statute does prescribe specific grounds on which a reviewing committee can intervene, courts have held that committee has overstepped limits.

## 4. Other Legislative Controls

### a. oversight committees

- i) Committee authorized to hold public hearings on proposed or adopted agency rules, to give advice to agencies concerning such rules, and to submit bills to the legislature to overcome by statute rules the agency declines to w/draw on its own.
- ii) authorization committees of congress consider legislation in a particular area and supervise agencies that enact legislation in those areas.
- iii) appropriations committees scrutinize agency's budget

### b. investigations and hearings

- i) standing committees of Congress investigate the manner in which agencies spend money and discharge their duties
- ii) hold hearings, request agencies to submit written reports, write committee reports.
- iii) Committee can subpoena documents that an agency does not want to disclose
- iv) legislative agencies, like GAO, can also be employed for oversight purposes.
  - *Walker v. Cheney* – GAO's investigatory powers limited; since no leg. Committee requested info sought or authorized litigation, GAO could not get the info

- c. funding
  - i) Congress and state legislatures fund every unit of government
  - ii) appropriations provide mechanism to achieve legislative objectives w/o altering statutes which furnish authority for agencies.
- d. direct contacts
  - i) individual members of Congress make direct contacts w/ agencies that are causing problems for their constituents.
- e. Appointment and removal
  - i) appointment – Senate confirmation of Pres appointment of officers of US; inferior officers may be appointed by Pres alone, by heads of depts., or courts of law.
    - Congress cannot serve as admin officials
  - ii) removal – officers of the US may not be subject to removal by congress, except by impeachment by the House and conviction by the Senate. *Bowsher v. Synar*.

## C. Executive Control

### 1. Appointment Power

- a. Pres must appoint principal officers w/ advice & consent of Senate. *Buckley v. Valeo*
    - i) Some members of the FEC appointed by Congress
    - ii) Held: Congress cannot appoint such members
    - iii) Principal officers include heads of exec depts., the members of independent agencies, and may include high-level officials in depts. and agencies (ex. Dept. A.G.). Also includes fed judges.
  - b. Congress may allow inferior officers to be appointed by the President alone, by the Courts, or by the heads of Departments
  - c. *Morrison v. Olson* – Court upheld statute allowing a special court to appoint an independent counsel to investigate and prosecute possible violations of federal law by high ranking federal officials b/c she was clearly an inferior officer b/c
    - i) subject to removal by a higher executive branch officer
    - ii) duties limited to investigation of certain federal crimes
    - iii) limited jurisdiction
    - iv) temporary position
  - d. Generally, “inferior officer” connotes a relationship w/ some higher ranking officer below the President. *Edmond v. US* (holding that members of the Coast Guard Ct. of Criminal Appeals were inferior officers)
    - i) inferior must have a superior
    - ii) inferior officers are those whose work is directed and supervised at some level by others who were appointed by presidential nomination w/ advice and consent of the Senate.
  - e. Employees aren’t covered by appointment power provisions at all:
    - i) *Freitag*. Okay for chief judge of tax court to appoint special trial judges. Majority said tax court was a “court of law” so could appoint; concurrence said tax court is “head of department.” Didn’t want them to be just employees.
    - ii) term “officer of the United States” interpreted narrowly in *Landry v. FDIC* (DC Cir) – FDIC’s ALJs were deemed “employees” and thus did not have to be appointed in conformity to Appointment Clause b/c they could never render final decisions on their own, on make recommendations which agency reconsidered de novo.
  - f. Legislatures cannot place their own members in administrative positions (Incompatibility Clause)
  - g. Legislatures regularly prescribe qualifications that executive appointees must meet, including state residence requirements, language requirements, exam, political balance etc.
- ### 2. Removal Power and Independent Agencies
- a. not expressly mentioned in Constitution.
  - b. *Myers v. US* (1926): power to remove is an incident of the power to appoint. (Ct struck down fed statute that required Pres to get Senate approval to remove a postmaster.)

- c. *Humphrey's Executor v. US* (1935): President does not have illimitable power to remove heads of independent agencies.
    - i) independent agency – cannot be removed by President unless for good cause.
    - ii) executive agencies – serve at pleasure of President (purely executive)
    - iii) *Wiener v. United States* – Court invalidated Eisenhower's removal of a member of the War Claims Commission b/c the Commission had been created to adjudicate according to law (not purely executive); thus, *Humphrey's Executor* precluded the President from removing its members.
  - d. *Morrison v. Olson*: Court abandons *Humphrey's* reasoning.
    - i) **Test:** proper inquiry is **whether removal restrictions “impede the President’s ability to perform his constitutional duty.”**
    - ii) Good cause (for removal) req't was ok for independent counsel.
  - e. Congress lacks the power to remove officials engaged in admin fxns. *Bowsher v. Synar*.
3. Executive Oversight
- a. Executive office entrusted w/ job of coordinating modern regulation, promoting sensible priority setting, and ensuring conformity w/ President's basics mission.
  - b. The Office of Information and Regulatory Affairs (OIRA) regularly conducts oversight of significant rulemaking proceedings on behalf of the White House
  - c. Exec Order 12866
    - i) principles for agencies to follow to extent permitted by law and where applicable.
    - ii) principles require agencies to consider many factors when devising regulation (cost/benefit, alternatives, impact, etc).
    - iii) agency must submit regulatory agenda and plan identifying the most important significant regulatory axns the agency plans to take in the next year → OIRA → Pres.
    - iv) meetings and conferences to share info about reg issues
    - v) centralized review of regulations that have major effect on economy, enviro, pub health, state/local/tribal gov't, conflicts w/ other agency axns, or raise novel legal or policy issues.
  - d. strong endorsement of Executive oversight in *Sierra Club v. Costle*
    - i) to prevent duplication and inefficiency
  - e. Independent agencies are exempt from OIRA review
  - f. Line Item Veto Act unconstitutional – *Clinton v. NY*.

## VIII. Scope of Judicial Review §706

### A. Issues of Basic Fact

- 1. Types of review, from most judicial power to the least:
  - a. trial de novo – court rehears the evidence and redecides the case -- §706(2)(E)
    - i) only available if (1) adjudicatory agency action and inadequate fact-finding or (2) issues did not come before the agency and are before the court for the first time
  - b. independent judgment on the evidence – court decides the case on the record made by the agency but need not give any deference to the agency fact findings
    - i) infrequently employed in federal admin law, but used in some states
  - c. clearly erroneous – court reverses if it is left w/ the definite and firm conviction that a mistake has been committed
    - i) standard used by federal court of appeals to review decision of trial judge when no jury.
  - d. substantial evidence – court cannot reverse if a reasonable could have reached the same conclusion as the agency.
    - i) standard used by federal court of appeals in reviewing findings of jury.
    - ii) applicable to judicial review of agency fact-finding occurring in formal adjudication or formal rulemaking
  - e. some evidence – court cannot reverse if there is some evidence to support the agency's conclusions.
  - f. non-reviewable – agency's factual determinations cannot be reviewed

## 2. Substantial Evidence Test

- a. court reviews entire record for substantial evidence in formal adjudication and formal rulemaking (APA §§556, 557)
  - i) some statutes apply substantial evidence review even if the agency action is not formal rulemaking or adjudication.
  - ii) in most other situations, facts are reviewed under arbitrary and capricious stnd.
- b. **Universal Camera Corp. v. NLRB**
  - i) Wagner Act states that “the findings of the Board, if supported by evidence, are conclusive.” Court interprets this to mean substantial evidence review.
  - ii) Reviewing court must look to the record as a whole to determine if determinations are supported by substantial evidence.
  - iii) substantial evidence means more than a mere scintilla; it is such evidence that a reasonable person would accept as adequate to support a conclusion
  - iv) doesn’t fail if reasonable person (or ct) would have come to a different result as long as a reasonable person could come to that result
  - v) Evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses, their demeanor, and lived with the case has drawn conclusions different from the Board’s than when he has reached the same conclusion.
  - vi) witness credibility should be given great deference
  - vii) Note: remember that when agency reviews ALJ decision, it reviews de novo
- c. Rationale for deference to agencies
  - i) agencies specialize and develop expertise in the areas they regulate
  - ii) fact-finding is an essential element of the delegated power, and thus, the legislature intends the court to respect those findings absent a serious error.
  - iii) discourages appeal from litigants, conserving resources of courts and agencies
  - iv) courts are likely to have a different political orientation than agencies.
- d. substantial evidence test a lot like clearly erroneous test

## B. Issues of Law

### 1. Approaches

- a. Traditional – independent judgment – courts grant some weight to agency’s interpretation.
- b. substitution of judgment where no deference given to agency’s view
- c. reasonableness test – courts accept an agency’s interpretation of an ambiguous statute if the interpretation is reasonable.

### 2. **CT State Medical Society v. CT Board of Examiners in Podiatry** (CT):

- a. Podiatry Board issued declaratory ruling that the ankle is part of the foot so that podiatrists could treat ankle ailments.
- b. Held: The construction and interpretation of a statute is a question of law for the courts where the administrative decision is not entitled to special deference, particularly where, as here, the statute has not previously been subjected to judicial scrutiny or time-tested agency interpretations.
  - i) ordinarily, great deference given to construction of statute by an agency – but such deference given to time-tested agency interpretation of a statute when the agency has consistently followed its construction and the interpretation is reasonable.
  - ii) here, power to define “foot” not delegated to agency
- c. dominant approach of state courts

### 3. **Chevron v. NRDC** – for interpreting a rule

- a. **The Test:** Step One: if the intent of Congress is clear, the agency must give effect to the unambiguously expressed intent of Congress. If, however, Congress has not directly addressed the precise question at issue, (Step Two): the court determines whether the agency’s answer is based on a permissible construction of the statute (reasonableness determination).
  - i) step 1: whether statutory meaning is clear or ambiguous
  - ii) step 2: if ambiguous, whether the agency’s interpretation is reasonable or permissible

- b. the court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction or even the reading the court would have reached if the question had originally arose in a judicial proceeding.
  - c. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority
    - i) such regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.
  - d. usually applies to notice-and-comment rulemaking and formal adjudication
4. Applying Step 1
- a. *FDA v. Brown Williams Tobacco Corp* – FDA issued controversial reg re cigarettes and tobacco. Court held the regulations unlawful –
    - i) in reviewing whether Cong. has specifically addressed the question at issue, a reviewing ct should not view statutory provision in isolation.
    - ii) fundamental canon of statutory construction that statute must be read in context w/ view to place in overall statutory scheme
    - iii) b/c Food, Drug, and Cosmetic Act aimed at regulating products to make them safe and tobacco products are not safe for any purpose, the rule was not based on reasonable interpretation of statute.
  - b. Canon that statutes should be construed to avoid constitutional problems has been frequently deployed to overcome *Chevron* deference.
    - i) although the Ct has not always given controlling weight to this canon
5. Applying Step 2
- a. *Chevron*: should determine step two through traditional tools of statutory construction.
  - b. *AT & T v. Iowa Utilities* – Court held that FCC could not require local phone cos to provide new competitors w/ unlimited access to their facilities b/c governing statute b/c Act req. FCC to apply *some* limiting standard.
  - c. ABA Administrative Law Section identified methods by which ct may reverse agency using Step 2
    - i) inquiring into whether the statutory context, viewed as a whole, clearly rules out the option the agency selected or a premise on which it relied.
    - ii) inquiring into whether the agency reasoned from statutory premises in a well-considered fashion
      - *NRDC v. Daley* – quota set was unreasonable b/c only had 18% chance of meeting conservation goals Cong. directed agency to achieve
      - *Chem Manuf Ass'n v. EPA* – rule that imposed extra costs w/o advancing the purposes of the statute deemed unreasonable
      - *Republic Nat'l Committee v. FEC* – reading “best effort” to mean mandatory was unreasonable; Congress did not authorize tactic to mislead donors so unreasonable interpretation
  - d. step two very much like arbitrary and capricious test
    - i) Levin: whether agency implemented the statute in a reasoned fashion
  - e. Court can reverse agency using *Chevron's* flexibility
  - f. cts ususally give more deference to formal adjudication, notice and comment, etc.

### C. Exceptions to *Chevron*

1. Interpretations – such as those in opinion letters, policy statements, agency manuals, and enforcement guideline – which lack the force of law, do not warrant *Chevron* deference. *Christensen v. Harris County*.
  - a. entitled to respect, but only to extent that those interpretations have power to persuade.
2. If agency lacks power to make rules carrying the force of law and no administrative formality
  - a. ***US v. Mead Corp***: Administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that 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.
  - b. rule is still entitled to respect according to persuasiveness. *Skidmore v. Swift*.

3. Once the Court has determined a statute's meaning, an agency's later interpretation of the statute is interpreted against that settled law. *Neal v. United States*.
4. Other (possible) *Chevron* exceptions
  - a. Statutes that the agency doesn't administer
    - i) Courts decide on their own, w/o deference, issues arising under, generic statutes, like Freedom of Info Act
  - b. Limits on Jurisdiction
    - i) although not settled law, cases suggest that an agency's legal interpretation that determines the scope of its jurisdiction is not entitled to *Chevron* deference
  - c. Big questions
  - d. Procedural Statutes
  - e. Litigation positions

#### D. Issues of Discretion in Adjudication

1. Courts review discretionary elements of agency actions under arbitrary and capricious test. APA §706(2)(A).
  - a. *def* – courts shall hold unlawful and set aside agency action that is arbitrary, capricious, or an abuse of discretion.
  - b. similar to a reasonableness standard
  - c. used to review informal adjudication
2. *Salameda v. INS*: alien petitioned for suspension of deportation. IJ denied relief and BIA affirmed.
  - a. Issue: whether INS's judicial officers addressed in a rational manner the questions the aliens tendered for consideration.
  - b. Held: BIA did not adequately consider issues –fails under the arbitrary and capricious test.
3. *Citizens to Preserve Overton Park*
  - a. review of decision by Sec. of Transportation to grant funds to build highway through park. Statute prohibited use of parks for hways unless no feasible and prudent alternative. Sec. did not explain why no feasible and prudent alternative.
  - b. Under the arbitrary and capricious test, Court decides:
    - i) whether the Secretary acted w/in the scope of his authority
    - ii) whether the choice made was arbitrary, capricious, or an abuse of discretion
      - To make this determination, the Court considers whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment.
      - If an agency failed to consider a relevant factor or took account of a factor it should not have considered, the action should be set aside as arbitrary or capricious.
      - The reviewing court must be able to find that the Sec could have reasonably believed there are no feasible alternatives
      - Sec's decision is entitled to a presumption of regularity and the ultimate standard of review is narrow; court cannot substitute its judgment for agency's
    - iii) remanded back to agency
  - c. However, in *Pension Benefit Guaranty Corp v. LTV*, Supreme Court limited the relevant factor approach.
    - i) "If an agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a large number of agency decisions might be open to judicial invalidation."
4. Abuse of discretion
  - a. Agency's discretionary determination shall not be overturned unless found to be unwarranted in law or w/o justification.
  - b. agency actions that constitute an abuse of discretion:
    - i) action that rests upon a policy judgment that is so unacceptable, renders action arbitrary
    - ii) reasoning that is so illogical can render action arbitrary

- iii) the asserted or necessary factual premises of the action do not w/stand scrutiny under the appropriate standard of review
  - iv) the action is w/o good reason, inconsistent w/ prior agency policies or precedents
  - v) the agency arbitrarily failed to adopt an alternative soln to the problem addressed in the action
  - vi) the action fails in other respects to rest upon reasoned decision making
5. *Chenery Rule* – a court cannot affirm an agency decision on some ground other than the one relied upon by the agency in the decision under review.
- E. Issues of Discretion in Rulemaking – Arbitrary and Capricious Review
1. *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Ins.*
- a. Agency deciding whether they should require “passive restraints”(airbags or seat belts). Decided on passive restraints. Under Reagan administration in 1981, the court eventually rescinded the standard – stating it couldn’t produce significant safety benefits and would have high costs.
  - b. Held: An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.
  - c. Under arbitrary and capricious standard, an agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection b/w the facts found and the choice made.
    - i) normally, an agency rule would be arbitrary and capricious if the agency relied on facts w/ Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence b/f the agency, or so implausible that it could not be ascribed to a difference in view or the product of agency expertise.
    - ii) Here, problem was that agency failed to consider alternative of requiring airbags.
  - d. a reviewing ct. should not supply a reasoned basis for the agency’s action that the agency itself did not give.
  - e. Failing to consider other options to passive restraints → rules fails a + c test
    - i) court remanded for further consideration
    - ii) another remedy would be to vacate the rule and start over
  - f. court here giving a hard look
  - g. agency that changes its position w/o supplying reasoned analysis fails a + c test
2. *Borden v. Commissioner of Public Health* (Mass.): Comm of Pub Health can ban any hazardous substance if public health can’t be protected through adequate labeling. Commissioner banned something (UFFI). TC held hearing on toxicity and invalidated the rule.
- a. **Held**, the court should be ultra-deferential to an agency
  - b. a person challenging a regulation must prove that it is illegal, arbitrary, capricious.
  - c. If the agency procedure is non-adjudicative, pl. may not meet its burden by arguing the record does not affirmatively show facts which support the regulation.
    - i) if the question is fairly debatable, the courts cannot substitute their judgment for that of the legislature.
3. Hard Look Review – more probing review
- a. used to describe review in federal courts (ex. *Motor Vehicle*)
  - b. reviewing court scrutinizes the agency’s reasoning to make certain that the agency carefully deliberated about the issues raised by its decision.
    - i) detailed explanations for agency’s actions required – must address all factors relevant to the agency’s decision.
    - ii) Court may reverse agency decision if it fails to consider plausible alternative measures and explain why it rejected these for the regulatory path it chose.

## IX. Availability of Judicial Review

### A. Reviewability

1. presumption that an administrative action is subject to judicial review
  - a. Must have an agency action to challenge
  - b. *Norton v. Southern Utah Wilderness Alliance*:
    - i) claims that BLM failed to take action w/ respect to ORV it was req to take
    - ii) some failures to act are remedial under APA; some are not
    - iii) failure to act is not the same thing as a denial
    - iv) action can only be compelled if agency is required to act. APA §706(1)
    - v) Court can only compel agency to take action; it cannot compel specific action
    - vi) Court will not compel compliance w/ broad statutory mandates b/c they would be required to determine whether compliance had been achieved – supervisory role.
    - vii) **Held**: an agency statement in a plan that it “will do” or “will take” a particular action is not a binding commitment under §706(1) – states that plan is “projected”
2. statutory preclusion – APA §701(a)(1)
  - a. generally, APA embodies a presumption of reviewability; need clear and convincing evidence to overcome presumption. *Abbott Labs v. Gardner*.
  - b. *Bowen v. Michigan Academy of Family Physicians*
    - i) Court starts with strong presumption that Congress intends judicial review.
    - ii) Even though act only provided for appeals for Part A, not part B of Medicare, court says attack on validity of regulation is not the same as a determination of the amount of particular claim, which the Act impliedly denies review.
    - iii) courts will never allow preclusion of constitutional claim. More likely to review rules than adjudication and law than fact (despite apparent statutory preclusion)
  - c. Cts often construe apparently preclusive statutory language to permit some form of review
    - i) courts allow some issues to be precluded more readily than others
    - ii) the presumption against preclusion of constitutional issues is almost irrebuttable
    - iii) the court is also less willing to find preclusion in cases involving administrative rules than in administrative adjudication and less willing to foreclose legal challenges than factual challenges.
    - iv) Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Webster v. Doe*.
  - d. some statutes provide for pre-enforcement review of rules during a short period (ex. 60 days) but preclude review of the rules in subsequent enforcement actions.
    - i) some due process constraints on the use of time limits . For example, Congress cannot totally preclude judicial review of prior administrative actions, even for non-constitutional errors, in the context of criminal enforcement.
3. actions committed to agency discretion – APA §701(a)(2)
  - a. *Citizens to Preserve Overton Park v. Volpe* – statutes prohibited Sec of Transportation from using fed funds to finance construction of hwy through public parks if a feasible and prudent alternative existed. Sec approved hwy thru park → axn challenged.
    - i) S Ct said that agency discretion exception should be construed narrowly
    - ii) Exception should only apply when the statute is drawn in such broad terms, that there is **no law to apply**
    - iii) here, statute clearly provided law to apply so reviewable
  - b. *Heckler v. Chaney*: death row inmate petitions FDA to say that lethal injection is not a “safe and effective” use of drug.
    - i) Held: FDA’s decision not to exercise its enforcement authority may not be judicially reviewed. No law applies to exercise of FDA’s prosecutorial discretion.
      - generally, agency’s failure to take action is presumptively unreviewable, but review happens b/c statute is narrowly construed in most cases
    - ii) **Test**: if the statute is drawn so that a ct would have no meaningful standard against which to judge the agency’s exercise of discretion, review is precluded.

- c. rationale for not reviewing agency discretion
  - i) agency must balance a # of factors w/in its expertise when deciding not to enforce.
  - ii) involves decision of where resources should be spent
  - iii) agency not acting in a coercive capacity when deciding not to enforce.

## B. Standing

### 1. In general

- a. federal court can only entertain cases or controversy – person seeking judicial assistance must have a sufficient stake in the dispute.
- b. *Tennessee Electric Power Co. v. TVA* Court held that private power companies lacked standing to enjoin the Tennessee Valley Authority from competing with them on the ground that the Constitution doesn't allow the federal Government to enter the power business.
- c. *FCC v. Sanders Brothers Radio*: Communications Act provided that anyone "aggrieved or whose interest were adversely affected" by a licensing decision of the FCC could seek review. Sanders was affected b/c someone else got a license.
  - i) The court made clear that Congress could confer such standing in order to promote the public's interest in a correct interpretation and application of federal law.
- d. *United Church of Christ v. FCC*: Church tries to sue FCC for issuing license to a racist TV station. The court held that viewers had standing to "vindicate the broad public interest relating to a licensee's performance of the public trust inherent in every license."

### 2. injury in fact and zone of interests – *Ass'n of Data Processing Services Orgs. v. Camp* (petitioners, who provided data processing services, challenged a ruling by Comptroller of Currency that national banks could provide data processing services). Court applies 3 part test:

- a. whether the pl. alleges that the challenged action has caused him injury in fact
- b. **Zone of Interests Test**: whether the interest sought to be protected by complaint is arguably w/in zone of interests to be protected or regulated by the statute in question
  - i) codified at APA §702
- c. whether judicial review of the agency head's action has been precluded
- d. Here, petitioners have standing
- e. injury in fact test rooted in Art. III but zone of interests is prudential, (Cong. could abolish)

### 3. Causal connection and public actions – *Lujan v. Defenders of Wildlife*:

- a. Standing requirements (in addition to Zone of Interests)
  - i) injury in fact – an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical
  - ii) There must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court."
  - iii) It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision
    - *Warth v. Seldin*: held that poor people had not standing to challenge zoning laws b/c even if zoning laws were struck down, no guarantee that low-income housing would be built
    - But *Arlington Heights v. Metro Housing Dev Corp* – builder and buyer of low-income housing had standing to challenge zoning laws b/c they demonstrated that the challenged law had prevented construction of a specific low-income housing project which the builder was prepared to build and the buyer could afford to purchase
- b. Here, Court found that pl. lacked standing
  - i) no imminent injury (no concrete plans to travel to Sri Lanka)
  - ii) redressability not established
  - iii) The citizen suit provision does not stand; any person cannot bring suit, b/c that would move the balance of power from the executive to the judiciary, and this violates the separation of powers.
  - iv) procedural violation cannot by itself satisfy standing's injury requirement

- c. associations as pl.
  - i) an association can seek review on behalf of its members
  - ii) *Hunt v. Washington State Apple Advertising* – an association has standing to sue on behalf of its members when
    - (a) one or more of its members would have standing to sue in own right, AND
    - (b) the interests org. seeks to protect are germane to the org's purpose, AND
    - (c) neither the claim nor the relief requested requires the participation of individual members in the lawsuit.
- d. must have concrete injury – *Sierra Club v. Morton*
  - i) Sierra Club sued to enjoin development of ski resort in wilderness area
  - ii) Court held that Sierra Club lacked standing b/c it failed to allege that it or its members suffered any injury. A historic commitment to conservation is not enough.
  - iii) Court said that recreational, aesthetic, or environmental injuries can be permitted if pl shows they will be actually harmed.
  - iv) However, many states permit public actions
- e. Federal Courts must always resolve questions of standing before reaching any other issues. *Steel Co v. Citizens for a Better Environment*.
- f. Procedural Injuries – a person who can establish injury in fact from failure to follow procedure has standing to challenge agency's failure to follow procedure.
- g. Citizen suits
  - i) *Lujan* holds invalid the citizen suit provision of ESA
  - ii) separation of powers argument
  - iii) Even if statute provided \$100 bounty for citizen who brings successful suit under ESA, probably no standing. *Vermont Agency of Nat. Resources v. Stevens* (an interest unrelated to the injury in fact is insufficient to give standing; an interest that is a mere byproduct of the suit itself cannot give rise to a cognizable injury in fact)
  - iv) *FEC v. Akins* – court allowed suit to challenge FEC's failure to treat AIPAC as a political committee. Statute allowed anyone who believed an injury occurred to bring suit. Ct held that pl had a concrete and particularized injury – lack of info required to be disclosed under statute.
- h. Qui tam actions – allows the private pl to bring suit on behalf of the US to recover amnt of a false claim made against gov't. If citizen wins, it receives a bounty (% of gov't recovery)
  - i) S Ct upheld standing
  - ii) not a by-product of the lawsuit; person bringing suit is assignee of gov't interest
  - iii) common at time Constitution was written
- j. In almost all states, taxpayers have standing to challenge the legality of action taken by the legislative or executive branch which they allege involves an unlawful expenditure of state funds.
  - i) However, at the federal level, taxpayers ordinarily lack standing to challenge the expenditure of federal funds unless it can be demonstrated that a victory on the merits will reduce the amnt of taxes a taxpayer is required to pay.

## C. Timing

### 1. Finality and the Final Order Rule – APA §704

- a. Final Order Rule – courts only review final orders; the litigant must complete the entire admin process before a court will review decisions which the agency took along the way.
- b. *Bennett v. Spear* – two conditions must be satisfied for an agency action to be final:
  - i) the action must mark the consummation of the agency's decision making process – it may not be tentative or interlocutory
  - ii) the action must be one by which rights or obligations are determined or from which legal consequences will flow.

- c. **FTC v. Standard Oil Co. of California**: issuance of a complain is not a final agency action. (FTC issued a complaint against major oil companies averring that it had reason to believe that they were engaging in unfair methods of competition)
  - i) not a definitive statement of position – represents a threshold determination that further inquiry is warranted.
  - ii) agency should be given opportunity to correct its own mistakes and apply its expertise.
- d. MSAPA permits immediate review of a non-final order where postponement of judicial review will result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.
- e. cases where decision reviewed by another before becoming final are often held to be non-final actions
  - i) *Franklin v. Massachusetts* – Sec. of Commerce conducts census and reports to Pres, who transmits a stmt to Congress allocating the # of seats for each state. Court held that Sec. of Commerce’s action was not final and thus not reviewable.
  - ii) *Dalton v. Specter* – Court refused to review an action of Sec. of Defense and Pres under Base Closing Act (Sec. recommends which base to close; Pres has discretion to accept or reject the report as a whole). Court held: (1) Sec. of Defense’s action not final and (2) Pres is not an agency.
  - iii) BUT, *Bennett v. Spear* – Court reviewed of Opinion of FWS, which recommended that the Bureau of Reclamation take certain steps. Court held that the opinion “alters the legal regime” and permits the Bureau to take action that could harm endangered species w/o concern for penalties.
- f. Petitions for reconsideration render agency action non-final
  - i) party cannot seek judicial review until the agency resolves the petition for reconsideration.

## 2. Ripeness

- a. a private party must be actually harmed, not merely threatened before the courts will review; there must be a concrete application of the agency action to the plaintiff.
- b. **Abbott Laboratories v. Gardner**: Pharmaceutical co brought suit to challenge FDA rule requiring the generic name on labels and other material every time the trade name is used.
  - i) **Held**: in considering whether a controversy is ripe for review, Court should look at both (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.
  - ii) ripeness doctrine is so courts can avoid entangling themselves in abstract disagreements over administrative policies.
  - iii) Here, final administrative action w/ definite harm to pl.
- c. *Toilet Goods* – Ct held that a different FDA rule was not ripe for pre-enforcement review.
  - i) Rule: if a maker of color additives refused to permit FDA inspectors free access to their facility and formulae, FDA could immediately suspend certification service to the maker.
  - ii) B/c the rule provided that the FDA “may” order and inspection and if it is refused “may” suspend cert, the Court found that by postponing review, it could see the adequacy of the safeguards to protect the rules. Also, lesser degree of hardship.
- d. In practice, *Abbott Labs* balance is normally struck in favor of immediate reviewability of legislative rules, but there are occasional exceptions.
- e. non-legislative rules less likely to be treated as ripe, but sometimes held ripe for review.
  - i) *Better Gov’t Ass’n v. Dept. of State*: guidelines adopted by Justice Dept. listing factors that agencies should consider in granting fee waivers under FOIA. Court held that in light of hardship to pl., it was ripe case for review.
  - ii) important factor that can militate against ripeness in the context of informal administrative action is the concept of “finality” – concern is not so much w/ avoiding interruption of the pending process, as with ascertaining whether the agency has reached a firm or definitive position.

f. *National Park Hospitality Ass'n v. Dept. of Interior* – Court held that agency's stmt about its legal obligations was unripe for review.

- i) NPS did not have authority to administer Act so it's stmt would not affect primary conduct.
- ii) not fit for judicial review b/c should await concrete dispute (even though legal question)

g. undermining *Abbot Labs* –

- i) *Reno v. Catholic Social Services*: Statute allowed certain undocumented aliens to apply for permanent residence if continuously present since 1986 w/ only brief absences. INS rule provided that any absence from US would break chain of continuous presence. Held: Court refused to hear b/f applied to particular aliens since the regulation only limited access to a benefit.
- ii) *Thunder Basin Coal v. Reich* – held that Congress intended to preclude pre-enforcement review of regulations under Mine Safety Act b/c the statute provided for an elaborate post-enforcement administrative procedure which could address petitioner's claim of invalidity of the regulation.

h. a reviewing court has discretion to grant a stay of agency action while it contemplates the review process by granting a preliminary injunction against agency action in question.

MSAPA factors on whether to grant a stay (federal law calls for a similar balance):

- i) the likelihood the applicant will prevail on the merits
- ii) whether the applicant will suffer irreparable injury
- iii) whether relief will substantially harm other parties to the proceeding
- iv) whether the threat to public health, safety, or welfare relied on by the agency is not sufficiently serious to justify the agency's refusal to grant a stay

### 3. Exhaustion of Remedies – APA §704

a. generally, court will not hear case until the party has first exhausted administrative remedies  
b. *McCarthy v. Madigan*: federal prisoner filed a damages action alleging prison officials had violated 8<sup>th</sup> Amend by deliberate indifference to his medical condition. The lower courts dismissed for failure to exhaust admin remedies.

- i) **Test**: In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.
- ii) administrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the gov'ts interest in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.
- iii) three situations in which interest of the indiv weigh heavily against requiring exhaustion: (exhaustion exceptions)

- if the admin action will unduly prejudice to subsequent assertion of a court action (ex. Unreasonable or indefinite timeframe from admin action)
- admin remedy may be inadequate b/c of some doubt as to whether the agency was empowered to grant effective relief
- an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue.

iv) Here, unnecessary to exhaust constitutional claim for money damages b/c (1) admin procedure imposes many deadlines w/ high risk of forfeiture if pl. fails to comply and (2) the admin remedy does not authorize an award of monetary damages.

v) exceptional case – most litigants are required to exhaust all admin remedies b/f going to court, even though remedies seem slow, costly, frustrating, and useless

vi) case has been overturned by statute – now prisoner must exhaust admin remedies b/f suing. However, case still good law outside prison context.

c. *Portela-Gonzales v. Sec. of Navy* – pl fired from job; filed grievance; skipped appeal and filed suit. Alleged appeal would have been futile **Held**: reliance on the exception in a given case must be anchored in a demonstrable reality; a pessimistic prediction or hunch that admin procedures will be unproductive is insufficient.

d. *New Jersey Civil Service Ass'n v. State* (NJ): the exhaustion requirement is not an absolute prerequisite to seeking appellate review; exceptions are made when the administrative remedies would be futile, when irreparable harm would result, when jurisdiction of the agency is doubtful, or when an overriding public interest calls for a prompt judicial decision.

i) b/c here, no facts and disputes nor does resolution of the issue call for special administrative expertise. Thus, putting appellants through expense and delay of admin process is unjustified.

e. Factors in the judicial balance

i) nature and severity of harm to pl.

ii) need for agency expertise

iii) nature of the issue involved (issue of law, con law, jurisdiction, factual)

iv) adequacy of remedy in light of pl. particular claim

v) extent to which the claim appears to be serious rather than a tactic for delaying the agency process

vi) clarity or doubt as to the resolution of the merits of pl. claim

vii) the extent to which exhaustion would be futile

viii) extent to which pl. had a valid excuse for failure to exhaust

f. under federal law, a party must exhaust admin remedies even though dispute concerns a question of law or of the agency's jurisdiction or its authority.

g. generally, agency lacks authority to determine the constitutionality of statutes

i) thus, for on-the-face challenges of the constitutionality of a statute, exhaustion not required, since no admin remedy in such cases.

ii) however, exhaustion required if (1) statute requires exhaustion, or (2) if the case presents both constitutional and non-constitutional issues, or (3) if the constitutional challenge is to the statute or regulation as applied to the plaintiff.

h. exhaustion as preclusion

i) normally, a party who cannot get judicial review b/c of failure to exhaust remedies can go back to agency.

ii) However, sometimes not permitted, ex, if a party failed to raise the issue the first time in front of the ALJ. Courts generally refuse to consider that issue on judicial review b/c it has been waived (exact issue rule)

iii) If a court requires exhaustion and petitioner failed to pursue admin remedy b/f time period for such action runs out, Court generally not permitted to raise claim.

j. issue exhaustion is not required in Social Security cases. *Sims v. Apfel*.

k. *Patsy* – a 1983 plaintiff is not required to exhaust state remedies

## D. Fee Awards

### 1. American Rule

a. each party in litigation bears its own attorney's fees, absent a statute providing for fees or some other exception. *Alyeska Pipeline Service Co. v. Wilderness Society*.

b. not all states follow the American Rule

### 2. Statutes providing for fees

a. numerous federal statutes authorize a court to require one side to pay the other side's fees

b. Civil Rights Attorney's Fees Awards Act provides that a prevailing pl. in a 1983 action can recover attorney's fees unless special circumstances render an award unjust.

c. Clean Air Act – provides for attorney's fees if appropriate

i) "appropriate" = where petitioners have (1) some success on the merits, and (2) contributed substantially to the goals of the Clean Air Act in doing so. *Western States Petroleum Ass'n v. EPA*.

d. prevailing party

i) generally, prevailing party is one who has secured judicial relief by prevailing on the merits of at least some of its claims through judgment or consent decree.

*Buckhannon Board & Care Hoome v. West Va. Dept of HHS*.

ii) party is not entitled to a fee award simply b/c its lawsuit brought about the desired effect through a voluntary change in def. conduct. *Id.*

3. Attorney's fees generally calculated on "lodestar method" – requires courts to multiply the hours spent on a case by a reasonable hourly rate.
  - a. Upward modifications only permitted in exceptional cases.
  - b. No modification is appropriate b/c of counsel's superior skills or excellent results retained.
  - c. *City of Burlington v. Dague* – lodestar amount cannot be increased b/c the attorneys were retained on a contingent fee basis, even though lodestar calculates on an hourly rate.
4. Equal Access to Justice Act
  - a. A prevailing party other than the US is entitled to attorney's fees and other expenses unless the gov'ts position was substantially justified or special circumstances make an award unjust.
  - b. similarly, fees can be awarded whenever the demand by an agency in an adversary adjudication or civil action brought by the US is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared w/ such decision.
    - i) amount that can be paid cannot exceed \$125/hr unless it is determined that an increase in cost of living or special factor justifies a higher fee.
    - ii) special factor (limited ability of qualified attorneys) applies only to attorneys w/ some distinctive knowledge or specialized skill, such as patent law or knowledge of a foreign language.
    - iii) The government has burden of proving that its position was substantially justified.