

Admin Law – Fall 2002

**I. JUDICIAL REVIEW**

**a. Is the Action Reviewable?**

i. Preclusion of Review

1. Statutory Preclusion

- a. APA (§701(a)(1) provides that that agency decisions are reviewable except to the extent precluded by statute
- b. Presumption that agency action is reviewable, unless persuasive reason Congress intended to preclude it (Bowen) –
  - i. need clear and convincing evidence that Congress intended to preclude

- 1. Cannot statutorily preclude constitutional issues
- 2. President doesn't count

2. Commitment to Agency Discretion by Law

- a. APA §701(a)(2) provides that agency actions are reviewable unless committed to agency discretion
  - i. Is the action/inaction within the discretion of the agency (Heckler v. Chaney)
    - 1. If inaction usually immune from judicial review

ii. Remedies

- 1. If no judicial review provided when other remedies could apply
  - a. Satisfactory remedies are injunction and declaratory judgment

**b. Standing/Timing**

i. Standing

- 1. APA §702 – Provides “a person suffering wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review
  - a. Injury in fact
    - i. Fairly traceable to the action and which a favorable decision will redress injury (Lujan)
      - 1. Laidlaw v. Friends of Earth – recreational and aesthetic value sufficient
  - b. Within the zone of interest to be protected or regulated by the statute or constitutional guarantee (Data processing)
    - i. Look at intended purpose of the statute
      - 1. National Credit Union lowered the bar a bit for ZOI – Thomas must have more than an interest in enforcing the statute

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- Remember Heckler v. Chaney saying agency discretion to non-enforcement
- 2. Is review precluded b/c doesn't vindicate own interest
  - a. **Associations** (Hunt) – can sue if one or more members would have standing to sue, interests to protect are germane to association's purpose, neither the claim nor relief requires individual members
  - b. **Third party** – Cannot assert right of 3<sup>rd</sup> party – only in cases when legally or practically disabled from suing or protected relationship
- If a party can establish an injury in fact from an action/omission, they can establish standing to challenge the agency's failure to meet its own procedural requirements even if no causation or redressability
- ii. Timing
  - 1. Finality
    - a. Need to be sufficiently final to justify review under (APA §704) FTC v. Social
      - i. If part of on-going process, ct. will not review
        - 1. Unless irreparable harm
    - b. Was decision consummated or tentative; have rights/obligations been determined or are they believed to be in jeopardy → balance against the interest of the agency in having decision made final (correct mistakes)
  - 2. Ripeness
    - a. Compare Abbott Labs w/ Toilet Assoc.
      - i. Must balance the harm to the plaintiff from delay in review
        - 1. Could be better to hear when more facts and developed
  - 3. Exhaustion of remedies
    - a. Must exhaust administrative remedies prior to seeking APA §704 review (McCarthy)
      - i. But might review if irreparable injury, futility or inadequacy of remedy
        - 1. Ct. has less discretion to excuse a failure to exhaust if exhaustion requirement is in specific statute
  - 4. Primary Jurisdiction doctrines
    - a. Ct. may insist that the case be tried in the agency
      - i. Need for uniform results and highly technical issue
- c. **What is the scope of review**
  - i. What type of Issue under challenge
    - 1. **Basic Facts**

- a. **Substantial evidence (formal adjudication & rulemaking)** on the whole record test (Ct. has relatively little power)
    - i. Ct. must affirm the finding was reasonable, even if ct. disagrees with it
      1. BUT disagreement between agency head and ALJ on a question of credibility detracts from the substantiality of evidence in support of the decision
    - ii. Universal Camera – are they considering record as a whole
      1. Cannot use hearsay → residuum rule applies
  - b. **Arbitrary & Capricious**
    - i. **Informal Adjudication and Rulemaking**
  - c. Trial De Novo
    - i. 706(2)(f)
      1. Rare → Only used when Congress says so
2. Conclusions of Law
    - a. If law ambiguous, Ct. must defer to agency's reasonable interpretation of statute (Chevron & Mead)
      - i. State law generally allows ct. to substitute judgment on questions of law
    - b. Does it carry force of law
      - i. If it does Chevron (Stronger deference)
        1. Statute clear or ambiguous
        2. Agency interpretation reasonable
    - c. If interpreting a policy statement (weaker deference)
      - i. Use Skidmore deference
        1. how much weight
          - a. look at logic, expertise, procedure, time, how thorough the examination
  3. Application of law to facts
    - a. Is question law (deference) or fact (substantial evidence)
    - b. Ct. must accept the agency's reasonable application of a broad statutory term to the basic facts (Hearst – presume law)
      - i. If application does not depend on expertise and if the facts are not complex courts may retain power to substitute their judgment on application issues
  4. Exercise of Discretion or procedure
    - a. **Use Arbitrary and Capricious test**
      - i. In adjudications
        1. Ct should determine if agency acted within scope of discretionary powers
          - a. Overton Park (informal) and Salamada (formal)

- b. Logical reasoning, did agency need to consider certain factors, consider alternatives
  2. Did agency act within scope on powers when deciding penalty (Butz)
    - a. Penalty unwarranted or was there alternative solution to sanction the problem
  3. Ct. must not substitute its judgment
- ii. Rulemakings
  1. Hard look review (state Farm)
    - a. Decision supported by the evidence
    - b. Alternatives
    - c. Adequate explanation
    - d.

## II. DELEGATION

*The Constitution provides that “all legislative powers shall be vested in the Congress of the United States”*

- a. **Did legislature invalidly delegate Legislative Power and violate the Constitution?**
  - i. Congress must provide an “intelligible principle” to which the agency or agency must conform (Amalgamated Meat Cutters)
    1. Were there meaningful standards to constrain agency discretion or did Congress insufficiently define so as to render it precatory (Benzene-Rehnquist) → gives no guidance
    2. Are there safeguards on agency action
      - a. Right for public participation
      - b. Judicial review
    3. Does it delegate to private parties (points to invalid delegation)
    4. Is the rule ultra vires (Beyond scope of delegated power)
  - ii. Can the Ct. use Narrow construction to avoid constitutional grounds? (Kent v. Dulles)
- b. **Agency Order – Did legislature invalidly delegate Judicial Power?**
  - i. Can delegate adjudicatory power necessary to implement a particular statutory scheme (Schor)
  - ii. Does it deal with private [usually invalid] or public rights [Valid]
  - iii. Vagueness of standards
- c. **Other Considerations**
  - i. Is there a violation of Separation of powers or Checks and Balances
    1. Is there Leg. appointment of person who will engage in rulemaking or adjudication
    2. Is there a legislative veto

3. Does Leg. get a role in removal of Person who will engage in implementing the law

### III. PROCEDURAL DUE PROCESS

The DPC provides that No person shall be deprived of life, liberty or property without due process of law

#### a. Is a Hearing Required by DP

- i. Has there been a deprivation of **Property**?
  1. Roth/Loudermill
    - a. Is there an independent source (K, statute, license) that creates a legitimate claim of entitlement (validly rely on the existence of the property right)
      - i. Make sure not de minimis
    - b. For Govt. K
      - i. Only those that involve extreme dependence (welfare benefits – Goldberg) or state terminate for cause (Roth/Loudermill) are property interest
    - c. For Employment K
      - i. Tenure or termination for cause are property interest (not permanent employees → Bishop)
  - ii. Has there been a deprivation of **Liberty**?
    1. Roth/Sadin/Constantineau/Paul v. Davis
      - a. Look at the nature of the interest
        - i. Stigma plus action
        - ii. Deprivation of constitutional right
        - iii. Deportation (Wong Yang Sung)
        - iv. Physical liberty (Solitary– Sandin)
        - v. Expulsion from School – not for academic reasons(Goss v. Lopez)
    - iii. Is it a Rulemaking OR Adjudication
      1. PDP does not apply to rulemaking
        - a. Londoner/Bimetallic distinction
          - i. Number of people
            1. small/individual grounds – Londoner→adjudication)
            2. Applying generally affecting a class – Bimetallic → Rulemaking
          - ii. If small number can agency say that rule was general and intended to affect who ever falls under the scope (Anaconda- affected only 1 plant, but meant to regulate industry)
          - iii. Adjudicative (answers of specific facts) v. Legislative (general facts)

#### b. What Procedure is due?

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- i. Matthews v. Eldridge
  1. The strength of private interest affected
    - a. How much reliance on the interest (Goldberg – Welfare)
  2. How probable is an increase in accurate decisionmaking with the addition of the additional safeguard
  3. What is the cost of additional procedures to the agency (qualitative v. quantitative costs)
  4. When (Pre v. Post)
    - a. Post (Mathews) v. Pre (Goldberg)
      - i. Same 3 part test as above
- ii. If deprivation, What are ingredient of the hearing
  1. Safeguards to ask for
    - a. Evidentiary hearing
    - b. Explanation
    - c. Oral presentation
    - d. Witness and cross
    - e. Right to retain counsel
    - f. Decision form impartial decision-maker
    - g. Written hearing
- iii. Use three part test from (i)

**IV. ADJUDICATION - INFORMAL**

- a. Does it need to be Formal or Informal Adjudication
- b. Agency gets deference to choice (Chemical Waste Management giving Chevron)

- i. Only PDP when agency action is adjudication
- ii. Statute must say “on the record” (City of West Chicago)
  1. If it does 554, 556 & 557 apply (See Part V)
- iii. If does NOT state “on the record” (Most Common) – CHECK PDP & §555 ONLY – Informal Adjudication
  1. Only 555 & PDP apply
    - a. Right to subpoena – If agency has subpoena power
    - b. Brief statement of reasons
    - c. Right to Counsel if compelled to appear
    - d. Informal hearing

**V. FORMAL ADJUDICATION**

- a. Does agency actually provide APA procedures §§ 554, 556, & 557
  - i. Must give proper Notice
  - ii. P has burden of proof
    1. Any relevant evidence is admissible, but in may findings must be supported by some evidence other than hearsay
  - iii. Post Hearing Must receive
    1. Finding of basic and ultimate fact
    2. Statement of reasons

**b. Does the Decisionmaking Process meet statutory and Constitutional requirements (Formal Adjudication Only)**

- i. Decisionmaker Judgment
  1. Decisionmaker must be adequately familiar with the record (Morgan I)
  2. If intermediate report was the report a valid reflection of the record (Morgan I)
  3. If intermediate report, was the claimant given an opportunity to examine the report and respond to any of its content (See Mazza)
  4. Should the agency decision-maker be subjected to discovery or trial
    - a. Morgan IV – no inquiry into the mental processes of the decision-maker
      - i. Maybe argue Overton Park (need explanation of agency head decision → failed to explain; get remand for explanation)
- ii. Separation of powers in communications
  1. Cannot have same person in both adversary and adjudicative responsibility §554(d)
    - a. Due process violated when investigate/prosecute and decide in same case (Walker)
  2. ALJ and agency heads free from bias
    - a. Maybe rule of necessity
      - i. All or nothing situation – if not heard here, then no one could hear
- iii. No illegal ex parte communications made to adjudicatory decisionmakers (APA §554(d))
  1. Decision maker may not
    - a. Consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate
    - b. Be responsible to or subject to supervision
- iv. §557(d) – Ex Parte – Outside the agency (CHECK PDP when this occurs)
  1. Prohibits exparte contacts
    - a. Was party interested
    - b. Was it a communication that attempted to influence
    - c. Was it a communication relevant to the merits
    - d. Decision about Remand or dismissal
  2. Legislative Presume
    - a. Has PDP of individuals been violated by leg. Interference
      - i. If not formal (DC Federation – not prohibited)
      - ii. Passage of time of Agency Heads (Pillsbury)
        1. Might argue that mental decisional process of agency interfered with
    - b. Will agency decision survive Arb. And Capricious test (DC Fed.)
- v. §556 – Ability to cross exam

- vi. Bias/Prejudgment/Personal interest and animosity
  - 1. **Look for strong language**
  - 2. Cinderella
    - a. Mind made up and that adjudged facts and law of a particular case
    - b. Can't be just a general bias
    - c. Also consider the desire to allow speeches
- vii. Was the decision constrained by the requirements of
  - 1. Res judicata
  - 2. Equitable estoppel
  - 3. Stare decisis

**VI. RULEMAKING**

**a. Is Formal or Informal rulemaking required**

- i. Was there some other external (not APA) statute that requires on-the-record hearing (Florida East Coast) → if no = Informal Rulemaking - §553
- ii. Cts. cannot supplement the APA (Vermont Yankee)

**b. Must be of Future effect (551) definition of rule**

- i. Has DPC been violated b/c impermissible retroactive rule
  - 1. Bowen – agency cannot make retroactive rules unless expressly given ability to by Congress
  - 2. If has a secondary retroactive effect, such as affecting past transactions in the future → does it pass Arb & Cap. test

**c. Do any Legislative or Executive Controls Apply**

- i. Regulatory or environmental impact statement

**d. Compliance with APA Procedures §553(c) - Informal**

- i. Notice of proposed rulemaking 553(b)
  - 1. Look for
    - a. Excessive variance between proposed and final rule (Chocolate Manuf. Assn.) – was it a logical outgrowth of proposed rule
      - i. States look to see if it substantially departs
    - b. Failure to disclose critical documents or studies
      - i. Portland Cement – Was data that was relied on provided to public
- ii. Public participation
  - 1. Either written or in some cases oral legislative type hearing
    - a. §553 Notice and Comment
    - b. Vermont Yankee – ct. cannot add procedures
- iii. Statement of basis and purpose
  - 1. Responding to material comments
- iv. Publication of the rule in the Fed. Register
- v. 30 day grace period
- vi. Right to petition to adopt or revise the rule

**e. Agency Head**

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- i. Decision maker must consider the submissions 553(c)
- ii. If intermediate report, must adequately reflect evidence presented
- iii. Should agency head be subjected to trial
  - 1. Morgan I says no → unless bad faith

**f. Impartiality Rules**

- i. Ex parte contacts
  - 1. Will review of notice and comment period survive judicial review under the arb. And cap. Standard
    - a. D.C. Federation
      - i. Did content of pressure make agency not decide on factors relevant by statute and was agency's determination affected by these comments
    - b. Must Ex parte comments be disclosed after Vermont Yankee
      - i. Sierra club – if document or oral communication and central relevance probably would have to
        - 1. Otherwise how could you create rule that reflects the record
    - c. Does agency involve quasi-adjudication among conflicting claims to a valuable privilege
      - i. Sagammon Valley – If only small number of people ex parte communications can be limited
  - ii. No limit of executive or legislative interference
  - iii. Narrow Bias Standard
    - 1. Must be clear and convincing evidence that official had unalterably closed mind on matters critical to the disposition of the proceeding
      - a. Assoc. of Natl Advertisers
        - i. Was agency officer free to change mind and was comments simply discussion, advocacy or exploration of issues and policy
    - 2. Removal from future rulemaking involving same party
      - a. Greene v. Wiese
        - i. Has official made up mind against the party

**g. Findings and Reasons**

- i. Did agency adopt concise general state of basis and purpose
  - 1. California hotel
    - a. Need to discuss how and why, major issues, of policy, major alternative, risk assessment, conflict resolution
  - 2. Qwill explanation survive Arb. And Cap. standard

**h. Issuance and Publication**

- i. 552(1) requires agency to publish substantive rules of general applicability (binding law)
- ii. 552(2) – requires agency only make available to the public statements of policy and interpretation which have been adopted by the agency and not published in the fed. Reg.

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1. Is agency required under 552 to publish rule in order for an individual to be adversely affected
  - a. Nguyen
    - i. Mandatory or binding (must be published)
    - ii. If guidance (make available)
- i. Exceptions to the APA Procedures**
  - i. Military or foreign affairs 553(a)
  - ii. Agency management or personnel 553(b)(A)
  - iii. Public property, loans, grants, benefits, or contracts
  - iv. Procedural rules
  - v. Good cause exception
    1. 553(b) says that rules do not have to go through notice and comment when agency has good cause to find that impracticable, unnecessary or contrary to the public interest
  - vi. policy statements 553(b)(A)
    1. Mada Luna
      - a. Consider if binding or just policy
  - vii. Interpretative Rules 553(b)(A)
    1. Hootor
      - a. Clarify meaning or shifts and creates new requirement
- j. Petition for Rulemaking**
  - i. §553 (e) – each agency shall give interested person right to petition
    1. Must it grant?
      - a. WWHT –
        - i. is it within agency discretion and expertise
        - ii. Exceptional circumstances (Geller – significant factual predicate of prior decision on the subject has been removed)
      2. Must give adequate explanation for denial of the petition
        - a. WWHT
          - i. Did they discuss info claimant relied on in making petition
- k. Waivers**
  - i. Can the Claimant plead with particularity of facts to warrant a waiver
    1. WAIT Radio –
      - a. Undue hardship for application of the rule
      - b. Equity or reliance
      - c. Application defeats statement of purpose for the rule
        - i. Does granting lead to general unraveling of rule
    - ii. Did the Agency explain their denial for waivers
      1. must meet arb. And Cap. Standard
    - iii. FL Rule-
      1. Grant when
        - a. Person demonstrates purpose will be achieved by other means
        - b. AND would create undue hardship or violate fairness

- iv. IA Rule –
  - 1. Waives when purpose of the rule not served

**VII. FORMAL RULEMAKING**

**a. Was it intended?**

- i. See FL East Coast – must say on the record
  - 1. Only need to fulfill 553 unless provides that on the record hearing or similar language
- ii. Was it generally applicable
  - 1. If not could be Arb. & Capricious

**VIII. HYBRID RULEMAKING**

**a. Limits on Judiciary Supervision of Agency Action**

- i. If on the record not stated – ct. cannot add procedures Vermont Yankee
  - 1. If Constitutional or extremely compelling circumstances maybe ct. could add → look for small number exceptionally affected or unjust departre from long standing well settled agency procedures
- ii. Will this stand arb. And capricious test

**IX. ACQUISITION OF INFORMATION**

**a. Agency acquisition of info (Applies to both rulemaking and adjudicative proceedings)**

- i. Agency seeking Info from the Private Sector
  - 1. Subpoena
  - 2. Conduct a physical search
- ii. Private party
  - 1. FOIA
    - a. Is it required to be published or make generally available
      - i. If not required to make available (have index)→ Specific Documents can still be requested unless they are under the exception
        - 1. Watch for inter or intra agency memos exception for predecisional nonfactual documents
    - b. Exceptions
      - i. Classified info
      - ii. Internal Personnel and Practices of Agency (doesn't apply to those that have public interest)
      - iii. Other statutes that have withholding statutes
      - iv. Trade secrets, commercial, or financial document (Confidential business info) –
        - v. covers inter and intra office letters
        - vi. personal records
        - vii. detailed exemption with law enforcement records
        - viii. financial institutions
        - ix. geological and geophysical

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2. Reverse FOIA lawsuits – submitter tries to block release to another party
  - a. Release would violate other law – trade secret law
  - b. Under APA submitters can challenge
- b. Sunshine Act**
  - i. Agency meetings must be open to the public
    1. Must have quorum
    2. Act jointly
    3. Conduct deliberations
    4. Dispose of agency business
  - ii. Can close the meeting by vote
- c. Paperwork Reduction Act**
  - i. Consider impact of paperwork
  - ii. Covers all agency actions
  - iii. Requires OMB approval for collection of info imposed on ten or more persons w/o approval, agency cannot enforce any such requirement
- d. EO 12866**
  - i. Cost/Benefit Analysis
    1. Quantifiable and Qualitative
- e. FACA – Federal advisory committee act**
  - i. When govt. solicits info from outside groups (usually good thing), procedures FACA apply
    1. Agencies must go through a number of procedural hoops
    2. Keep minutes
    3. allow non-committee members to a
    4. What is an advisory committee –
    5. If all federal employees than not an advisory committee
    6. What is a group v. a set of individuals
    7. When does agency seek advice
    8. What does utilize mean

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**APA GENERALLY**

Good

- Durable document that accurately describes a lot of agency action
- Vermont Yankee strengthened

Things it doesn't cover

- Rulemaking
  - Paperwork reduction act (additional procedures and impact statements)
  - Unfunded Mandates Act (additional procedures and impact statements)
  - EO 12866 (additional procedures)
  - Requirements of longer statements of basis and purpose and now moved to publishing much of the rule
    - Logical outgrowth test
    - Interim final rulemaking,
    - Unfunded mandates
    - Negotiated rulemaking
    - Reg – Flex
      - Must consider impact of rulemaking on small entities
    - Direct final
      - All not mentioned in APA
- Adjudication
  - Little about Informal adjudication which makes up 80% of adjudication
  - Mostly regulated by DPC
  - Growth of Ajs
  - Little about ADR
  - Prospective policymaking – Wyman Gordon
- Judicial review
  - §706(2) provides basic outline
  - State Farm made Arb. & Cap. Test a hard look test
  - Chevron, Skidmore, Mead lead to deferential test
  - Rulemaking record does not appear in APA