ADMINISTRATIVE LAW

LEGISLATIVE CONNECTION TO ADMINISTRATIVE AGENCIES

The Non-Delegation Doctrine

Intelligible principle – clear intent from Congress – limitations on power

- hesitancy to enforce: efficiency – years pass between challenge & S.Ct. decision; if unconstitutional, all action under statute becomes void → big mess

Hampton v. United States (1928) *(61)*

- need for an "intelligble principle" – if Congress has announced an intelligible principle, delegation of legislative power is OK

Amalgamated Meat Cutters v. Connally (D.D.C. 1971) *(65)*

- Showing that an Act of Congress is unconstitutional requires showing "that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible . . . to ascertain whether the will of Congress had been obeyed." *(66)*
    - In *Yakus*, requiring that fixed prices be "generally fair and equitable" was enough *(66)*
    - here: President authorized "to issue such orders and regulations as he many deem appropriate to stabilize prices," etc. *(65)*
    - safeguards used:
        - minimum levels for price fixing: those prevailing on 5/25/1970 *(67)*
        - President could not single out part of the industry or a sector of the economy on which to impose control unless wages or prices in that industry or sector have increased at a "grossly disproportionate" rate *(67)*
        - limited time frame; initially set to expire in 6 months, renewals were for "even shorter durations" *(69)*
        - previous legislation on price-fixing provided guidance
        - opportunity for judicial review – safeguarding this = "one of the primary functions" of nondelegation doctrine *(71)*
        - review available under APA, maybe, but OK if not *(71–72)*
        - extensive congressional deliberations/legislative history
        - self-confining as policy developed *(75)*
    - stabilizing prices OK *(67)*

Whitman v. American Trucking Ass'ns, Inc. (2001) *(83)*

- Intelligible principle found

- discretion "cabined by objective scientific criteria" – NAAQS standards must reflect "latest scientific knowledge" and be set to "requisite" level to protect public health *(85)*
- "well within the outer limits of [] nondelegation precedents" *(85)*

- Any agency cannot cure a lack of standards for its discretion by exercising voluntary self-control. *(85)*

The Legislative Veto

Congress has the power to modify organic legislation by passing amendments or a new statute, but this requires broad bipartisan support. For the decades preceding *Chadha*, Congress viewed the legislative veto as the most efficient method, with which administrative laws or regulations default to passing unless the President or either House objects. This mechanism was struck down in *Chadha*.

Immigration and Naturalization Service v. Chadha (1983) *(95)*

- legislative act = alters rights & status of a person outside of Congress → bicameral process + presentment constitutionally required
- "report and wait" – e.g., agency makes reg and effective date delayed for 120 days for Congressional review, possibly overriding it – is fine

- AG exempt from full bicameral process because the Constitution requires presentment of legislative decisions, not executive ones. *(100 n.16)*

- reasons for including one-house veto
  - legislative efficiency *(95)*
  - previously viewed one-house veto as "essential to controlling the delegation of power to administrative agencies" *(101)*
  - "central means" for controlling accountability of exec/independent agencies *(101)*
  - "means of defense" reserving power to Congress to have the final say "as the nation's lawmaker." *(101)*

- alternatives to one-house veto
  - Congressional Review Act, providing a generic, expedited process for Congressional review of agency regulations *(110 – lengthy discussion/criticism)*
  - More specific statutes, whereby Congress defines standards for agency behavior more exactly *(112)*
  - "Sunset laws" *(113)*
  - Appropriation riders – funds for agency earmarked for certain projects or prohibited from certain uses *(113)*
  - OMB – major way for executive to control admin policy

Delegations of Adjudicatory Authority

Commodity Futures Trading Commission v. Schor (1986) *(115)*

- Dual purpose of Article III, § 1
  - (1) protect "the role of the independent judiciary within the constitutional scheme of tripartite government" *(118)*
    - not curable by consent
  - (2) protect litigants' "right to have claims decided before judges who are free from potential domination by other branches of government" *(118–19)*
    - is curable by consent (subject to waiver; cf. arbitration) *(121)*

- Why purpose (1) was met above by CFTC *(120)*
  - only dealt with a "particularized area of law"
  - orders only enforceable by District Court
  - orders reviewed under relatively stringent "weight of the evidence" standard
  - legal rulings subject to *de novo* review
  - did not exercise "all ordinary powers of the district courts" – e.g., no jury trials or habeas
  - counterclaims in admin law forum were voluntary (even though original claimaint required to bring claims before CFTC *(116)*) – use of T&O test
    - jurisdiction to hear common-law counterclaims was entirely dependent on original CTFC admin action

- Purpose (2) not at issue here
  - Does not confer "an absolute right to the plenary consideration" of every kind of claim *(119)*

- "Private" rights → "a claim of the kind assumed to be at the 'core' of matters normally reserved to Article III courts"
  - not determinative – no "talismanic power"
  - does provoke "seaching" examination
- Non-Article-III adjudication of "public" rights has less danger of "encroaching on the judicial powers" than adjudication of private rights *(121)*

EXECUTIVE SUPERVISION OF AGENCY ACTION

Powers to Appoint and Remove

Questions

- Who appoints?
- What do they do? (over whom do they have authority?)

Congressional power to check executive appointments *(183)*
- Appointments can be blocked
    - Officers of the United States can be impeached by House, tried by Senate, unseated by supermajority (Const. Art. II § 3 cl. 6)
- Removal can be prohibited or conditioned on "cause"
- Agencies can be "independent" of the Executive branch
- Control of agency budgets
- Statutes can be changed

"[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." – *Buckley*

Buckley v. Valeo (1976) *(190)*
- Congress only has the power to make appointments to positions with *investigative* or *informative* duties – not adjudication, enforcement, or rulemaking

- An "Officer of the United States" is "any appointee exercising significant authority" under U.S. laws.
    - Appointment must be by President *(192)*
    - "inferior Officers" are under the direct supervision of some higher-up, so probably excludes judges.
        - Congress can still appoint its own inferior officers *(193)*
        - Congress may enact laws delegating power to appoint inferior officers to the Courts or Heads of Departments *(192)*
    - "enforcement power, exemplified by [] discretionary power to seek judicial relief" → Officer *(195)*

Bowsher v. Synar (1986) *(202)*
- Issue: Comptroller General (agent of Congress) given supervisory authority over President → violated separation of powers
    - CG reported conclusions on budget to President
    - President "must issue a 'sequestration' order mandating the spending reductions specified by" the CG *(203)*
    - CG as executing the law
        - President could not "modify or recalculate" CG's findings *(207)*
        - "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *(207)*

Congress's Power to Regulate the Relationship with Administrators

"The power to hire and fire is the easiest way to control policy." Limiting the President's power to hire and fire limits his power to control policy.

- Having executive involvement in rulemaking:
  - Good because makes agencies' rules consistent with presidential policy.
  - Bad because agencies have little/less/no independence; long-lasting effects.
- Executive removal power depends on the character of the office.
  - Officers of an executive agency (generally) removable at will *(225, but see 240)*

What does *not* constitute for-cause removal

- ideological differences
- failure to follow presidential directive

Humphrey's Executor v. United States (1935) *(220)*

- Issue: for-cause removal
  - Definitely limited power: "inefficiency, neglect, or malfeasance in office" *(221)*
    - Congressional requirements
      - FTC must be non-partisan, impartial commission *(221)*
      - "Quasi-legislative" power: investigations & reports
      - "Quasi-judicial" power: enforcing Act in court
      - (no executive powers)
      - free from "political domination or control" *(222)*
  - Constitutional
    - Distinguishing *Myers*
      - *Myers* held that the President could remove a postmaster first class without advice & consent *(222)*
      - PmFC is "so essentially unlike" the commissioners at issue here that *Myers* does not control.
      - *Myers* applies only to "purely executive officers"
        - notion of independent/executive agencies
        - An officer that "is merely one of the units in the executive department" is "inherently subject to the exclusive and illimitable power of removal by the Chief Executive." *(223)*
    - Congress must have power to require cause for dismissal of officers like the Commissioners, or else the removal power would "become[] practically all-inclusive in respect of civil

officers" *(223)* → would make independent commissions/agencies impossible
    - "[O]ne who holds his office only during the pleasure of another[] cannot be depended upon to maintain an attitude of independence against the latter's will." *(224)*
    - "[T]o call the FTC 'independent' and the EPA 'executive' is only to recognize the statutory differences in presidential removal power." *(226)*

Wiener v. United States (1958) *(228)*
- "Functional approach" to determining whether an agency is independent *(228)*
    - President's removal power is not constitutionally required *(229)*
        - Not implicitly conferred in Congress's silence
    - Claims before Administrator to be "adjudicated according to law" → quasi-judicial → "Congress did not wish to hang over the Commission the Damocles' sword of removal by the President" at his pleasure

Political realities of appointments *(229)*
- Members of independent boards and commissions rarely serve their full terms *(230)*
- 1945–70: in seven agencies, only once did the President need >3 years to appoint an actual majority of Commissioners; avg = 21 mos; when Presidency changed parties, needed avg of 7 mos to gain partisan majority
- "even with limited removal authority, the President retains substantial power to shape the membership, and thus presumably the policies, of the independent agencies."

Morrison v. Olson (1988) *(231)*
- Why the Independent Counsel is an "inferior" Officer *(236)*
    - Subject to removal by AG
    - Limited duties
    - Limited jurisdiction
    - Limited tenure
- Appointment by the Court OK under CONST. Art. II § 2 cl. 2 – interbranch appointments may not be "usual and proper," but constitutionally permissible.
    - Since Counsel was investigating Executive officials, it was especially important to have a non-Executive make the appointment. "[C]ourts are especially well qualified to appoint prosecutors." *(237)*
    - Appointment power comes from Art. II, so is free of the limits in Art. III on court's abilities to take on executive or administrative duties of a nonjudicial nature. *(238)*

- Prescribing limits to Counsel's jurisdiction is a necessary extension of the appointments clause, and is limited by the factual circumstances giving rise to the AG's investigation. *(238)*

- Removal limited to "cause" is OK.
  - Whether an official is "purely executive" does not determine whether the official is removable at will; the question is whether removal restrictions "impede the President's ability to perform his constitutional duty." Here it didn't. *(241)*
  - Counsel holds significant discretion, but limited by AG's ability to remove Counsel for "misconduct." *(242)*

Executive Supervision of Policy

Youngstown framework *(255)*

- Express or implied statutory authorization from Congress, or inherent authority vested by the Constitution → President is at the peak of his power. (Jackson's concurrence) *(256)*

- "[A] systematic, unbroken executive practice, long pursued to the knowledge of the Congress and never before questioned" → gloss on President's Art. II § 1 power (Frankfurter's concurrence) *(257)*

- Action "in the absence of either a congressional grant or denial of authority" – a "zone of twilight" in which propriety of the action depends upon factors such as "congressional inertia, indifference or quiescence" (Jackson's concurrence) *(256)*
  - a proposal dying in committee ≈ congressional silence
  - note that part of why the President's seizure here was impermissible is that Congress had provided other means for him to act

- Action contrary to Congress's express or implied policy → "area of action most susceptible to challenge" – power is at its "lowest ebb" (Jackson's concurrence) *(256)*

- *General agreement that President has greatest authority to act in an emergency (257)*

Article II inherent authority and duty to protect the public – "take care" clause

Does the Presidential initiative threaten the institutional authority of Congress or the courts, or jeopardize any individual's right to due process? *(260)*

Marbury v. Madison – reviewable "ministerial" acts vs unreviewable "political" acts – President is compelled by Congress to enforce ministerial acts, subj. to judicial review for failure to do so

Executive Oversight of Regulatory Policy

Early cases established:

- If Congress constitutionally directs the Executive to implement a particular action, the President has no power to suspend the law.
- If Congress constitutionally prohibits the Executive from taking a particular action, the President has no power to authorize the action. *(263)*
    - President cannot authorize an *ultra vires* act

Pressure from President on agencies to conform to executive policy

- absent statutory restriction, "expected and proper" – from D.C. Cir. *(264)*
- President has a national constituency (cf. Senators & Reps) – voted into office by majority of voters, presumably the best equipped in the gov't to direct policy according to the "will of the public as a whole." *(271)*
- Clinton saw administrative agencies as the most critical vehicle to achieve his domestic policy goals *(295)*
    - criticism of this view follows

Memorandum for Hon. David Stockman (1981) *(270)*

- President may not use EO to counter the will of Congress.

- President's powers differ based on whether an agency is "independent:"
    - May issue an EO requiring *executive* agencies to consider certain criteria, such as a cost-benefit analysis, "even when an agency, acting without presidential guidance, might choose not to do so." *(272)*

    - May *not* order an *independent* agency to consider specific criteria unless "the Supreme Court is prepared to repudiate * * * dicta" in *Humphrey's Executor*, which states that "independent agencies" are to be "independent of executive authority *except in [the] selection*" of the agency members. *(273)*

    - For independent agencies, the President may "supervise them as necessary to ensure that they are faithfully executing the laws," but "he may not displace their substantive discretion." *(274)*

Environmental Defense Fund v. Thomas (D.D.C. 1986) *(288)*

- Because of extensive delays caused by the OMB (executive regulatory oversight agency) in the implementation of regulations (avg. 91 days, total

311 weeks), OMB cannot delay EPA regulations through review beyond the date of a statutory deadline. *(291)*
    - If a deadline has already expired, OMB can do nothing

    - *stuff about curbing OMB review of specific programs (292)*

ADMINISTRATIVE ADJUDICATION

Constitutional Constraints on Agency Adjudication: Administrative Due Process

Questions
- Is due process required?
    - Is there a liberty or property interest involved?
- What kind of process is due?
    - Is hearing by writing adequate?
        - Is the party literate?
        - Able to afford counsel?
    - Is it a factual inquiry → need to cross-examine?
    - Need to preserve right to counsel?
    - Need for adjudicator to state his reasons?
- When is it due?
    - Pre-deprivation?
    - Post-deprivation?

APA definition of adjudication = "agency process for formulation of an order"
- order = anything other than rulemaking
- rule = forward-looking/future effect

Adjudication is extremely broad. Process varies.
- Formal hearing process only required under the APA when other statute so requires
- If a statute is in place, does it conform to due process requirements?

Londoner v. Denver (1908) *(314)*
- Individualized determination on an individualized set of facts (plus deprivation & gov't action) triggers due process

Bi-Metallic v. State Bd. of Equalization (1915) *(314)*
- General determinations → no need for adjudicatory hearing

Judge Friendly's list of features that may be essential to a fair hearing *(316)*
- An unbiased tribunal
- Notice of the proposed action and the grounds for it
- Opportunity to present reasons why the proposed action should not be taken

- Right to call witnesses
- Right to know the evidence against oneself
- Right to have a decision based exclusively on the evidence presented
- Right to counsel
- Making of a record
- Availability of a statement of resons for the decision
- Public attendance
- Judicial review
- (timing)

Historical approaches to due process doctrine *(317–19)*, esp. "social welfare calculation" *(319)*

Goldberg v. Kelly (1970) *(322)*

- Removed distinction between rights and privileges
    - public assistance benefits = "a matter of statutory entitlement" *(323)* – "more like 'property' than a 'gratuity'" *(323 n.8)*

- "OtbH must be tailored to the capacities and circumstances of those who are to be heard" *(326)*
    - risk of erroneous deprivation ↑ → process ↑

- Process required here
    - Hearing w/ personal appearance for oral testimony
        - written = "unrealistic option" for most; too ignorant/illiterate to write effectively & cannot obtain professional assistance
        - esp. when *credibility and veracity are at issue*, written submissions = "wholly unsatisfactory" *(326)*

    - for recipients, benefits are often "the very means by which to live" → pretermination evidentiary hearing required – "grievous loss" *(329)*
        - furthers "important" government interest in fostering "the dignity and well-being of all persons w/in its borders"

    - informal procedures ok *(326)*
        - no need for order of proof/rules of evidence

    - must retain right to
        - cross-examine witnesses
            - "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses" *(326)*
        - attorney *(327)*

- Adjudicator must state his reasons for his determination and indicate the evidence relied upon
    - need not be a full opinion or formal findings of fact & conclusions of law

Mathews v. Eldridge (1976) *(337)*

- What is the private interest?
- What is the risk of erroneous deprivation?
- What is the government interest, including the "function involved and the fiscal and administative burdens that the additional or substitute procedural requirement would entail?"
    - costs of pre-termination hearings *(334)*

- Common complaint against *Mathews* is that the amount of process due in any given case is a matter of judicial discretion

Distinguishing *Mathews* from *Goldberg*

- Eligibility not based on need; lower "potential deprivation" *(342)*
- Worker remains eligible for other federal and state aid programs, including welfare *(342)*
- SSI/SSDI decisions usually based on "routine, standard, and unbiased medical reports" *343)* – not so much credibility/veracity issues
- Written submissions more likely to be effective
    - Ex-workers generally have higher literacy rates than welfare recipients
    - Much of the decision will be absed on documentation authored by doctors
- Lengthy questionnaire filled out by recipient himself, plus dated from other sources, provide all the relevant information; an oral argument would not be valuable

- substantial weight given to "good faith individuals charged by Congress" with administering social welfare programs that fair process provided
    - not the Court's job to dictate agency procedures; up to individuals to make their case as to why process is insufficient

Protected Interests

Board of Regents v. Roth (1972) *(354)*

- Property interest = "more than an abstract need or desire" or "unilateral expectation"—must be "legitimate claim of entitlement" *(357)*

- Why Roth had no property interest in his job *(354–55)*
    - Employment Ks at-will – no tenure

- Rehiring @ discretion of university officials
- No protection in Board of Regents' Rules for rehiring: "no reason for non-retention need be given. No review or appeal is provided in such a case."

- When due process could be implicated *(356)*
  - When dismissal involves a "charge * * * that might seriously damage his standing and associations in his community"
    - dishonesty, immorality
  - "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."
  - Gov't imposes "stigma or other disability" that "foreclose[s] his freedom to take advantage of other employment opportunities"

  - *Not* implicated: "when he simply is not rehired in one job but remaisn as free as before to seek another" *(357)*

Perry v. Sinderman (1972) *(360)*
- Why there was a property interest
  - 10 years' state employment
    - Series of one-year Ks – "de facto tenure program"
  - Press release charging insubordination → stigma (arguable liberty interest)
  - Just-cause provision in university policy
    - No official reasons given for discharge

Cleveland Bd. of Edu. v. Loudermill (1985) *(367)*
- Pretermination process required for a public employee dischargeable only for cause
  - governed by federal law *(369)*
  - hearing need not be elaborate *(371)*
    - oral/written notice
    - explanation of evidence against him
    - OtbH
  - Nine months was not too long for the administrative proceedings to last *(372)*

- *Mathews* applied *(370-71)*

Statutory Hearing Rights

Interpreting statutes with the Constitution in the background
- Look at the authorizing statute. Does it provide for a hearing?

- Is the APA triggered (§ 556)?
    - **Magic words**: "On the record after opportunity for an agency hearing" (other language might work too)

    - "after hearing" does not trigger § 556 – *Florida East Coast*
    - Hearing to be shaped by the "risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." – *Yamasaki*, quoting *Mathews*

- Does the statute *modify* the APA?
    - Authorizing statute always trumps the APA.
- if a hearing is required, but the APA is not triggered, what kind of hearing?
    - Judges cannot create procedural rights in adjudication that cannot be traced to constitutional requirements or a statute – *PBGC v. LTV Corp. (399)*

Distinguishing rulemaking from adjudication *(393–94)*

- Numbers affected
- Prospectivity
- Factual bases
    - *Adjudicative facts:* specific to the parties (who did what, where, when, how, why)
    - *Legislative facts:* general facts not usually concerning the immediate parties; help the tribunal decide questions of law, policy, and discretion

U.S. v. Flordia East Coast Railway Co. (1973) *(387)*

- Presumption against formal rulemaking unless specifically mandated by Congress
    - supplanted by *Chevron* deference
- Much turns on whether @ issue is rulemaking or adjudication
    - This was like a rulemaking (*cf. Bi-Metallic*) – "formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts" (adjudications require formal hearing)

Califano v. Yamasaki (1979) *(395)*

- Facts
    - Recoupment of overpayments for SSDI
    - There *shall* be no recoupment if:
        - absence of "fault"
        - "defeat the purposes" of the Act
        - "be against equity and good conscience"
- Issue

- Is written waiver request sufficient? *(397)*

- Fault standard = "inherently subject to factual determination and adversarial input" → need oral hearing
  - "Evaluating fault * * * usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard-luck story from a fabricated tall tale." *(398)*

Third-party hearing rights
- Comparative hearings
  - *Ashbacker* – licensing – mutually exclusive applications must have hearing *(402)*
    - two radio stations w/ same frequency w/in same broadcast area
  - *ANR Pipeline v. FERC* – "economic disadvantage" ≠ mutually exclusive → no hearing *(403)*

- Third-party intervention
  - *United Church of Christ v. FCC* – claimed a radio station was not complying with a statutory requirement of broadcasting multiple points of view; as "responsible representatives" of the listening public, UCC had to have a chance to substantiate their allegations . . . characterized as standing *(404–05)*

On-the-Record Adjudication

Protections provided by §§ 554/556/557
- Exclusivity of record; limitations on ex parte contacts
- Interested parties to be provided with notice & op'ty for submissions
- Op'ty to present case/defense, present rebuttals, cross-examinations

- § 555 – ancillary matters – in the background of hearings under §§ 554/556/557

Two ways of overturning adjudicatory decisions
- Defective process
- Inadequate substantive support

Issue 1. Adjudcatory authority
- Authorized by statute?
- Permissible under the Constitution? (nondelegation, separation of powers, due process)

Issue 2. Procedure

- Constitutional floor: notice & OtbH
- *Mathews*
- Authorizing statute may provide more specifics on what kind of hearing right
    - triggered APA formal adjudication
    - triggered APA, altered informal adjudication
    - hasn't triggered APA at all
        - const'l floor + congressional intent

Exclusivity of record; ex parte contacts –

- Exclusive record for decision – § 556(e)
    - Transcript of testimony
    - Exhibits
    - Other formally filed papers
    - Official notice of outside facts OK, but parties may make timely requests to rebut
- Ban on ex parte contacts:
    - Once the hearing is 'noticed'
    - No contact "releavant to the merits of the proceeding" between "any interested person outside the agency" and any "member of the body comprising the agency, ALJ, or other employee who is mor may reasonably be expected to be involved in the decisional process" – § 557(d)(1)(A), (B)

    - If hearing = adjudicatory & not for licensing:
        - Presiding officer cannot consult any "person or party on a fact in issue, unless on notice and opportunity for all parties to participate." – § 554(d)

    - Exceptions to ban
        - Agency persons can contact presiding officer during formal hearing – § 554(d)
        - Persons other than presiding officer can give info ex parte to Congress about the merits – § 557(d)(2)

    - Impermissible contact occurs → must be made part of record – § 557(d)(1)(C)
        - sanctions – § 557(d)(1)(D)
            - before final decision → possible dismissal
            - after final decision → decision is voidable but not void

Seacoast Anti-Pollution League v. Costle

- Administrator may make decisions based on input of staff
    - Agency experts can "sift[] and analyze[]" evidence

- Ideal administrative function: "staff work organized in such a way that the appropriate specialization is brought to bear upon each aspect of a single decision, the synthesis being provided by the men at the top." *(409)*

- A court can tell if the panel did more than sift and analyze if the panel made reference to studies outside the evidentiary record, and if the Administrator's conclusion is not supported by the record "until supplemented by the panel." *(410)*

Initial vs. tentative decisions *(412)*

- Unless agency itself presides at hearing:
  - Decision may be considered "initial" → becomes final unless a party tries to have the agency change it – § 557(b)
  - Decision may be considered tentative or a recommendation → must be formally adopted before it can be implemented – § 557(b)

Appeals *(412)*

Richardson v. Perales (1971) *(413)*

- Facts/posture
  - Petr sought right to cross-examine adverse testimony of doctor acting as medical adviser to the tribunal. (disallowed)

- Why procedural due process was met
  - Written reports from doctors acceptable despite their hearsay nature *(417)*
    - have "indicia of credibility"
    - "routine, standard, and unbiased medical reports" – adverse ≠ biased or nonprobative
    - doctors had personal contact with **π**
  - Distinguishing *Goldberg (418)*
    - Perales had the opportunity to subpoena and cross-examine the doctors that provided the reports on his health
    - No questions of credibility and veracity
      - disagreement ≠ not credible
  - Cumulative factual record w/o inconsistency (everyone said **π** wasn't disabled)
  - Agency is non-adversarial

- Why medical adviser was OK
  - trial examiner = layman; doctor = board-certified specialist

ADMINISTRATIVE RULEMAKING

Informal: § 553
[hybrid]
Formal (rare): § 553(c) language; §§ 556, 557

- Has Congress authorized the agency to promulgate substantive rules?
- Is there an intelligible principle?
    - can the will of Congress be determined?
- Within the bounds of the nondelegation doctrine?
- Acting within statutory authority?
    - does the rule "implement the statutory plan?"

Agency Authority and Constitutional Constraints

National Petroleum Refiners Ass'n v. FTC (D.C. Cir. 1973) *(475)*

- Agencies have discretion whether to use adjudicative or rulemaking power
    - Rules by adjudication are subject to review on "abuse of discretion" standard
- De novo review of statutory intent; no deference because not dependent on agency expertise
    - Overruled by Chevron?

Benefits of rulemaking

- Efficiency in implementing policy; all parties bound rather than making case-by-case determinations
- Greater fairness to regulated parties
    - better general notice → greater general compliance
    - single parties not burdened with costs of litigation & subsequent obligation
- Greater clarity and uniformity of application
- Agency dictates the pace of policymaking
    - no need to wait for violations to occur
- General principles that don't need reexamination in each case
    - no analysis of factual predicate to rule *(see 482)*

Benefits of adjudication

- Rulemaking is more complex than adjudication
    - OMB/OIRA/Congressional Review Act
- Modifications made more easily through adjudication
    - Rulemaking: must go through the entire rulemaking proces
    - Adjudication: single case is an easier way to modify by reinterpretation
- Avoids political conflict
    - Usually small, incremental change

        - limited number of parties affected → fewer aware, less public response
- Scope can be very limited
    - tends to avoid over/underinclusion

Substantive Review Under the APA

What is the proper extent of judicial review over agency rules, both substantively and procedurally?

- policy determination → informal (ex parte/informal consultations/agency experiments and research OK)
- factual controversy → formal

Standards of review

- arbitrary and capricious → agency can rely on information outside the record
    - informal hearing: agency may act "upon the basis of information available in its own files, and upon the knowledge and expertise of the agency"
- substantial evidence → agency must make its determination on the basis of the record; formal comments needed

Statutory link between formal–"substantial evidence" and informal–"arbitrary and capricious" has shifted *(510)* – higher standard applied more often than before

- statutes sometimes require informal hearings + substantial evidence

§ 553

- Notice – rule must be "logical outgrowth" of NPRM
    - parties must be able to *reasonably anticipate* the final rules after notice of the proposed rule, else new comment period
- Comment – evidence made available to those commenting
    - In order to be *meaningful*, commenters must know what agencies relied on in formulating its rule
- Statement
    - Substantive: "rational relationship" between evidence and rule
        - usually "arbitrary & capricious" standard
    - Procedural: requirement of a record
    - "concise general statement"
        - absence from Federal Register rarely basis for overturning rule; sometimes inferred from other contemporaneously prepared documents or from the rule itself *(509)*

        - meant to advise the public of the general basis and purpose of the rules *(510)*
- Rule must adhere to other statutory requirements, e.g., "practicability" or cost-effectiveness

- An agency may resort to information outside the record when it is relying on its own expertise, as well as when agency staff (or the functional equivalent, e.g., contracted consultants) are conducting original research, even after the close of the record. *(547)*

Auto Parts & Accessories Ass'n v. Boyd (D.C. Cir. 1968) *(500)*
- Petr argued that the Sec of Transportation had failed to justify the regulations' substantive requirements

- *Proceduralized substantive review*
    - Court found implicit in § 553 a record-generating requirement *(502–03)*
        - Compile a record of the submitted comments
        - Concise general statement of the basis and purpose of the rules adopted
            - Statement must "formulate * * * the significant issues faced by the agency and articulate the rationale of their resolution"
            - Enable a court to see what major policy issues came up during the proceedings and why the agency responded as it did *(504)*
    - Court's function "is to see that only the result is reasonable and within the range of authority conveyed, that it has been formulated in the manner prescribed, and that the disappointed have had the opportunity provided by Congress to try to make their views prevail." *(509)*
        - ensure agency avoids "arbitrariness and irrationality" *(504)*

Nat'l Tire Dealers & Retreaders Ass'n, Inc. v. Brinegar (D.C. Cir. 1974) *(512)*
- Affected party makes claim on the record & no agency rebuttal → agency decision is arbitrary if it is based on the opposite of what affected party claimed
    - Statute says: "regulation must be practicable"
    - Industry says: "this rule is not not practicable" (and gives evidence)
    - Agency makes no significant response & adopts the rule anyway → arbitrary and capricious

- Two bases for vacating the decision

- Substantive: failed to marshal supporting evidence – Secretary made "only unsupported and unconvincing assertions" referring to data outside the record
- Procedural: Secretary failed (adequately) to respond to industry claims of impracticability

MVMA v. State Farm Mutual Automotive Insurance Co. (1983) *(520)*

- No reasonable basis to rescind rule for air bags – air bags still viewed as efficacious

- Agency must go through the rulemaking process to rescind a rule – § 551(5)

Procedural Review Under the APA

Focused on § 553(c)'s requirement of a comment period

U.S. v. Nova Scotia Food Products Corp. (1977) *(535)*

- Post-enforcement rule challenge
  - Adjudication enjoining operations challenged in Court of Appeals

- What is needed for meaningful comment period?
  - Ventilation of basis for decision
    - don't need to have comment period on all scientific input
- What is needed for meaningful comment period?
  - Ventilation of basis for decision
    - don't need to have comment period on *all* scientific input, just the stuff that is the basis of the decision
  - Without notification of the scientific basis for a conclusion, agency cannot be said to have considered all the relevant factors *(540)*

- In an informal rulemaking, an agency may resort to information outside the record when it is relying on its own expertise, as well as when agency staff (or the functional equivalent, e.g., contracted consultants) are conducting original research, even after the close of the record. *(547)*

ANPRM – describes problem, outlines alternative solutions, invites public comment before proposed rule is advanced

Challenging rules based on industry input

- Industry is often in a better position to assess the technical feasibility of proposed rules (e.g., retreading industry in *Brinegar*)
  - creates risk that agency will hear only one side of the issue

        - particular worry when affected parties' interests sharply diverge
- some agencies have relied on contract services for studies and investigations used in rulemaking

Vermont Yankee Nuclear Power Corp. v. NRDC, Inc. (1978) *(550)*

- Courts cannot require additional procedures in informal rulemaking proceedings.
    - Reading in more extensive hearing requirements would push an agency toward formal hearings, which would defeat the purpose of having separate provisions for formal and informal hearings *(553)*
    - Agencies should be free to create their own rules of procedure absent constitutional constraints or "extremely compelling circumstances" *(553)*

    - Three compelling reasons
        - Review to determine whether agency procedures are "perfectly tailored" to receive what the court believes is the correct result → "judicial review would be totally unpredictable" *(553–54)*
        - Reviewing agency's choice of procedures based on hearing record rather than evidence available to agency when it formed its procedures → pushes agency to formal hearings *(554)*
        - "Fundamentally misconceives" the role of judicial review of agency rules *(554)*

Ex Parte Contacts in Rulemaking

- No specific restrictions in § 553 (cf. §§ 556, 557)
- Should there be an implicit rule?
    - *Nova Scotia* – in order for comment period to be meaningful, decision must be made on the record
        - shouldn't have "secret" ex parte contacts: must be on the record; record before the public, the Court, and the agency must be the same *(HBO, 558)*
            - does not apply to pre-notice contacts
            - limited to rulemaking involving "competing claims to a valuable privilege" *(ACT, 560)*
            - potential unfairness > practical burdens
                - cf. *Londoner/Bi-Metallic*

- A complete ban on ex parte contacts would be too burdensome and hinder agency decisionmaking *(561)*

- See also *Costle*

Sierra Club v. Costle (D.C. Cir. 1981) *(563)*

- Procedural challenge: impermissible ex parte contacts

- Guidelines for ex parte contacts in § 553 informal rulemaking
  - Post-comment
    - Post-comment documents may be placed in the record, but not always required *(570)*
    - Parties can be expected to keep in contact with the rulemaking agency up until promulgation. Generally speaking, this is not a problem. *(570)*
    - *Dicta.* "Documents of central importance" should be open to public comment. *(570)*

    - Agency need not docket *all* post-comment-period conversations and meetings, but those "of central relevance to the rulemaking" should be "docketed in some fashion or other." *(571)*

  - Congressional pressure will result in overturning a rule if:
    - The pressure is meant to force the Secretary to base his decision on matters not made relevant by statute; *and*
    - The Secretary's decision is actually affected by extraneous considerations. *(575)*

  - Intra-executive post-comment contacts permissible unless expresly forbidden by Congress.
    - **Adjudication only:** intra-executive contacts should be docketed if:
      - Contacts directly concern the outcome of adjudications or quasi-adjudicative proceedings. *(574)*
      - Specifically required by statute. *(574)*

Ass'n of Nat'l Advertisers, Inc. v. FTC (D.C. Cir. 1979) *(577)*

- Standard for disqualification of an agency member in an informal rulemaking proceeding
  - *clear and convincing* showing that the agency member has an *unalterably closed mind* on matters *critical to the disposition of the proceeding (580)*
  - does not apply to adjudication; adjudication standard is much lower

- decisionmaker must be impartial, but ≠ "uniformed, unthinking, or inarticulate" *(580)*

- specific facts = subset of legislative facts
  - narrow in focus
  - material to outcome
  - resolution best accomplished through a "trial-type" procedure

  - specific facts → quasi-adjudicatory
  - other → within normal ambit of policymaking expectations/responsibility
    - both trigger "clear and convincing"/"unalterably closed mind" test, but still *legislative* facts in *rulemaking*, not adjudicative facts in adjudication

Exceptions to § 553: Legislative vs. Interpretive Rules

Substantive (legislative) rules vs. interpretive rules vs. policy
- legislative = binding on public and agency

- interpretive/policy ≠ require notice & comment rulemaking.

  - § 553(a) – all of § 553 does not apply to:
    - (1) – military or foreign affairs
    - (2) – agency management or personnel matters; matters of public property, loans, grants, benefits, contracts

    - Administrative Conference recommended that whenever feasible, agencies responsible for gov't grants, benefits, and Ks should follow § 553
      - some agencies have *(585)*

  - § 553(b)(A),(B) – § 553(b) [notice & comment reqmt] does not apply to:
    - (A) – interpretive rules, policy statements, or rules of agency organization, procedure or practice (housekeeping)
      - rules in "form" of agency procedure not always exempted, e.g., FDA's 150 pages of rules in the CFR *(585–86)*
      - procedural rules that impose burdens ≠ trigger notice & comment *(586)*

- (B) – agency for good cause finds that notice & public procedure thereon are impracticable, unnecessary, or contrary to the public interest
    - must incorporate this finding and a brief statement of reasons into the resultant rules

American Mining Congress v. Mine Safety & Health Administration (D.C. Cir. 1993) *(587)*

- Does the rule have "legal effect?" *(591–92)*
    - in the absence of the rule, is there adequate legislative basis for enforcement or other agency action?
    - is the rule published in the CFR?
    - has the agency explicitly invoked its general legislative authority?
    - does the rule effectively amend a prior legislative rule?
        - repudiates or is irreconcilable with a prior rule

    - if yes to any → rule is legislative

- Here: continued revision of what constitutes a diagnosis was *interpretive*.
    - underlying rule had been promulgated through notice & comment rulemaking. required reporting.
    - "Program Policy Letters" periodically clarified ambiguities; regulations had already required reporting of diagnoses.

Hypothetical

- Statute criminalizes "obscene, indecent, or profane language." Agency promulgates rule listing seven words that meet these criteria. Notice & comment rulemaking needed?
    - probably not; could have proscribed those seven words through adjudication; rulemaking primarily functions as prior notice to interested parties.

Access to Information

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION
Interpretation of Law
Findings of Fact
Reviewability
Finality
Standing